CRIMINAL LAW UPDATE 2024 - 2025

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CRIMINAL LAW CONFERENCE, LEGAL AID NSW

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Bail and Other Legislation Amendment (Domestic Violence) Act 2024

Crimes Legislation Amendment (Coercive Control) Act 2022

Criminal Code Amendment (Deepfake Sexual Material) Act 2024 (Cth)

Bail and Crimes Amendment Act 2024

Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023

Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Act 2023 (Cth)

Crimes Amendment (Prosecution of Certain Offences) Act 2023

SENTENCE

1. GENERAL

Five judge bench - ICO for federal offender - court to apply s 16A Crimes Act 1914 (Cth), not s 66 Crimes (Sentencing Procedure) Act 1999 (NSW)

Vamadevan v R [2024] NSWCCA 223

A five-judge bench held that, in considering whether to impose an ICO for a federal offender under s 20AB *Crimes Act 1914* (Cth) a Court is obliged to apply s 16A *Crimes Act 1914* (Cth), and not s 66 *CSPA (NSW)*: at [9]-[46]; *Stanley v DPP (NSW)* (2023) 296 ALJR 107.

Per the Court at [57]:

The steps to be undertaken by a sentencing court before an ICO can be imposed on a federal offender under s 20AB(1) *Crimes Act* are:

1. The sentencer 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).
2. The sentencer 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 at [11]) apply, then the sentencing court may consider whether or not to impose an ICO. In doing so, the sentencing judge is obliged to consider the matters in s 16A *Crimes Act* and not s 66 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".

ICO - finding that risk of reoffending is best addressed by serving the sentence in the community does not mandate an ICO order – error in subordinating community safety to general deterrence

Khanat v R (Cth) [2024] NSWCCA 41

> s 66(1) *CSPA* provides community safety must be the paramount consideration when deciding whether to make an ICO.
>
> s 66(2) provides that when considering community safety, the court is to assess whether serving the sentence in the community or by way of full-time detention is more likely to address the offender's risk of reoffending.

The sentencing judge made a finding that risk of reoffending was low and more likely addressed if sentence was served in the community, but that general deterrence must be given significant weight and imposed full-time imprisonment.

The CCA rejected the applicant's submission that the sentencing judge erred in application of s 66 *CSPA*. *Stanley* [2023] HCA 3 does not state that a finding that the risk of reoffending is best addressed by serving the sentence in the community mandates an ICO order. The assessment required by s 66(2) is not determinative of an ICO. Section 66(3) requires also consideration of s 3A, common law sentencing principles and other matters. The exercise is evaluative, albeit community safety is the paramount consideration. Although *Stanley* (at [76]) observed that community safety will *usually* have a decisive effect unless relevant evidence is inconclusive, it leaves open the possibility an ICO may not be ordered: at [89], [91]-[95].

However, the appeal was allowed on the ground that the judge erred in referring only to general deterrence as the reason for declining to impose an ICO, and therefore could not have given paramount consideration to community safety: at [96]-[101]; *Stanley* [2023] HCA 3 at [73].

ICO - paramount consideration not given to community safety – not expressly referring to s 66 not in itself an error

SR v R [2024] NSWCCA 43

The applicant's appeal was allowed on the basis that the sentencing judge's remarks left the impression that the judge did not engage with the statutory requirement that community safety must be the paramount consideration in determining whether to make an ICO: at [3]-[4], [70]-[71].

A failure to refer to s 66 specifically is not by itself a reliable basis for concluding the judge completely overlooked s 66. It is important that proper allowance is made for modes of expression that are used and time constraints that operate upon judges, especially when delivering *ex tempore* decisions: at [2]-[3], [45]; *Mourtada v R* [2021] NSWCCA 211 at [37].

ICO - "leniency" associated with ICO significantly moderated by respondent's time in custody – ICO is a nevertheless a custodial sentence – ICO for domestic violence offences

R v Rose [2024] NSWCCA 193

The CCA dismissed the Crown appeal against the respondent's sentence of 1 year, 3 months imprisonment to be served by way of an ICO for break and enter of his former partner's home and committing a serious indictable offence, namely, detain with intent to obtain psychological advantage while armed with a knife (s 112(2) *Crimes Act* 1900). The sentence was not plainly unjust or wholly unreasonable: at [53].

The CCA made observations regarding "leniency" of an ICO and with respect to domestic violence offences:

- The "leniency" commonly accepted to be inherent in the imposition of an ICO was significantly moderated by the respondent's time in custody, i.e. 9 months in custody before release on bail subject to onerous home detention conditions: at [2].
- An ICO reflects a degree of leniency because it does not involve immediate incarceration, but it is a custodial sentence (*Stanley v DPP (NSW)* (2023) 97 ALJR 107 at [63]-[64]) and represents significant punishment over and above a Community Correction Order or Conditional Release Order: at [65].
- It cannot be said that an ICO is manifestly inadequate for a domestic violence offence under specific provisions of the *CSPA*. The following provisions indicate legislative intention that there is no legal bar to an ICO for a domestic violence offence (at [66]-[70]):

  s 4A *CSPA* requires a court to impose, for a domestic violence offence, full-time imprisonment or a supervised order. For the purpose of s 4A, a supervised order includes an ICO which is subject to supervision conditions, as in this case.

  s 4B *CSPA* imposes restrictions upon power to make an ICO for a domestic violence offence unless the court "is satisfied that the victim of the domestic violence offence, and any person with whom the offender was likely to reside, will be adequately protected (whether by conditions of the ICO or for some other reason)".

  s 67 *CSPA* proscribes a series of offences in respect of which an ICO must not be made. Section 112(2) *Crimes Act* does not, nor do domestic violence offences, per se, fall within the proscribed categories.

Five-judge bench - aggregate sentencing under s 53A CSPA 1999 (NSW) can be applied to federal offences - s 53A does not conflict with mandatory minimum provisions ss 16AA, 16AAB Crimes Act 1914 (Cth)

McGregor v R [2024] NSWCCA 200

Note: The High Court has granted the Commonwealth DPP Special Leave to appeal in this matter ([2025] HCADisp 66])

The applicant appealed his sentence for four federal child sexual abuse offences, being an aggregate term of 11 years 6 months imprisonment, NPP 8 years. One offence (Count 1) carried a mandatory minimum sentence of 7 years under s 16AAA *Crimes Act 1914* (Cth).

A five-judge bench allowed the appeal on the basis of erroneous application of the discount under s 16AAC for guilty pleas and cooperation with authorities (see below under '*4. Discounts'*).

On re-sentence, the Crown submitted:

(i) that aggregate sentencing under s 53A *CSPA* is not available for sentencing of federal offences, as it is not capable of being picked up by s 68 *Judiciary Act 1903* (Cth) for any federal offence. (However, the Crown previously accepted s 53A did apply to federal offenders in *DPP (Cth) v Beattie* [2017] NSWCCA 101); and

(ii) that it was not open to impose an aggregate sentence under s 53A *CSPA* for Count 1 as this would be inconsistent with s 16AAA (or s 16AAB). This is because s 16AAA states that a court "must impose a sentence of imprisonment of at least the period specified" and that when an aggregate sentence is imposed under s 53A *CSPA* the only operative sentence imposed is the aggregate sentence; the indicative sentences are not operative (eg *R v Clarke* [2013] NSWCCA 260): at [95].

The Court held:

- Aggregate sentences under s 53A *CSPA* (NSW) are available for federal offences: at [103]. The Cth DPP has previously accepted in *DPP (Cth) v Beattie* that aggregate sentencing was available for federal sentences which has been applied since. *Beattie* was not "plainly wrong". The Crown's further arguments were rejected at [92]-[103].

- The minimum sentence provisions in ss 16AA, 16AAB and 16AAC can operate harmoniously with aggregate sentencing as per s 53A *CSPA*: at [103]. If an aggregate sentence of at least the minimum term is imposed for offences in ss 16AAA and 16AAB, then the requirement that at least such a term has been imposed for that offence has been satisfied: at [97]. As sentences of imprisonment operating concurrently may be imposed for offences addressed by ss 16AAA-16AAC, there is no clash between the purpose and effect of those provisions and the possibility of aggregate sentencing: at [100].

The applicant was re-sentenced to an aggregate term of 10 years 9 months, NPP 7 years 6 months.

Necessary for sentencing judge to engage with significant submissions

Whipp v R [2024] NSWCCA 79

The CCA allowed the applicant's appeal where a significant proportion of the applicant's oral submissions at sentence were that he suffered PTSD from assaults in detention but the sentencing judge failed to account for the effect of his mental health on the extent it would make a full-time custodial sentence more onerous. It was incumbent upon the sentencing judge – perhaps only very briefly – to refer to the matter, and to either accept it had some mitigatory role or to explain why it had been rejected: at [62].

Although a sentencing judge is not required to "tick a box" for every single written and oral submission, here it was a significant proportion of oral submissions: at [53]-[54]; [62].

Denial of procedural fairness - judge did not accept unchallenged applicant's psychiatric evidence where no dispute as to psychiatrist's opinions

Smith v R [2024] NSWCCA 59

The sentencing judge, in remarks, rejected an unchallenged psychiatric report because of an apparent inconsistency with a sentence assessment report. The prosecutor had not sought to cross-examine the expert and indicated he did not wish to be heard on favourable subjective material.

The CCA found procedural unfairness and allowed the applicant's appeal.

It should be inferred that there was no dispute as to the psychiatrist's opinions on the causal link between psychiatric and cognitive impairments and offending. The judge was bound to advise the parties if proposing to take a different view. The judge did not explain why the sentence assessment report cast doubt on the psychiatrist's conclusions. The applicant should have had an opportunity to put the matter to his psychiatrist and the judge: at [48]-[49]; *authorities cited*.

A judge may reject evidence or a submission without advance warning. However, there will be a risk of procedural unfairness if the evidence or submissions constitute common ground between the parties who have therefore not addressed that aspect: at [41]; *authorities cited*.

No denial of procedural fairness - sentencing judge not obliged to accept matters contained in unchallenged expert report - Edmonds v R [2022] NSWCCA 103 distinguished

Issac v R [2024] NSWCCA 2

At sentence, the applicant did not give evidence and tendered a psychiatric report without objection. The Crown accepted his major depressive disorder had impaired decision-making, but the sentencing judge found his mental health condition did not reduce moral culpability to a significant degree.

The CCA found no denial of procedural fairness and dismissed the appeal.

At no stage did the judge give any indication that he would not draw an adverse inference. Counsel for the applicant at sentence had accepted that this was a matter for the judge to be persuaded of: at [48]–[58], [63].

A sentencing judge is not obliged to accept an expert report tendered without objection or cross-examination. The onus is on the applicant to persuade the judge on the balance of probabilities of the position in the expert report. The judge considers all the evidence, not just the report. Where there was conflicting evidence in agreed facts and medical evidence tendered by the applicant, it is not surprising that the judge was *not* satisfied on the balance of probabilities of the position in the expert report: at [59]–[62].

The CCA distinguished *Edmonds v R* [2022] NSWCCA 103. Procedural unfairness was found where the sentencing judge indicated he was "not in a position to reject the version of events given by the offender" in the unchallenged expert report and it was unnecessary for defence counsel to address on it – but subsequently made adverse findings: see at [41]-[48].

Sentencing for an offence constituting a breach of condition of parole

Marshall v R [2024] NSWCCA 194

The issue in this case concerned determination of the commencement date where sentencing for an offence constituting a breach of parole.

The applicant was sentenced to 2 years 3 months imprisonment for break, enter and steal. At the time of offending, he was on parole for a previous offence. The applicant was arrested on the day of the offence on 5 July 2023, parole revoked and he remained in custody from that date. The sentencing judge backdated the sentence commencement date by around 4 months to commence after the expiry of the balance of parole in respect of the previous sentence, i.e. 1 January 2024, around 6 months after the date of the offence.

The CCA (Dhanji J; Basten AJA and Faulkner J agreeing) allowed the appeal on the ground the sentence was manifestly excessive. On resentence, a fixed term of 15 months was imposed to date from the date of arrest.

Dhanji J found that:

- The sentence should date from the date of arrest, 5 July 2023. Dating the sentence from a point after the revocation of parole has the effect of adding to the punishment for the present offence. It has the effect of taking the decision as to whether the parole period for the earlier sentence should be served in custody or on parole out of the State Parole Authority's hands for the equivalent of the period between revocation and commencement of the new sentence: at [51], [55].
- Here, given the length of the extant parole period and the nature of the further offence, the new sentence was (and will be on resentence) subsumed within the balance of parole, to be served entirely concurrently: at [50], [55].

Dhanji J made the following observations:

Where sentencing for an offence constituting a breach of parole, subject to the existence of some other non-parole period, a sentencer must impose sentence to commence on a date no later than the date of sentence: *CSPA*, s 47; *R v Gray* [2018] NSWCCA 241; *Browne v R* [2023] NSWCCA 218. Determination of the commencement date involves the exercise of discretion, the range of which is generally fixed by the date of arrest at one end, and the date of sentence at the other: at [45].

The prevailing view that the matter is discretionary sits between two extremes: a failure to fully backdate the new sentence involves impermissible double punishment; or that an offender is entitled to a backdate only for presentence custody solely referable to the offence being sentenced: at [46]-[47]; *Callaghan v R* (2006) 160 A Crim R 145 at [22]-[24] (Simpson J).

Where there has been some delay (as in this case), fairness to the offender may require a judge to "notionally determine at what point the respondent could reasonably be expected to have been sentenced, having regard to the date of his plea, and direct the sentence commence no later than that date": at [48]; *R v Gray* at [66].

ICO revoked – sentencing for subsequent offence – totality – double punishment

Edquist-Wheeler v R [2024] NSWCCA 49

The applicant was sentenced for a drug (index) offence committed whilst subject to an ICO. The ICO was revoked and was being served in custody at time of sentence. The sentencing judge found the index offence aggravated by being committed on conditional liberty. A term of imprisonment was imposed to commence 1 year and 6 months from the commencement of the revoked ICO sentence.

The CCA allowed the appeal. There was failure to apply the principle of totality. The applicant was re-sentenced to a lesser term of imprisonment to commence 6 months from the commencement of the revoked ICO sentence.

Where parole is revoked solely due to subsequent offences, an argument is available that the offender is doubly penalised for the subsequent offence by revocation of parole and by a cumulative sentence (*White v R* [2016] NSWCCA 190). A discretion exists to backdate a sentence to some point. It is always open to an offender to seek and be granted parole even after a revocation (*Callaghan v R* [2006] NSWCCA 58): at [41]-[42].

Although *White* and *Callaghan*, and s 47 *CSPA*, refer only to "parole" and not an ICO, fairness and justice required that the judge take a similar approach to the revoked ICO, given that reinstatement of the revoked ICO was available pursuant to s 165 *Crimes (Administration of Sentences) Act 1999*. This is to avoid perception of double punishment, having regard to criminality of both offences: at [43].

Time in custody for unrelated offences – totality - sentence backdated

Murray v R [2024] NSWCCA 107

The sentencing judge backdated the applicant's aggregate sentence to take into account time spent in custody solely referable to the subject offences. In that time, the applicant also served sentences for unrelated Local Court matters. The sentencing judge made no mention of having regard to the totality principle in regard to the Local Court matters.

The CCA allowed the appeal and backdated the sentence by a further three months in respect of the unrelated Local Court matters.

The judge failed to have regard to the totality of the criminality of all the offences to which the total period of the applicant's imprisonment is attributable. The totality principle is not limited in application to the subject offences but extends to any offences for which the offender is already serving a sentence: at [57], [62]-[63], [74]; *Postiglione v The Queen* (1997) 189 CLR 295.

The CCA noted the judge was not provided with sufficient assistance in relation to how totality applied in this case.

Error where aggregate non-parole period (NPP) greater than the sum of the two indicated non-parole periods

Portnoy v R **[2025] NSWCCA 60**

The applicant was sentenced to an aggregate term for two offences. The two offences had prescribed standard non-parole periods, thus the sentencing judge was required to indicate non-parole periods as part of the sentences indicated for the two offences (s 54B *CSPA*).

The applicant submitted error because the aggregate non-parole period (NPP) exceeded the total of the two indicated NPPs by one month.

The CCA allowed the appeal.

A NPP which exceeds the sum of the indicated non-parole periods leads to the inference that the sentencing judge erred. It is also inconsistent with the judge's finding the circumstances of the offences supported "significant concurrency" of the sentences indicated: at [35]. The non-parole periods indicated can be examined to illustrate whether an error occurred in the application of the principle of totality: at [32]-[35]; authorities cited.

Indicative sentences - assessment of objective seriousness of individual offences - multiple victims and obvious differences between offences brought under same section

Dorsett v R [2024] NSWCCA 192

The CCA allowed the applicant's appeal in respect of 8 child sexual offences. The sentencing judge failed to make separate findings in relation to the differences between the offences and did not provide reasons for fixing identical indicative sentences for most of the five offences under s 66C(3) despite obvious differences: at [141]-[142]; *JM v R* [2014] NSWCCA 297.

- It is not an error to fail to assess the objective seriousness of an (non-SNPP) offence by reference to a notional range. But there is no principle to suggest that there is no need to make *relative* findings of objective seriousness when sentencing for multiples offences/victims where objective seriousness of each offence differs. In such cases it *will* often be necessary, even in very broad terms, to identify factors which make some offences more or less serious, if that is the case: at [155].
- A separate finding need not be made for every single offence, even if there are no differences between them (see *Turner v R* [2021] NSWCCA 5). But on the facts in *this* case, it is not apparent that the judge assessed the criminality of each of the 8 offences separately in circumstances where there were multiple victims and some obvious differences between the offences brought under the same section: at [157].

In ***Harden v R*** [2024] NSWCCA 184 the CCA dismissed a similar ground in a case involving 105 State child sex offences and 7 victims and a number of the indicative sentences were the same.

The sentencing judge assessed the objective seriousness of each of the 105 offences and clearly set out the basis for distinguishing between groups of offences. There was little to differentiate between the facts for some offences given the constraints of the Agreed Statement of Facts and repetitive nature of the conduct: at [361]-[362].

The judge provided indicative sentences for all 105 offences. That the same indicative sentence was fixed for small different groups of offences all under the same section (s 66A) does not of itself indicate an impermissible approach to determining objective seriousness, particularly where the same offences are committed during a single course of offending over a lengthy period of time (*Turner v R* [2021] NSWCCA 5). Although it may have been an error had the judge fixed the same indicative sentence for *every* offence, this was a long way from that: at [363]-[365].

Error to take account of further Form 1 offence in determining objective seriousness of a principal offence – principles on use of a further Form 1 offence

Tukuafu v R [2024] NSWCCA 84

The applicant was sentenced for aggravated BE with intent (s 112(3*) Crimes Act*) and three counts of supply prohibited drug (s 25(1) *DMTA*). An AOABH offence on a Form 1 Schedule was attached to the s 112(3) offence; and further offences on the Form 1 were attached to the third s 25(1) offence.

The CCA held the sentencing judge erred by taking the Form 1 offences into account when assessing the objective seriousness of each principal s 25(1) offence: at [135], [139]. An offence on a Form 1 can only be taken into account when dealing with an offender for *the* principal offence; that is, *one* principal offence.

To do otherwise is contrary to the statutory scheme and risks double-counting: at [136]; *Kapila v R* [2024] NSWCCA 48; Div 3, Pt 3, *CSPA 1999*.

Principles on permissible use of evidence of a further Form 1 offence: at [129].

A further offence:

1. may increase the weight to be afforded to personal (or specific) deterrence and retribution.
2. may provide the context of the offending for which an offender is to be sentenced.
3. may demonstrate that a principal offence was not isolated or aberrant but is representative of an ongoing course of conduct.
4. may inform moral culpability.
5. may establish that an offender is not a person of good character.
6. may establish motive, state of mind and/or intention at the time the principal offence is committed.
7. may establish an offender's awareness of the complainant's vulnerability.

Test for whether bail conditions amount to quasi-custody

R v Butler [2024] NSWCCA 133

In this Crown appeal, the CCA held the sentencing judge erred by backdating the sentence to take account of a period of 18 months of onerous bail conditions as quasi-custody. Effectively, the respondent was not required to serve any part of the custodial portion of his sentence for his drug offence.

The bail conditions for 18 months were daily reporting to police, 12 hour curfew except for work and children's activities, residing with his mother and surety of $1m. The bail conditions were later varied to reporting 5 days, residing in own home, 19 hour curfew and surety of $900k.

The CCA found it was not open to the judge to conclude that even the stricter conditions of bail over 18 months amounted to quasi-custody justifying backdating commencement of sentence. The conditions were of a type very commonly imposed by the Supreme Court for a serious offence: at [44], [55].

Test for whether bail conditions amount to quasi-custody

- The test 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": at [34]; *R v Quinlin* [2021] NSWCCA 284; 293 A Crim R 253.
- Two questions arise:

  (i) whether the bail conditions in fact amount to quasi-custody; and

  (ii) whether and to what extent an allowance should be made by backdating sentence: at [46].
- The question is one of fact in which questions of degree arise: at [44].

The CCA gives useful case examples of quasi custody and how the principles may apply: see at [45]-[53].

State and Commonwealth offences - inconsistent orders - recognizance release order (RRO) to take effect during State non-parole period - need to adjust structure of sentences

Beck v R [2024] NSWCCA 201

The CCA found the sentence structure in this case was not available.

The applicant was sentenced for two Commonwealth offences and one State offence. He received an aggregate sentence for the two Commonwealth offences, to be released on recognizance. However, the State sentence non-parole period was set to expire four months after the applicant was ordered to be released on recognizance. This meant the offender would remain in custody under another sentence when he should be at large in the community under conditional release (s 20(1)(b) *Crimes Act 1914*): at [16]-[18].

There is no provision for the present problem where the later sentence is for a State (as opposed to federal) offence: at [16].

The CCA restructured the sentence. The State sentence will commence first, as a fixed term for the same length as the original non-parole period. The federal aggregate sentence is to commence at a date when the RRO order can take effect so the applicant will not be in mandatory custody serving another sentence: at [32]-[36].

While it may be that this sentence fails to reflect the seriousness of the State offending, the adjustment is necessary to permit coherent punishment under two legal systems: at [35]; *Mill v The Queen* (1988) 166 CLR 59 at 67

Federal offender - no error where combined period of custodial sentence and recognizance release order (RRO) exceeded 3 years - Crimes Act 1914 (Cth), s 19AC

Curle v R [2024] NSWCCA 117

> s 19AC(1)(b) *Crimes Act 1914* (Cth) provides that where a sentence/s does not exceed 3 years, the court must make a single recognizance release order (RRO).

The applicant was sentenced for Commonwealth child abuse material offences to 2 years 5 months imprisonment. The sentencing judge made a RRO under s 19AC(1) for a period of 1 year 6 months.

The applicant submitted that the sentencing judge erred under s 19AC as the combined period of sentence and RRO exceeded 3 years. The CCA dismissed the appeal.

The period of a RRO is not to be taken into account in determining the question whether the sentence(s) imposed exceed a period of 3 years in s 19AC(1): at [44]. Section 19AC(1) requires a judge to determine whether or not the sentence(s) do not exceed 3 years *before* considering whether or not to impose a RRO; draws a distinction between the sentence(s) imposed and the RRO; and s 19AC(1)(b) directs attention to the period of the aggregate sentence(s) defined in s 16(1) as a "sentence of imprisonment", not the period of a RRO: [40]-[44].

Parity principle

Mohr v R [2024] NSWCCA 197 and ***Tasdik v R*** [2024] NSWCCA 195

Both appeals were allowed on parity grounds.

The judgments each set out helpful summaries of the parity principle.

Mohr v R observes that whilst sentencing of co-offenders undertaken by the same judge has been said to tend against appellate intervention, this needs to be qualified to some extent where co-offenders have not all been sentenced at the same time and on the same body of evidence: at [24]; *Cameron v R* [2017] NSWCCA 229 at [83]; ***Keen v R*** [2024] NSWCCA 157 at [146].

Tasdik v R concerned participants in the same criminal enterprise charged with significantly different offences: at [66]; *Green v The Queen* (2011) 244 CLR 462 at [30].

2. MITIGATING FACTORS

Fail to make findings regarding mitigating factors under s 21A(3) CSPA - where parties made competing submissions

Pauls v R [2024] NSWCCA 123

The sentencing judge erred where competing submissions were made as to remorse, likelihood of reoffending and rehabilitation prospects, but the judge failed to make findings in respect of these three mitigating factors (ss 21A(2)(g), (h), (i) *CSPA*).

The judge referred to each factor in reasons and noted competing submissions were made. Where the evidence was not completely consistent on these issues, the differences required "clear and transparent resolution" (*Masters v R* [2019] NSWCCA 233). The Court cannot infer the judge considered these factors where the judge was unable to reach the positive finding in mitigation: at [39], [42].

Unlikely to reoffend - s 21A(3)(g) CSPA - error to find it 'certain' applicant would not reoffend, rather than assessing 'likelihood' of reoffending

ACE Demolition & Excavation P/L v Environment Protection Authority [2024] NSWCCA 4

Section 21A(3)(g) provides it is a mitigating factor that the offender is "unlikely to re-offend."

The sentencing judge misapplied the test in s 21A(3)(g) by expressing a finding that he could not be *certain* that no future offending would not occur. Although this finding was open, the judge neglected to address whether the applicant had established the *likelihood* which was sufficient to engage s 21A(3)(g). The applicant was denied the benefit of a finding of unlikely to re-offend: at [57].

Mental health – error in not finding moral culpability reduced - question is whether mental conditions contributed to the commission of offence in a material way; not whether there was causal link or whether they entirely accounted for offender's actions

JL v R [2024] NSWCCA 246

The 14-year-old applicant appealed his sentence for sexual offences and break and enter. At sentence proceedings, the psychologist's unchallenged evidence was that features of the applicant's mental health conditions (ASD and ADHD) "*likely contributed to his offending in a material way*."

The CCA allowed the appeal. The sentencing judge accepted this evidence but erred in finding that the applicant's mental conditions did not reduce moral culpability because they "*cannot account for [the applicant's] actions entirely*" and because there was not "*the type of causal connection that would have the effect of reducing his moral culpability"*.

The CCA said that:

- The psychologist's evidence was consistent with the language of *De La Rosa* (2010) 79 NSWLR 1 which held that "[w]here the state of a person's mental health *contributes to the commission of the offence in a material way*, the offender's moral culpability may be reduced".
- The sentencing judge applied the test at a higher level than was required. The question for consideration is not whether there was a "causal link" between the mental health condition and offending, but whether the mental health contributed to the offence in a material way: at [1], [3]-[4], [59]-[64]*; DB v R* [2023] NSWCCA 323; *DPP v De La Rosa*.
- There is no requirement for mental health to "entirely" account for an offender's actions before a finding can be made that moral culpability is reduced. Although it would have been *open* to find moral culpability was only reduced to a small extent on account of mental health, that is not what the judge did. Instead, the judge made no reduction at all: at [2], [5]; *DPP v De La Rosa*.

Bugmy v The Queen (2013) 249 CLR 571 - incorrect that moral culpability cannot be reduced pursuant to Bugmy if offence is pre-planned

Robertson v R [2024] NSWCCA 22

The sentencing judge erred in application of *Bugmy* principles by finding childhood deprivation did not reduce moral culpability because the applicant had planned his offending. Although the *Bugmy* principles *may* not operate to reduce moral culpability in a case where careful planning and premeditation is involved, it is incorrect to state that moral culpability *cannot* be reduced pursuant to an application of the *Bugmy* principles if the offence is pre-planned: at [80], [110]-[111], [116]; *Taysavang v R* [2017] NSWCCA 146.

Factors relevant to both objective seriousness and moral culpability – manslaughter by driving, acting in defence of daughter - failure to take into account relevant considerations when assessing objective seriousness

Britton v R [2024] NSWCCA 138

The applicant was sentenced for 2 counts of manslaughter. The applicant thought her daughter was lying on the ground being assaulted by a woman. The applicant drove her car to push the woman off her daughter. The car landed on top of her daughter and the woman, killing both.

The CCA allowed the applicant's sentence appeal.

The judge found the applicant was acting in defence of her daughter and that her response was "not excessive by a significant margin". The judge took these matters into account in considering moral culpability but failed to do so in the assessment of objective seriousness: at [123]. The sentencing judge's assessment of objective seriousness as "considerable" was not made having regard to the applicant acting in defence of her daughter: at [119]. The judge failed to take into account a material consideration and there is an identifiable error in the sentencing exercise: at [126] (Rothman J), [3], [6] (Stern JA), [169], [171] (Yehia J).

There is a clear distinction between objective seriousness and moral culpability. Nevertheless, some factors may be relevant to both, such as motive, perceived self-defence, age, provocation, and mental illness: at [113]-[114] (Rothman J), [2] (Stern JA), [168]-[170] (Yehia J); *DS v R; DM v R* (2022) 109 NSWLR 82; *Tepania v R* [2018] NSWCCA 247. That a particular circumstance may be relevant to both objective seriousness and moral culpability or subjective circumstances, does not necessitate double counting: [115].

On resentence, taking into account that the applicant was acting in defence of her daughter and her response was not excessive by a significant margin, the objective seriousness is well below mid-range: at [129], [143].

Loss of applicant's career constituted extra-curial punishment – teacher – use carriage service

Wanstall v R [2024] NSWCCA 167

The CCA allowed the appeal of the applicant, a former Deputy High School Principal, for use carriage service to procure person he believed to be under 16 (s 474.26(1) *Criminal Code Act 1995 (Cth)).*

On re-sentence, the applicant submitted that loss of his career constituted extra-curial punishment. The CCA noted the divergence of views of courts about the significance of the loss of an offender's career in sentencing: at [41]ff; *authorities cited and discussed*.

In this particular case, loss of career did constitute extra-curial punishment. The applicant's whole career of 23 years was in teaching with awards. At the time of the offence, he was a deputy headmaster with ambitions to be a principal. Loss of his career, more significant than loss of a particular employment, as a result of offending not committed in the course of employment, although not completely remote from it, is significant extra-curial punishment, given former success in that career, age and likelihood that he would have continued in that career for some time, but for his offending: at [49].

Federal offender - fail to consider mandatory requirement of 'prospects of rehabilitation' - s 16A(2)(n) Crimes Act 1914 (Cth)

Abbas v R [2024] NSWCCA 228

> s 16A(2)(n) *Crimes Act 1914* (Cth) provides that in determining the sentence to be imposed on a federal offender, the court *must* take into account 'the prospect of rehabilitation.'

At sentencing proceedings, the applicant's counsel made written and oral submissions that the applicant had good prospects of rehabilitation. The sentencing judge did not expressly address nor make any findings about the applicant's prospects of rehabilitation in remarks on sentence.

Allowing the appeal, the CCA held:

- The "prospect of rehabilitation" is a mandatory relevant consideration. To the extent that it is relevant and known to the sentencing court, a failure to refer to and make findings establishes error: at [57].
- The sentencing judge erred in failing to take into account the applicant's prospects of rehabilitation *or* in failing to explain in his reasons *how* prospects of rehabilitation had been taken into account. The sentencing remarks do not adequately identify if and how this consideration informed the sentencing exercise. In the absence of any clear finding, any *uncertainty* demonstrates error (*Lee v R* [2016] NSWCCA 146 at [20]). *Summarising* the material is not enough to conclude matters were considered and findings made: at [50]-[56].

Federal child sex offender - fail to have regard to 'objective of offender's rehabilitation' - s16A(2AAA) Crimes Act 1914

Elwdah v R [2024] NSWCCA 150

> Section 16A(2AAA) *Crimes Act 1914* provides the court "must have regard to the objective of rehabilitating the person" when sentencing or making orders for a Cth child sex offender.

The CCA allowed the applicant's appeal on the ground the sentencing judge failed to apply s 16A(2AAA).

- The 'objective of rehabilitation' in s 16A(2AAA) *must* be taken into account. As the mandatory consideration is engaged "*when* making the order", the judge failed to comply with the section and the sentencing discretion miscarried (at [43], [50]):
- No explicit reference in sentencing remarks was made to s 16A(2AAA). While a judge may comply with s 16A(2AAA) without directly referring to it, there must be other indicia demonstrating engagement with the section: see at [44]-[46]; *SR v R* [2024] NSWCCA 43.
- The recognisance release order was not long enough to accommodate any rehabilitative programs discussed at sentence proceedings: at [47].
- The judge failed to include the mandatory conditions for a person convicted of a Commonwealth child sex offence as per s 20(1B), indicating that the judge did not consider, at the time he originally made the recognisance release order, the objective of rehabilitating the applicant: at [48].

The objective of rehabilitation in s 16A(2AAA) is materially different to "prospect of rehabilitation" in s 16A(2)(n): at [43], [52].

In ***Curle v R*** [2024] NSWCCA 117, the applicant was sentenced for Commonwealth child abuse material offences to 2 years 5 months imprisonment. The sentencing judge made a RRO under s 19AC(1) for a period of 1 year 6 months.

The applicant submitted that the sentencing judge erred in not having regard to s 16A(2AAA) in the calculation of the period of custody.

The CCA dismissed the appeal. Subsection 16A(2AAA) does not require the court to identify how the period of imprisonment takes into account the objective of rehabilitation. Nor is it inconsistent with s 16A(2AAA) to impose a custodial sentence where this may have an adverse impact upon rehabilitation. The judge clearly took into account the objective of rehabilitation under s 16A(2AAA). The judge was satisfied that no sentence other than imprisonment was appropriate: at [50]-[52].

3. AGGRAVATING FACTORS

Where finding of aggravating factor inevitable - procedural unfairness – threshold of materiality – no practical injustice

Dent v R [2025] NSWCCA 43

The applicant was sentenced for recklessly cause GBH. He attacked a member of the public with an axe at a hardware store.

The applicant submitted on appeal that the sentencing judge erred in finding the offence aggravated by being committed "without regard for public safety" (s 21A(2)(i) *CSPA*) where the finding was not pursued by the Crown, conceded by the defence or foreshadowed by the sentencing judge

The CCA dismissed the appeal.

Although there was a breach of procedural fairness in the sense there was no indication nor opportunity to address, there remained the threshold question of materiality or practical injustice: whether it was open for the judge to find beyond a reasonable doubt that the offence was committed without regard for public safety: at [80]-[81]; *Smith v R* [2024] NSWCCA 59.

The judge's finding is an inference easily drawn on the facts. It was inevitable for the judge to find the factor proved beyond reasonable doubt. No practical injustice was visited upon the applicant: at [87]-[88]; authorities cited.

Relationship between guideline judgment of R v Ponfield and s 21A CSPA

MacBlane v R [2025] NSWCCA 52

The applicant was sentenced for BE and commit a serious indictable offence, larceny, under s 112 *Crimes Act 1900*. The sentencing judge referred to *R v Ponfield* (1999) 48 NSWLR 327, the guideline judgment for s 112, finding that relevant factors of aggravation were the applicant's criminal record of committing similar offences, and that he was subject to an Intensive Corrections Order. The judge took into account these factors in assessing objective seriousness.

The CCA held the judge erred in assessing objective seriousness by taking into account the offender's criminal record and that he was on conditional liberty, i.e. subject to an Intensive Correction Order.

The issue concerned the relationship between *R v Ponfield* (1999) 48 NSWLR 327 and s 21A *Crimes (Sentencing Procedure) Act 1999* (NSW).

Ponfield (at [48]) expressed that a court should regard the seriousness of a s 112 offence as "enhanced" if any listed factors are present. Relevantly, these include:

- The offence is committed whilst the offender is at conditional liberty on bail or on parole.
- The offender has a prior record particularly for like offences.

Section 21A(2) *CSPA* states that aggravating factors to be taken into account in determining sentence are, relevantly:

(d) The offender has a record of previous convictions.
(j) The offence was committed while the offender was on conditional liberty.

Ponfield is of limited utility. It was decided before s 21A *CSPA* and is little more than a statement of the general sentencing principles that applied at the time. *Ponfield* has been largely overtaken by statute: at [35]; *Mapp* v *R* [2010] NSWCCA 269.

It is now well established that prior criminal history and the fact the offence was committed while on conditional liberty are not relevant to assessment of objective gravity: at [35]-[36]; *Mapp; R v McNaughton* (2006) 66 NSWLR 566; *R v Way* (2004) 60 NSWLR 168.

Drug supply – financial gain – motive – error in placing little weight on motive to repay drug debt or finance drug addiction – applicant's appeal allowed

Robertson v R [2024] NSWCCA 22

The CCA allowed the applicant's sentence appeal for commercial drug supply of cocaine.

At sentence, evidence showed the applicant was using large quantities of drug, was attacked in a home invasion due to drug debt and began dealing drugs due to his debt.

The CCA noted that engaging in a drug offence to repay a drug debt or to finance a drug addiction is not mitigatory of objective seriousness. However, doing so for financial reward may increase objective gravity: at [90]; *De La Rosa* at [261].

In this case, the sentencing judge erred in treating "financial gain" as the applicant's primary motive and as a significant factor in finding objective seriousness was "mid-range." The reasons for the applicant's financial gain (to pay off a drug debt to those who carried out the home invasion and to skim drugs for his addiction) was of little consequence in that exercise. The judge erred in placing little or no weight on motive in determining objective seriousness: at [93].

To the extent that offending to repay a drug debt or finance a drug addiction may be construed as a form of seeking financial gain, it is the purpose of that financial gain that determines its relevance. The judge did not, in terms, identify it as an aggravating factor, but in finding that the applicant was "selling comparatively small amounts … to support his habit", it is not apparent how else the offence could attract a finding of mid-range seriousness: at [92]; *Hejazi v R* [2009] NSWCCA 282.

Offences committed whilst subject to an ADVO an aggravating factor under s 21A(2)(j) CSPA.

DPP (NSW) v Wolinski [2024] NSWCCA 139

The CCA stated that an offender subject to an AVO or ADVO is on conditional liberty and commission of an offence during the period of the order is an aggravating factor under s 21A(2)(j): [176]; *Sivell v R* [2009] NSWCCA 286 at [29].

In any event, breach of an ADVO would be an aggravating factor under general law and did not require application of s 21A(2)(j). In this case, the sentencing judge clearly regarded the offending whilst subject to the ADVO as an aggravating factor: at [177].

Further, where the offender was sentenced to imprisonment in the Local Court for contravention of the ADVO, it is not "double-counting" to take into account that his offending in counts 5-8 was seriously aggravated by disregard of the ADVO. The ADVO sentence was properly considered by the sentencing judge in applying the principle of totality: at [178].

4. DISCOUNTS

Five-judge bench – federal offenders – discounts under mandatory minimum penalty provisions – ss 16AAA, 16AAB, 16AAC Crimes Act 1914 (Cth) - s 16AAC(3) sets a minimum floor

McGregor v R [2024] NSWCCA 200

> s 16AAC(2) *Crimes Act 1914* (Cth) provides a court may impose a sentence less than the mandatory minimum period specified in s 16AAA or s 16AAB(2) to take into account:
>
> (a) s 16A(2)(g), the person pleading guilty
>
> (b) s 16A(2)(h), cooperation with law enforcement agencies

The applicant was sentenced for four federal child sexual abuse offences to an aggregate term of 11 years 6 months imprisonment, NPP 8 years. One offence (Count 1) carried a mandatory minimum sentence of 7 years under s 16AAA *Crimes Act 1914* (Cth).

On appeal, the applicant submitted (and the Crown conceded) that the sentencing judge erred by using a wrong formula in applying a discount under s 16AAC for guilty pleas and cooperation with authorities.

The five-judge bench allowed the appeal:

- The sentencing judge erred by calculating the discount in s 16AAC by considering a percentage of the minimum penalty as specified in ss 16AAA and then deducting that figure from the notional starting point: at [35].

  The judge applied a discount of 30% to the 7-year mandatory minimum sentence in s 16AAA, providing a discount of 25.2 months from the starting point of 8 years imprisonment: at [11].

- The correct approach is that the discount provisions in s 16AAC(3) set a floor below which the term of imprisonment cannot go: at [13]. The discount will be informed by the chosen starting point for the sentence, which will vary from case to case, as opposed to being calculated by reference to the mandatory minimum sentence, which will not: at [28]; *Hurt v The King* (2024) 98 ALJR 485.

  The discount of 30% was to be calculated by reference to the starting point of 8 years, providing a discount of 28.8 months: at [13]-[15]; *R v Delzotto* (NSWCCA) (2022) 298 A Crim R 483.

Early Appropriate Guilty Pleas - mandatory discounts for guilty pleas - offer to plead guilty in Local Court rejected, but later accepted in District Court on same terms - s 25D(2) CSPA, 25% discount applies only if plea is actually entered in Local Court

Rokovada v R [2025] NSWCCA 64

The applicant was charged with sexual offences. He made an offer to plead guilty to one count of sexual intercourse without consent on the factual basis that the complainant consented to all sexual activity except the act of ejaculation. The Crown rejected this offer. However, at a subsequent "Super Call-over"

in the District Court, the Crown accepted an offer to plead guilty on the same terms as the applicant's earlier offer.

The sentencing judge allowed a 10% discount for the plea of guilty under s 25D(2)(b)(ii) *CSPA*.

Section 25D provides mandatory discounts for guilty pleas:

- 25% - where the guilty plea was accepted by the magistrate in committal proceedings: s 25D(2)(a)
- 10% - where the guilty plea was made at the first available opportunity after the offender was committed for trial: s 25D(2)(b)(ii)

On appeal, the applicant submitted that the judge erred in applying a 10% discount, and not a 25% discount under s 25D(2)(a), as it would be manifestly unfair given the Crown achieved no better result at the Super Call-over than it would have achieved in the Local Court. The case conference certificate filed in the Local Court recording his conditional offer to plead *should* be sufficient to establish under s 25D(2)(a) that a plea offer was made and "accepted" by the Magistrate as the offer to plead ultimately accepted by the Crown was in the same terms. He submitted that the "literal" words of s 25D(2)(a), "guilty plea … accepted by the Magistrate in committal proceedings" ought to mean "offered to plead guilty in the Local Court": at [32]-[33], [49].

The CCA dismissed the appeal.

- The applicant falls squarely within the express words of s 25D(2)(b)(ii) since he pleaded guilty after having been committed for trial. Section 25D(2)(a) applies only to a plea of guilty which has been *made before*, and *accepted by*, a Magistrate in committal proceedings. The quantum of the sentencing discount in Division 1A "turns on the *actual* timing of the plea or the *actual* compliance with the pre-trial notice requirements": at [37]; *Green v R* [2022] NSWCCA 17 at [47]-[48]; *Black v R* (2022) 107 NSWLR 225.
- The legislative intention was that those who plead to an offence with which they have been charged in the Local Court will *only* be entitled to a 25% discount if the plea is *actually entered in the Local Court*. Parliament could have made a different legislative choice and based entitlement to a discount of 25% on an *offer to plead* rather than the *making and acceptance of a plea* to that offence: at [42]-[43].
- It was open to the applicant to plead guilty pursuant to s 97(1) *Criminal Procedure Act*, before he was committed for trial, to one of the two charges of sexual intercourse without consent. He chose not to, thereby losing entitlement to the discount under s 25D(2)(a). It is not to the point that there were practical forensic reasons, arising from s 25F(4), why the applicant might have been wary of entering a plea and engaging in a disputed facts hearing on the complainant's lack of consent: at [38].

Members of the Court made observations on the operation, inflexibility and potential unfairness of the statutory regime and desirability of review and possible reform: at [52]-[54], [61] (Hamill J); [65]-[69] (Ierace J).

Early Appropriate Guilty Plea - mandatory discounts - error to round down discount to even months, s 25D CSPA - plea of guilty at District Court "super call-over" may demonstrate facilitation of administration of justice, s 22A CSPA

Sampson v R [2025] NSWCCA 25

The applicant pleaded guilty at super call-over in the District Court to GBH with intent upon his partner. He was sentenced to 5y, NPP 3y.

The applicable EAGP discount was 10%: s 25D *CSPA*.

The sentencing judge stated, "*I have started the sentence at five and a half years and discounted it by 10%. In arriving at that start point I have taken into account the additional discount in relation to the super call-over* [s 22A]… *Having rounded the discount to even months, I impose a sentence of five years*."

The CCA allowed the applicant's appeal on the following grounds:

Error in rounding down 10% discount to even months

- It was not open to round the 10% discount in s 25D, either up or down: at [49]. Div 1A *CSPA* is a mandatory scheme subject only to exceptions in ss 25F(2), (4): at [43]-[44].
- Rounding the discount effectively reduced the discount. The judge was obliged to discount his starting point by 6.6 months (10% of 66 months), i.e. 6 months 18 days. The head sentence ought to have been 4 years 11 months 12 days. It would then have been open to round that down to take account of the "lesser penalty" in s 22A: at [44]-[45], [49].

s 22A *CSPA* can apply to a plea at super call-over

- Section 22A can apply to a plea at super call-over and is not confined to a "trial on indictment": at [36]-[37]; *BAP v R* [2024] NSWCCA 206. (In *BAP v R*, the CCA said that a plea of guilty at a District Court "super call-over" may demonstrate facilitation of the administration of justice, over and beyond utilitarian value of the plea (*CSPA*, s.22A). Each case must be decided upon its own facts and circumstances: at [61]; *Doyle v R* (2022) 108 NSWLR 1; *R v Borkowski* (2009) 195 A Crim R 1).

Re-sentence: The CCA applied a 10% discount (s 25D), but none under s 22A as it would result in a sentence unreasonably disproportionate to the offending: at [117]. The applicant was re-sentenced to 4y 6m, NPP 2y 8m.

Early Appropriate Guilty Plea - mandatory discounts - error in not applying 5% statutory discount for guilty plea entered after trial commenced and victim had given evidence - s 25D(2)(c), CSPA

DS v R [2025] NSWCCA 53 and ***WP v R*** [2024] NSWCCA 77

The applicants' appeals were allowed where the parties erroneously told the sentencing judge that the applicant was not entitled to a 5% discount under s 25D because he pleaded guilty after the trial had commenced and a victim had given evidence. The applicable numerical discount is 5%: s 25D(2)(c). The fact the victim had given evidence before the applicant entered his pleas did not alter that statutory fact: ***WP v R*** at [108]; ***DS v R*** at [61]-[63].

Early Appropriate Guilty Plea – s.25E CSPA – murder - early offer to plead manslaughter – Crown murder case recast – whether plea "withdrawn" – 25% discount applied

R v Rahim [2024] NSWSC 1419 (McNaughton J, Sentence)

The accused, being sentenced for murder, had made an offer to plea to manslaughter recorded on a Case Conference Certificate. The Crown submitted:

- No EAGP discount is available as the offer was made before the Crown case was recast in relation to the count of murder - that is, as based on joint criminal enterprise / extended JCE, rather than constructive murder following the High Court decision in Mitchell v The Queen [2023] HCA 5; 276 CLR 299.
- The offer should have been renewed following the change in accordance with an email inviting the accused to make any further submissions before finalisation of the indictment.
- s.25E was satisfied except subs (1)(d)—in that failure to renew or confirm the offer means the earlier offer should be regarded as having been "withdrawn".

The Court held that the 25% discount applied on the basis of earlier offer to plead to manslaughter.

- The words of s 25E(1)(d), "the offer was not subsequently withdrawn", do not naturally accommodate a "deemed withdrawal": at [150].
- There is no direct authority on this point but assistance is provided by *Black v R* (2022) 107 NSWLR 225; [2022] NSWCCA 17 at [36], [38], [41] (manslaughter is a "different offence" to murder within the meaning of s 25E(1)(b)); and *R v Steele* [2024] NSWSC 214 per Davies J at [45] (s 25E is concerned with the "offence" and not its basis).

  It makes no difference that the murder count had been put on a different basis when the offer to plead to manslaughter was made: at [153]-[157].

5. PARTICULAR OFFENCES

s 66EA Crimes Act 1900 - maintain unlawful sexual relationship with child – factors relevant in assessing objective seriousness

RA v R [2024] NSWCCA 149

s 66EA *Crimes Act 1900* (new provision commenced 2018) provides for the offence of maintain unlawful sexual relationship with child.

The offence provides, inter alia:

> An unlawful sexual relationship is one where an adult engages in two or more unlawful sexual acts with or towards a child over any period: s 66EA(2).
>
> The prosecution is not required to allege particulars of the unlawful sexual acts: s 66EA(4)(a).
>
> The jury is not required to be satisfied of the particulars of any unlawful sexual act to convict: s 66EA(5)(b).

The applicant was sentenced for two s 66EA offences. The sentencing judge found that it was unnecessary to identify the "ingredient offences". The applicant submitted it was an error to sentence for the unlawful sexual relationship by taking into account that it occurred repetitively without particularising each incident: at [78], [83].

The CCA dismissed the appeal. The sentencing judge did not err in approach: at [104].

Construction of s 66EA

- s 66EA(4)(b) is clear that the particulars that must be provided by the Crown are only those that specify "the period of time over which the unlawful sexual relationship existed". It is not necessary for the Crown to specify any ingredient or underlying unlawful sexual acts.

- The gravamen of the offence is the maintenance of an unlawful sexual relationship with a child. A relationship is an unlawful sexual relationship by virtue of the commission of two or more unlawful sexual acts within – or in the course of – the relationship: at [92]; [95], [99]; ss 66EA(8) 66EA(15); *MK v R; RB v R* (2023) 112 NSWLR 96; *Xerri v The King* [2024] HCA 5.

- Sentencers are required to take into account any conduct that occurs within the period of the offence as charged that would amount to an offence of the nature listed in s 66EA(15), whether or not individual instances of the offending conduct can be identified, enumerated, or particularised. It is enough that the sentencing judge is satisfied that the unlawful sexual acts were committed. The focus of s 66EA is not on proof of a particular number of individual sexual offences, but on proving the existence of a particular kind of relationship: at [99].

Here, the sentencing judge was correct to have regard to multiple acts that would have constituted, if sufficiently particularised, an offence of a type referred to in s 66EA(15)(a)-(e). That evidence established the nature and gravity of the unlawful sexual relationship: at [100]; *MK v R; RB v R* (2023) 112 NSWLR 96. (A similar argument was rejected in ***MK v R*** [2024] NSWCCA 127: at [118])

Sentencing for s 66EA offence – Relevant factors in assessing objective seriousness

The CCA set out a non-exhaustive enumeration of all relevant features to be considered by a sentencing court. The gravity of a s 66EA offence falls to be determined by (at [101]-[102]):

- Length of period over which the unlawful sexual relationship was maintained;
- Nature of relationship in which unlawful sexual acts were committed, such as a parental relationship, or that between a coach and player;
- Whether the relationship placed the offender in a position of authority over or trust towards the child;
- Age of child at commencement, and during period, of the relationship, and how far below 16 the child was;
- Age differential between offender and child;

- The extent of the commission of unlawful sexual acts above the statutory threshold of two;
- Frequency and nature of unlawful sexual acts;
- Where the unlawful sexual relationship existed wholly or partly before the commencement of the relevant amendments, being 2018, the maximum penalties applicable to particular unlawful sexual acts committed within the period of the relationship.

s 66EA Crimes Act 1900 – Crown Appeal allowed - totality of sexual acts erroneously limited to demonstration that a small number of specific acts not isolated

R v Fisher [2024] NSWCCA 191

The applicant was convicted by jury of two s 66EA offences. The trial indictment contained alternative counts particularised as specified individual sexual offences to the s 66EA counts.

The CCA allowed the Crown appeal against sentence.

The judge limited his treatment of offending other than that corresponding with the alternative offences to its capacity to show those particularised offences were not "isolated": at [110]. As the judge accepted beyond reasonable doubt the totality of offending described by the complainants, he was obliged to take all such offending into account in determining objective seriousness: at [53].

The relevance of repeated, persistent, unlawful sexual acts which were accepted as having taken place by the judge was erroneously limited to demonstration that a small number of specific acts were not isolated. This defeated the purpose of the s 66EA offences in allowing sentencing to take place for unlawful sexual acts which cannot be particularised with specificity. The sentencing judge failed to take into account the totality of offending in assessment of objective seriousness: at [120].

Sentencing Bench Book – s 66EA Guidance

The CCA noted that at the sentencing proceedings, defence counsel's submissions were based upon s 66EA guidance in the Sentencing Bench Book, which had not been updated to include recent decisions on s 66EA. The sentencing judge expressed concern that the Bench Book was not consistent with the High Court decision *Xerri v R* [2024] HCA 5. The Crown endorsed the factors in *Burr v R* [2020] NSWCCA 282 (at [106]), particularly the requirement to consider the number of offences. The judge sought, but did not receive, assistance on up-to-date authorities: at [33]-[41].

[Note: The Sentencing Bench Book s 66EA commentary is under review; and recent cases are listed under the 'Recent Developments' Tab to the s 66EA commentary].

s 66EA Crimes Act 1900 - Crown appeal allowed - relevant factors in assessing objective seriousness as set out in RA v R [2024] NSWCCA 149 at [102], not Burr v R - sentencing judge misapprehended that he had to be satisfied of each incident beyond reasonable doubt

R v Lamey [2025] NSWCCA 17

The Crown appealed the respondent's sentence for an offence under s 66EA. The complainant's evidence was that the sexual abuse was regular and ongoing over six months. The sentencing judge found her evidence "compelling" but did not accept her estimate of frequency of incidents of unlawful sexual acts. The judge sentenced on the basis he could only be satisfied beyond reasonable doubt that a minimum of five *specific* incidents had occurred: at [120].

The Crown submitted the sentencing judge erred in requiring satisfaction beyond reasonable doubt of each incident before assessing the offending.

The CCA allowed the appeal and remitted the matter for sentence to the sentencing judge. The focus of s 66EA is not on proof of a particular number of individual sexual offences, but on proving the existence of a particular kind of relationship. The sentencing judge erred in proceeding on the basis that he had to be satisfied of each incident beyond reasonable doubt before he could find that the abuse was ongoing: at [114]-[117], [121]-[127]; ***RA v R*** [2024] NSWCCA 149; ***R v Fisher*** [2024] NSWCCA 191.

s 66EA – Relevant factors in assessing objective seriousness as set out in **RA v R** [2024] NSWCCA 149 at [102] not Burr v R

The CCA affirmed that the proper approach to assessing objective seriousness for s 66EA is to have regard to the factors in ***RA v R*** at [102], above, and not the factors identified in *Burr v R* [2020] NSWCCA 282; (2020) 285 A Crim R 506 which were relevant to the predecessor s 66EA offence. Although in *GP (a pseudonym) v R* [2021] NSWCCA 180 it was said (at [64]) that the factors identified in *Burr v R* were still relevant to the new provision, that observation was limited to the issue in dispute in that appeal: at [90]. (See also ***R v Fisher*** [2024] NSWCCA 191 at [81]).

s 66EA Crimes Act 1900 - Crown should provide best particulars available to avoid unfairness

Nolan v R [2024] NSWCCA 140

The applicant was convicted under s 66EA. The CCA found the sentencing judge did not err in taking into account an act of which the complainant had given evidence but was not particularised in the indictment: at [37]; ss 66EA(4)(a), (5); *Xerri v The King* [2024] HCA 5.

The Crown is not required to plead particulars of any unlawful sexual act (s 66EA(4)(a)). However, it is preferable the Crown particularise in the indictment the acts relied on in interests of fairness and transparency and to avoid issues of unfairness and uncertainty arising in sentences. Further, to avoid "undermining a fair trial" and for fundamental procedural fairness, that is, the accused is entitled to know the case against them: at [4]-[9], [37].

Child sexual offences - historical - difficulties in sentencing in accordance with sentence patterns at time of sentence - comparable cases – s 21B CSPA (formerly 25AA), s 19 CSPA - Crown appeal – factors relevant to exercise of residual discretion

R v Carey [2024] NSWCCA 90

> A court is required to sentence according to the sentencing practices and patterns at time of sentencing, not offending: s 21B *CSPA* (formerly s 25AA).
>
> Where a maximum penalty is increased, the penalty applies only to offences committed after the commencement of the provision increasing the penalty: s 19 *CSPA*.

The CCA by majority allowed the Crown appeal against sentence for four counts of sexual intercourse with child (s 66C(2)) on the ground of manifest inadequacy. The Court exercised the residual discretion to re-sentence where the applicant's release date was 4 months away.

s 21B, 25AA CSPA and comparable cases

The Court made observations regarding s 21B, 25AA *CSPA* and comparable cases:

- There are difficulties in sentencing in accordance with sentencing "patterns" existing at time of sentence when the earlier maximum penalty has since increased substantially.
- Relevant comparable case will require two temporal features:
  - (1) They need to be cases from the period when the maximum penalty (or SNPP) was the same or similar.
  - (2) They need to be cases decided after the introduction of s 25AA(1), now s 21B.

Present case

This case demonstrates the difficulties in sentencing in accordance with sentencing "patterns" existing at the time of sentence when the earlier maximum penalty has increased substantially from the time of the offences. For s 66C(2) offences, the maximum penalty has increased from 10 to 20 years; there was no SNPP but now a SNPP of 7 or 9 years applies (depending on how charged): at [52].

The result is that there is a limited number of truly comparable sentencing cases. Further, there are limitations in applying sentencing statistics and results in other cases to an individual case, District Court sentencing judgments are not published on Caselaw, and cases heard in the CCA often involve sentences at the margins of leniency or severity: at [53].

The comparable cases provided do suggest leniency. However, a survey of those cases does not, of itself, establish that the sentence is manifestly inadequate: [53]-[55].

The combination of the lenient (and in one case manifestly inadequate) indicative sentences and the modest degree of accumulation for what were, in most instances, separate and distinct offences, did result in an aggregate sentence that is unreasonable, plainly unjust or manifestly wrong: at [62].

Factors relevant to residual discretion

The CCA (by majority) determined to exercise the residual discretion and re-sentence where the applicant's release date was 4 months away from the date of the appeal hearing.

The factor of an imminent release date is just one factor with other factors relevant to the exercise of the discretion, including the need for guidance to be provided to achieve consistency: at [90].

The cumulative force of several factors warranted intervention, including: complainant aged 12 -13 and vulnerable; position of trust; physical pain to complainant; not isolated offences; letters to complainant; denial; no remorse; and describing child's behaviour as "precocious and provocative": at [2], [91].

Commonwealth child sex offences – suspended sentence under s 20(1)(b)(iii) Crimes Act 1914 - "exceptional circumstances"

R v Bredal [2024] NSWCCA 75

> Before imposing a wholly suspended sentence for a Commonwealth child sex offence, a Court must be satisfied there are "exceptional circumstances": s 20(1)(b)(iii) *Crimes Act 1914* (Cth).

The CCA dismissed the Crown appeal against the respondent's suspended sentence for use carriage service to groom person under 16 (s 474.27(1) *Criminal Code* (Cth)).

The respondent, aged 45, communicated for a month with a police assumed online identity (AOI) posing as a 14-year-old female, before cancelling a meeting and stopping communications.

The CCA held the sentencing judge did not err in finding a combination of matters led to exceptional circumstances within the meaning of s 20(1)(b)(iii), and that the sentence was not manifestly inadequate.

Meaning of "exceptional circumstances" in s 20(1)(b)(iii)

"Exceptional circumstances" is not defined.

- To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but cannot be one that is regularly, or routinely, or normally encountered: at [58]-[60]; *R v Kelly (Edward)* [1999] 2 All ER 13 at 20 cited in *R v Tootell; Ex parte A-G of Queensland* [2012] QCA 273.
- A combination of factors, each not in itself exceptional, may demonstrate that the circumstances of the case are exceptional: at [61]; *Griffiths v The Queen* (1989) 167 CLR 372 at 379; *R v Tootell*.
- Whether the threshold is reached is considered having regard to all the circumstances of the case.
- The greater the objective seriousness the more difficult it will be to establish the case is relevantly exceptional: at [63]; *Hurt v The King* [2024] HCA 8; 98 ALJR 485.

Circumstances in which the "exceptional circumstances" test applies, discussed at [55]-[57].

No error in finding exceptional circumstances

It was open to the judge to find the case was exceptional within s 20(1)(b)(iii) based on a combination of factors. A number of factors were of particular significance (at [111]):

- voluntary withdrawal from the offence was an unusual circumstance
- no evidence to suggest respondent was looking to actively engage with a child
- absence of any indication on searching the respondent's home and electronic devices of an interest in children, and lack of prior record together with withdrawal from offending, suggest that contact with a "child" may well not have occurred but for the undercover police operation
- not irrelevant that communications were with an AOI (as the harm actually done remains a very relevant factor)
- absence of convictions and prior good character
- personal circumstances in having to care for three children with special needs is both unusual and significant: at [111]-[119].

s 115 Crimes Act 1900 - offence complete on proof of previous conviction and commission of s 114 offence – double punishment - inappropriate to impose any penalty or indicate any sentence as part of an aggregate term of imprisonment

Bazzi v R [2024] NSWCCA 35

> Section 114(1)(d) *Crimes Act 1900* creates the offence of 'Being armed with intent to commit indictable offence.'
>
> Section 115 provides that whosoever, having been convicted of any indictable offence, afterwards commits any offence mentioned in s 114, shall be liable to imprisonment for ten years.

The applicant was sentenced to an aggregate term for offences including s 114(1)(d) and s 115. The sentencing judge indicated a sentence of 9 months for the s 115 offence.

Simpson AJA (Weinstein J agreeing; Button J dissenting on this ground) upheld an appeal ground that the judge erred by failing to avoid double punishment for the elements common to the s 114 offence and the s 115 offence.

Simpson AJA stated that if she were the sentencer, the s 115 offence would have been disposed of pursuant to s 10A *CSPA 1999* (conviction without any other penalty). The offence created by s 115 is one of recidivism - with no *actus reas*, or *mens rea*, and completely dependent on criminality of offending under s 114 and of the offence of which the offender has been convicted in the past. Section 115 exposes the already punished offender to a further penalty of imprisonment for up to 10 years, and is inconsistent with prevailing sentencing standards which abjure double punishment: at [37]-[39]; *Pearce v The Queen* (1998) 194 CLR 610; *Darcy v R* [2022] NSWCCA 54 at [7], [50].

If the s 115 offence were to be charged separately, it would be inappropriate to impose any penalty. It would be equally inappropriate, in dealing with a s 115 offence as part of an aggregate sentence, to indicate a sentence: at [57].

The legislature is reminded of the NSW Law Reform Commission recommendation that s 115 be repealed (*Sentencing, NSWLRC 79, 1996,* at 10.19): at [38].

Sexual intercourse without consent – recklessness - s 61HE(3)(b) (now 61HK) Crimes Act 1900

Slater v R [2024] NSWCCA 210

> s 61HE(3)(b) *Crimes Act* (now 61HK) provides a person is taken to know another person is not consenting to sexual activity if they are reckless as to whether the other person consents.

The CCA affirmed that recklessness for sexual intercourse without consent is made out where the accused:

- realises there is a possibility the other person does not consent to sexual intercourse but proceeds regardless (sometimes called advertent recklessness); or
- does not consider at all whether the other person is consenting (sometimes called inadvertent recklessness and called non-advertent recklessness in *Lee v R*): at [56]; *Lee v R* [2023] NSWCCA 203 and ***Tuuholoaki v R*** [2024] NSWCCA 135.

The sentencing judge was required to identify fully the facts, matters and circumstances. This included the fact that the applicant was reckless when he inserted his finger into the vagina of the sleeping victim, either because he realised the possibility that she was not consenting and proceeded regardless or did not consider the issue of whether she was consenting at all. The agreed facts did not specify which of these pertained. This does not matter. The relevant point is that it was one of them: at [69].

The CCA rejected the applicant's submission that there is a third category of recklessness of 'reasonable possibility the offender believed the victim was consenting.' A reasonable possibility of belief in consent means recklessness has not been proved beyond reasonable doubt: at [57]-[58], [66]- [67].

Criminal contempt - contemnor a juvenile

In the matter of KL [2024] NSWSC 1334 (Hamill J)

The contemnor, a young person, pleaded guilty to two offences of contempt. He refused to answer questions as a witness in a pre-trial hearing, and in a jury murder trial of other persons.

Penalties for contempt

Contempt is a common law offence, with no prescribed maximum penalty. A court may:

- punish contempt by committal to a correctional centre or fine, or both: Part 55, r 13(1) *Supreme Court Rules 1970*.
- make an order for punishment on terms, including a suspension of punishment or suspension of punishment with security: r 13(3).

The power of suspension provides a broad scope to impose a suspended punishment on "terms". This includes requiring a contemnor to be of good behaviour which would require them not again to commit a contempt: at [35].

The sanctions and penalties in the *Children (Criminal Proceedings) Act* are not available: at [26]; *Dowling v Prothonotary of the Supreme Court of NSW* [2018] NSWCA 340. However, the inherent powers of this Court are of such breadth that orders can be fashioned which have the same practical result. For example, it is open to order that any term of detention be served in a juvenile institution rather than in an adult gaol, or to impose a bond or recognisance at common law with conditions: at [31].

Orders

The Court ordered the contemnor be committed and detained as a juvenile offender for 6 months and 9 months (concurrently) for each offence, suspended on condition of good behaviour, including not to commit contempt by refusing to answer questions if called as a witness in a further trial: at [48].

Note: The judgment helpfully refers to a number of sentencing cases for contempt.

6. APPEALS

Distinction between "fresh" and "new" evidence of less significance on a sentence appeal - relevant enquiry when determining whether to admit additional evidence - additional evidence admitted on appeal

Lawavou v R [2025] NSWCCA 35

The CCA allowed the applicant's appeal on the ground that the absence of additional material at sentence resulted in a miscarriage of justice.

The applicant did not disclose to his lawyers at sentence serious sexual assaults upon him in prison which took place close to commission of his charged offences, because he was ashamed and did not appreciate its significance.

The CCA stated that:

- The distinction between "fresh" and "new" evidence is of less significance on a sentence appeal where the additional material may have had a real bearing on sentencing outcome and absence resulted in a miscarriage of justice: at [113]; discussed at [112]-[128].
- The relevant enquiry when determining whether to admit additional evidence (irrespective of whether "new" or "fresh" evidence) is a consideration of whether a miscarriage of justice has occurred in depriving the applicant of the opportunity to have material considered which could have a real bearing on the sentence. In considering that test, the Court is to consider whether the additional material had the capacity or potential to materially impact the sentence. It is not whether the Court can conclude with any certainty that the material *would* have made a material difference to the sentence: at [129]; *Betts v The Queen* (2016) 258 CLR 420; *Shalida v R* [2024] NSWCCA 55; *Green v R* [2022] NSWCCA 230; *Shortland v R* [2024] NSWCCA 174, applied.
- The additional evidence in this case was "fresh" evidence, not being discoverable with the exercise of reasonable diligence. Even if characterised as "new", it had capacity to have a real bearing upon the exercise of the sentencing discretion: at [32]-[34]; authorities cited.

Error favourable to an offender but not the subject of a ground of appeal by either party - error exposed by Crown

Baydoun v The King [2024] NSWCCA 65

The applicant's appeal was allowed on various grounds. The CCA confirmed the sentences as no lesser sentence was warranted.

One error was exposed not by the appellant but by the Crown, and not in the Crown notice of Appeal but merely in the Crown's written submissions. The applicant, possibly because they considered it advantageous, accepted the Court should proceed to resentence: at [71], [73].

The CCA said that it is unnecessary to address whether the approach taken in this case (where an error favourable to an offender is identified but *not* the subject of a ground of appeal by either party) is within the principles identified in *Flaherty v R; R v Flaherty* (2016) 92 NSWLR 290 at [92]–[93] or is a permissible extension of it. It is also unnecessary to reach a conclusion about those matters because no lesser sentence in law is warranted: at [76].

Flaherty v R held it would be a distortion of justice to find error and that an appellant had not been sentenced according to law but refrain from intervention where the error was exposed by the Crown and not the appellant. There is no reason why *Kentwell v The Queen* (2014) 252 CLR 601 does not apply to sentencing affected by error by whomever exposed: at [92]-[94].

Inconsistent approach by Crown in co-offenders' appeals – Crown must act with fairness and integrity

Keen v R [2024] NSWCCA 157

The CCA expressed "considerable disquiet" caused by the Crown's differing positions in related proceedings concerning the applicant. In the present disparity appeal, the Crown submitted the applicant's "extensive" role was in line with his co-offenders. However, in an earlier Crown appeal against the co-offenders' sentences before a different bench, the Crown submitted his role was low-level and subordinate: at [121].

The very high standard of conduct expected of the Crown is not necessarily met where related cases are conducted in an inconsistent way. At times a different approach is dictated by differences in evidence, e.g. where evidence admissible against one co-offender is not admissible against another. However, criticism can be made where different approaches appear dictated by convenience or securing a particular result: at [9]-[10], [121].

Despite the inconsistency, the Crown cannot be bound by differing submissions in other proceedings touching on the case against the applicant, and its different positions is not relevant to determination of the present matter: at [9], [120]-[124].

Re-exercising sentencing discretion afresh where error arithmetical

JA v R [2024] NSWCCA 130

The CCA allowed the applicant's appeal on the ground that although the sentencing judge did not make an express finding of special circumstances (s 44 *CSPA*), he had identified five factors as a bases for such a finding. The judge's intention was to reduce the statutory ratio between NPP and head sentence but he inadvertently increased it to 75.68%: at [4], [8].

The issue was whether the CCA should sentence afresh (*Kentwell v The Queen* (2014) 252 CLR 601), which was the Crown's position, or correct the error where the error was arithmetical.

The CCA held that if the judge had stated that he intended to vary by a specified period or percentage, but failed to do so, the Court could give effect to the expressed intended result. However, the judge had not made any such statement, therefore Court would be required to form its own view as to the appropriate reduction and to "exercise the discretion afresh": at [9], [22].

Observations by N Adams J

N Adams J found that there is no need to resentence as the nature of the arithmetic error is apparent: at [49]-[50]. Her Honour observed that it is not apparent why the scope and nature of an appeal such as this

is left to be dictated by the respondent (Crown) rather than the applicant. Whether it is appropriate, if the parties *agree,* to simply correct error of the type established in this appeal, does not appear to be settled. However, it is settled that if the Crown does *not* agree with this course (and their approach has not been consistent) then this Court is required to resentence afresh. This is clearly an unsatisfactory result: at [47]-[48].

Manifestly excessive ground should not be advanced as a means of raising further sub-grounds alleging patent errors

ACE Demolition & Excavation Pty Ltd v Environment Protection Authority [2024] NSWCCA 4

The CCA observed that an appeal ground that sentences are manifestly excessive should not be advanced as a means of raising further sub-grounds alleging patent errors that could have been addressed by a specific ground.

In this case, within the manifest excess ground were sub-grounds as to errors in identifying starting points of fines and principles of totality, accumulation and parity.

Manifest excess (or manifest inadequacy) is a conclusion which does not depend upon attribution of identified specific error (*Dinsdale v The Queen* (2000) 202 CLR 321 at [6]). There has been error although the error is not patent on the face of the reasons. A finding of manifest excess invites the Court to consider whether the sentence is so excessive that it is plainly unfair or unjust. It is therefore inconsistent for specific errors to be pleaded as though they are "sub-grounds" of manifest excess: at [7]-[14].

See also ***Stanton v R*** [2024] NSWCCA 185 per Garling J at [102]-[113]. There is a need, when fashioning grounds of appeal, to pay careful attention to principles and not confuse allegations of latent and patent error. Manifest excess as a ground of appeal does not raise specific error. Rather, it is a result from which it can be concluded that there must have been some misapplication of principle, even though where and how cannot be identified (*House v The King* (1936) 55 CLR 499 at 505). Put differently, there must be some "latent" error as opposed to a "patent" or obvious error.

Appeal of indicative sentences - ground that indicative sentence manifestly excessive but not that aggregate sentence was itself manifestly excessive

KS v R [2024] NSWCCA 147

The applicant appealed on the ground that an indicative sentence was manifestly excessive but not that aggregate sentence was itself manifestly excessive.

The CCA dismissed the appeal.

- An excessive indicative sentence is not sufficient to impugn an aggregate sentence which is not alleged to be manifestly excessive. In the absence of patent error, the applicant can only successfully impugn the aggregate sentence if s/he demonstrates that the aggregate sentence is manifestly excessive: at [74]; ***PN v R*** [2024] NSWCCA 86.
- The CCA distinguished *AJ v R* [2023] NSWCCA 158. In *AJ*, identifiable patent error affected the indicative sentences meaning the *process* was erroneous. It was not necessary to address whether the *result* (the aggregate sentence) was also erroneous as it was necessarily affected by the error in the process: at [57], [62]–[63].
- Characterisation of an *indicative* sentence as *"manifestly* excessive*"* and falling within the category of latent error involves a misconception. That type of error applies to "the *result* embodied [in] the order", being the *aggregate* sentence and not the indicative sentences: at [66]; *House v The King* (1936) 55 CLR 499; *Markarian v The Queen* (2005) 228 CLR 357.
- Where an aggregate is imposed, the offender has "lost" the right to challenge the sentences *indicated*: at [72]; s 53A *CSPA*. But an indicative sentence can provide guidance as to whether the aggregate sentence is manifestly excessive or inadequate: at [67]; *Davidson v R* [2022] NSWCCA 153; *JM v R* [2014] NSWCCA 297.

See also ***Dorsett v R*** [2024] NSWCCA 192 at [169]-[176].

CONVICTION AND OTHER APPEALS

1. EVIDENCE

s 90 Evidence Act – admissions to undercover operative in police custody excluded – improperly and unfairly obtained information used to elicit admissions – conversation the functional equivalent of an interrogation

R v Rose [2024] NSWSC 1614 (Weinstein J)

The Court excluded a covertly recorded conversation between the accused and police undercover operative (UCO), based on unfairness to the accused (s 90 *Evidence Act*).

When arrested for murder, the accused exercised his right to silence. However, the request for deployment of a UCO incorrectly indicated he had not exercised his right to silence. The request also included information from earlier improper and unfair police questioning for an unrelated offence, where the accused exercised his right to silence but was also questioned about the murder.

The covertly recorded conversation, containing admissions, took place when the accused was in custody after arrest for the alleged murder.

The Court held the UCO engaged in "post-arrest trickery" and "actively elicited" admissions from the accused in derogation of his right to silence. The conversation was a "carefully executed plan of subterfuge" by the UCO taking advantage of a vulnerable man with the "stated aim of eliciting admissions." It was the "functional equivalent of an interrogation", which unfairly derogated from the accused's free choice to speak or be silent, a choice of which the undercover operative was aware: at [115]-[116]; [126]-[127]; *R v Swaffield & Pavic* (1998) 192 CLR 159; *R v Mallah* (2005) A Crim R 150; [2005] NSWSC 358.

Further, the UCO exploited the accused's vulnerability as a homeless alcoholic left alone in a cell for longer than a day in a 2.5-hour conversation: at [127].

Tendency evidence - tendency constituted by charged and uncharged acts - whether directions sufficient - DPP v Roder (a pseudonym) [2024] HCA 15 - s 161A Criminal Procedure Act 1986

Astill v R [2024] NSWCCA 118

The applicant, a Senior Correctional Officer, appealed multiple sexual assault convictions involving 13 female inmates. At trial, the Crown relied on tendency evidence constituted by charged and uncharged acts.

On appeal, the applicant submitted the trial judge erred in directions on tendency evidence and should have given:

- a supplementary direction that tendency evidence comprised of the complainant's own allegations could not be used as tendency evidence for the very same count or for any of the counts concerning that complainant;
- a direction that, in so far as the tendency evidence included the very same allegations in the indictment, lack of satisfaction at the tendency stage would mean that a verdict of not guilty would need to be returned in relation to that count or counts; and
- a direction pursuant to s 161A(3) *Criminal Procedure Act 1986*.

    > s 161A(1) states that a jury must not be directed that evidence needs to be proved beyond reasonable doubt to the extent that it is adduced as tendency evidence
    >
    > s 161A(3) *CPA* states the general prohibition in s 161A(1) does not apply if a court is satisfied—
    >
    > (a) there is a significant possibility that a jury will rely on an act or omission as being essential to its reasoning in reaching a finding of guilt, and
    >
    > (b) evidence of the act or omission has been adduced as tendency evidence.

The CCA refused leave to appeal.

Tendency direction

- Such a supplementary direction would have unduly increased complexity of the jury's task, encouraged a revisiting of the underlying body of evidence supporting the alleged tendency on the jury's consideration of each charge, and produced other vices referred to in ***DPP v Roder (a pseudonym)* [2024] HCA 15; 98 ALJR 644** (see under *'High Court Cases'*, below).

- A direction regarding tendency evidence involving the very same allegations in the indictment would detract from the simple elegance of the approach mandated in ***Roder*** and encourage conflation of standards of proof: at [48].

The trial judge did direct the jury in terms which would appear to have satisfied the applicant's concern. The judge drew a distinction between evidence given by a complainant and support for that evidence from "other evidence", which included evidence of other witnesses and tendency evidence. The judge also gave clear directions that the jury give separate consideration to each charge: at [50]-[53].

Section 161A *CPA*

- s 161A(3) relaxes the prohibition in s161A(1) in circumstances contemplated by *Shepherd v R* at 584-585. Section 161A recognises that tendency evidence will not usually form an indispensable link in the chain of reasoning to guilt but is a form of circumstantial evidence which only need be proved on the balance of probabilities: at [55]; ***Roder*** at [29].

- Here, the terms of s 161A(3) were not engaged. There was direct evidence from each of the relevant complainants and, in for some counts, additional evidence from other sources (complaint evidence, documentary evidence of complainants' diary entries, evidence of other correctional officers) and admissions. Hence, the tendency evidence was not "indispensable" within the meaning of *Shepherd* in the sense that failure to prove the existence of the tendency would mean that there was no case to go to the jury: at [56]; *Carbone v The King (No 2)* [2024] NSWCCA 7 at [13]; *Davidson v R* (2009) 75 NSWLR 150 at [74].

- If the direct evidence of the complainant was not accepted in relation to particular counts, there would be no significant possibility of the jury relying on the tendency evidence to establish guilt, especially where appropriate directions were given as to onus and standard of proof and the need to determine each count separately. Such directions were given, and the 17 counts which were not made out illustrated their efficacy: at [57].

Tendency directions invited circular reasoning – miscarriage of justice - DPP v Roder (a pseudonym) [2024] HCA 15

***Decision Restricted* [2025] NSWCCA 22**

The applicant's trial took place before the High Court judgment in ***DPP v Roder (a pseudonym)* [2024] HCA 15; 98 ALJR 644** (see under *'High Court Cases'*, below).

The applicant was convicted of 3 child sexual offences against 1 complainant. The Crown relied on police interviews with the complainant to show the applicant's tendency to have a sexual interest in the complainant and a tendency to act on it in a way that coincided precisely with the specific conduct alleged in each of the counts on the indictment: see at [89].

The trial judge's directions included:

> The Crown says that the three occasions when the accused sexually assaulted the complainant reveals that the accused had a tendency to have a sexual interest in the complainant and to act on that sexual interest, which makes it more likely that he committed each of the offences charged in the indictment. You will need to consider the evidence relating to the alleged conduct of the accused on the three occasions and decide whether he did in fact conduct himself in the way the Crown alleges. *Although you are looking at the three occasions of alleged conduct that are the subject of charges, you are not when considering them as tendency evidence considering whether those episodes of misconduct have been proved beyond reasonable doubt.* For the purpose of determining whether the accused has the relevant tendency, you do not consider each of the three occasions in isolation, you look at them collectively to decide what conduct occurred.

If you decide that all or at least some of the conduct occurred, you then need to consider whether it enables the inference to be drawn that the accused has the tendency asserted by the Crown. (Emphasis added by the Court).

The CCA allowed the applicant's appeal, quashed the convictions and remitted the matter for retrial.

- There was a misdirection of law. A direction was given to the jury to make findings of the charged conduct in order to determine if the tendency expressed in the same terms as the charged conduct is established: at [87], [105]; ***DPP v Roder (a pseudonym)*** at [37]; *JS v R* [2022] NSWCCA 145 at [43];
- Framing the tendency and identifying the evidence to establish it so as to constitute exclusively the offending behaviour itself is inconsistent with the nature of tendency evidence. There is no remaining purpose for a tendency if, by it being established, the alleged offences are also established: at [92]-[94]; *Decision Restricted* [2022] NSWCCA 259. Where the tendency is expressed in the same terms as the conduct alleged, such a direction is likely to encourage, if not require, the jury to engage in the impermissible circular reasoning identified in *JS* at [43] and ***Roder*** at [25]-[26]: at [97]-[98].

Although the summing up dealt properly with onus and standard of proof and that the element of each charge needs to be proved beyond reasonable doubt, it could not address the difficulties that arose as a result of the tendency being expressed in precisely the same terms as the acts relied upon to establish the tendency and relied upon to establish the guilt of the applicant: at [99].

Tendency directions - potential for impermissible circular reasoning by jury - summing up viewed as a whole - no miscarriage of justice - DPP v Roder (a pseudonym) [2024] HCA 15

Wardell v R [2025] NSWCCA 26

The applicant's trial took place before the High Court judgment in ***DPP v Roder (a pseudonym)* [2024] HCA 15; 98 ALJR 644** (see under *'High Court Cases'*, below).

The applicant was convicted of sexual offences. The Crown relied on charged and uncharged acts as tendency evidence. The applicant appealed on grounds including that the trial judge's tendency directions were not in accordance with ***Roder***.

The CCA dismissed the appeal.

Although the trial judge's direction did not comply with the approach in ***Roder***, when the summing up is read as a whole, there was no realistic possibility that the onus and standard of proof were not properly applied by the jury. No miscarriage of justice occurred: at [84].

The CCA reached this conclusion for a number of reasons, including:

- it was not contended that there was any specific misstatement of the law in the summing up, including in relation to tendency evidence: at [75].
- the trial judge's directions were consistent with the principle in *R v Bauer* (2018) 266 CLR 56 and ***Roder*** that ordinarily a jury should not be directed that evidence of charged or uncharged acts adduced to support the asserted tendencies are required to be proved beyond reasonable doubt when determining whether the tendencies have been established: at [76].
- the directions identified the tendencies as intermediate facts to be proved in their own right and then deployed in aid of the proof of each charge (***Roder*** at [27]): at [77].
- the summing up included careful directions as to: the standard of proof beyond reasonable doubt and the onus on the Crown to prove the elements of each charge beyond reasonable doubt; the need for separate consideration of each count; the need to accept the evidence of the relevant complainant as to the occurrence of each count; and, the direction that the tendency, if proved, "may assist the Crown to prove the accused committed the offences, but it is not enough by itself": at [82].

Content of tendency directions

This does not mean that similar tendency directions should continue to be given. ***Roder*** at [37] requires that content and length of directions should not overcomplicate the jury's task and that there should be one tendency direction.

Where the prosecution relies on charged and uncharged acts to establish asserted tendencies, a single, separate tendency direction should be given in which:

1. the evidence relied on to support the asserted tendencies is identified.
2. the jury is directed to consider whether they are satisfied that any of the asserted tendencies is established; and
3. the jury is advised that, if any of the tendencies is established, that tendency can be used in considering whether it is more likely that the accused committed a relevant offence charged: at [96].

Tendency directions should not include the jury being directed or invited to make findings in respect of charged conduct for the purposes of considering whether any of the tendencies was established: at [97]; ***Roder***; *JS v R* [2022] NSWCCA 145.

Tendency to intentionally touch body of unconscious female – Crown relied on significantly less serious conduct alleged by tendency witness to prove offence – evidence wrongly admitted as tendency - New v R [2025] NSWCCA 32

The appellant was convicted by jury of two sexual offences against two complainants, AP and EM:- intentionally touching AP sexually without consent (s 61KC(a) *Crimes Act 1900*) and having sexual intercourse with EM without consent (s 61I *Crimes Act*).

The matters were heard together on the basis that the evidence of each complainant, together with evidence of a witness, FK, was admissible to prove that the appellant had a tendency to "*intentionally touch the body of an unconscious female*."

Evidence of FK that she woke to find the appellant touching her in a sexual manner, with the tendency evidence of AP and EM, was held by the CCA to be admissible.

However, further evidence by FK of conduct by the appellant of an attempt on multiple different occasions, commenced while she was asleep, to initiate sex should not have been admitted. The CCA allowed the appeal and quashed the convictions on this ground.

- Such evidence was evidence of the non-consensual sexual touching of a conscious woman in an apparent attempt to engage in further, consensual, sexual activity. This was not evidence which, beyond the first touching (as to which FK had already given general evidence), directly supported a tendency to sexually touch unconscious women: at [245]-[246].
- The clear inference is that the contact was intentional. The evidence was also to be viewed as part of the body of tendency evidence, which, viewed as a whole, tended to rebut any lack of intention. The evidence that the appellant persisted after FK woke therefore added little. To the extent that it could be said to support the tendency it did not give the evidence significant probative value: at [246].

The evidence was both extremely damaging, and not probative of the asserted tendency: at [248]-[250].

s 97A Evidence Act 1995 - tendency - exceptional circumstances - whether presumption of significant probative value rebutted

Davidson (a pseudonym) v R [2024] NSWCCA 60

ss 97A *Evidence Act* provides:

> .....
> (2) It is presumed that the following tendency evidence will have significant probative value -
> (a) tendency evidence about the sexual interest the defendant has or had in children
> (b) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.
> (3) Subsection (2) applies whether or not the sexual interest or act to which the tendency evidence relates was directed at a complainant in the proceeding, any other child or children generally.
> (4) Despite subsection (2), the court may determine that the tendency evidence does not have significant probative value if it is satisfied that there are sufficient grounds to do so.

s 97A(5) lists matters not to be taken into account when determining whether there are sufficient grounds for the purposes of subsection (4) unless the court considers there are exceptional circumstances, including:

> (a) the sexual interest or act to which the tendency evidence relates is different from the sexual interest or act alleged in the proceeding.

The applicant was convicted of aggravated sexual intercourse against his 15-year-old niece through marriage (s 66C(4) *Crimes Act*). Crown evidence of sexual text messages by the applicant to his teenage stepdaughter was admitted at trial to show tendency of sexual interest in teenage girls under his care not his biological daughters.

On appeal, the applicant submitted there were sufficient grounds to rebut the presumption of significant probative value as the tendency evidence derived from a single witness (his stepdaughter); and the acts with respect to the tendency evidence were different from those alleged in the proceeding (s 97A(5)(a)).

The CCA dismissed the appeal.

Tendency evidence derived from one witness does not constitute sufficient grounds to rebut the presumption in s 97A(2) which applies whether the tendency sexual interest or act "was directed at a complainant in the proceeding, *any other child* or children generally" (s 97A(3)). It thus contemplates the evidence of sexual tendency being confined to a single other child: at [39], [47]. Further, the tendency evidence included numerous text messages over a year and therefore could not be classified as a "single incident": at [40]; cf *Restricted Judgment* [2021] NSWCCA 298.

Regarding s 97A(5)(a), it is not exceptional that a sexual interest may manifest itself in grooming behaviour (e.g. sexual texts) with respect to one person and in isolated opportunistic touching or intercourse with respect to another. The differences in the acts do not amount to exceptional circumstances and cannot be taken into account in determining whether there are sufficient grounds to displace the presumption: at [49].

Conclusion

The tendency evidence had significant probative value: showing sexual interest in his stepdaughter who shared significant common features with the complainant, as a female member of his household, not a blood relative, and aged 15-17. Such evidence could rationally affect the probability of him having a sexual interest in the complainant and whether he committed the acts charged: at [38], [43], [54]-[55].

Application to re-call sexual assault complainant to give further evidence about her interactions with others after alleged assaults - trial judge erred in refusing to grant leave - s 306D Criminal Procedure Act 1986

Hayne v R [2024] NSWCCA 97

> Section 306D(2) *Criminal Procedure Act 1986* provides that the Court is to give leave to the complainant to give further evidence only if it is necessary to clarify matters, canvas information or material that has become available, or in the interests of justice.

The CCA allowed the appellant's conviction appeal for sexual intercourse without consent. The trial judge erred in refusing the applicant's application pursuant to s 306D to re-call the complainant for cross-examination on material that became available regarding her not disclosing communications with other witnesses. Those matters were significant to her credibility, which was the critical issue in the trial. They had capacity to demonstrate consciousness by the complainant that the evidence of her communications did not support her account of the events: at [482].

The complainant had indicated that she chose to give further evidence. It was for the jury to assess and decide if they accepted her answers. It was not appropriate for the trial judge to anticipate how the complainant would answer further questioning by defence counsel as a basis to refuse the application. Nor to take into account his view of the complainant's reactions on the day of the hearing of the first appeal in this Court: at [238]-[239]; [483]-[484].

Section 306D - "necessary"

The word "necessary" in s 306D is a "strong word". 'Necessary" is not synonymous with "essential". Judicial officers are required to be satisfied of something more than "desirability" or "convenience": at [231]; *WX v R* (2020) 102 NSWLR 467

Judicial officers are to be satisfied that the additional examination is "reasonably required or legally ancillary to the accomplishment" of one of the three criteria in s 306D: at [233].

It is the interests of justice balanced against the purposes of the provisions. "Interests of justice" requires consideration of the impact on the fairness of the accused's trial if the complainant does not give further evidence and the desirability of not occasioning further trauma to the complainant if they do: at [80], [232]-[233].

If there were material that has become available since the original proceeding and such information was probative of an issue in the proceedings and significant, then, to the extent that the material is to be used to challenge the credit of the complainant, it is difficult to envisage where such further evidence would not be necessary for a fair trial: at [234].

Principal offender's certificate of conviction for murder not admissible in trial of alleged accessory – ss 9(1), 91 Evidence Act 1995

***Decision Restricted* [2024] NSWCCA 38**

> Section 9(1) *Evidence Act 1995* provides that the Act does not affect the operation of a rule of common law, except so far as the Act provides otherwise expressly or by necessary intendment.
>
> Section 91(1) provides that evidence of the decision in an Australian proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.

The appellant was convicted of being an accessory after the fact to murder committed by the principal offender, N. N was found guilty of murder a year before the appellant's trial.

The CCA held the trial judge erred in admitting into evidence against the appellant a certificate of N's conviction based on the common law rule in *R v Dawson* [1961] VR 773: that proof of the conviction of the alleged principal offender is admissible in the trial of an alleged accessory and constitutes prima facie evidence the felony was committed by him. The judge incorrectly held that *R v Dawson* is not abrogated by s 91 *Evidence Act* and remains operative by force of s 9(1): at [209].

The effect of s 91(1) is that the certificate of N's conviction ("evidence of the decision") was not admissible in the appellant's trial to prove that N had murdered the deceased (the "fact that was in issue in that proceeding"): at [208].

The conviction was quashed, and retrial ordered.

Hearsay - representations by third parties in furtherance of common purpose with offender - s 87(1)(c) Evidence Act 1995 (NSW)

***Audish v R* [2024] NSWCCA 196**

> s 87(1)(c) *Evidence Act 1995* provides that a that a previous representation made by a person is also taken to be an admission by a party, and should be admitted into evidence, if it is reasonably open to find "the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party."

The applicant was convicted by jury of three counts of sexual intercourse without consent in company (s 61J *Crimes Act 1900*).

The Crown case was the applicant had sexual intercourse without consent in company (count 1) and participated in a joint criminal enterprise with WS and RO to have sexual intercourse without consent in company (counts 2 and 3).

The trial judge permitted the Crown to adduce evidence of previous representations by RO, WA and FA pursuant to s 87(1)(c) *Evidence Act 1995*. The Crown relied upon an alleged common purpose to concoct a false version of events (that the applicant did not have sexual intercourse with the complainant, only FA and WS did). Such evidence went to the applicant's credit.

The CCA held the trial judge erred and the representations should not have been admitted.

Section 87(1)(c) should be construed as requiring that the common purpose relied upon is a common purpose embraced by the offence charged. A common purpose relied upon merely for the purpose of the operation of s 87(1)(c) is insufficient to render representations in furtherance of that common purpose

admissible: at [86]; *R v Dolding* (2018) 100 NSWLR 314; *Higgins v R* [2020] NSWCCA 149; *Macdonald; Obeid* (2023) 112 NSWLR 402.

The evidence was not admitted as being in furtherance of a common purpose embraced by the offence charged but relied upon for an alleged common purpose to concoct a false version of events. Also, a common purpose to deceive the police (the essence of the common purpose to concoct a false version of events) was a different purpose from the joint criminal enterprise to commit the offences. The common purpose to concoct a false version of events formed no part of facilitating the conduct the subject of the charge and was not relied upon by the Crown to prove the conduct alleged: at [87].

The trial judge further erred in directions as to the use which could be made of the representations pursuant to s 87(1)(c): at [87], [101]-[101]. A miscarriage of justice resulted. The convictions were quashed, and a retrial ordered on one count.

Prior sexual experience - s 293 Criminal Procedure Act 1986 (now s 294CB) – complainant's employment in brothel properly excluded - Cook (a pseudonym) v The King [2024] HCA 26

> s 293(3) *Criminal Procedure Act 1986* provides that evidence of a complainant's sexual experience, or lack thereof, is inadmissible.
>
> s 293(4)(a) provides that s 293(3) does not apply if the evidence -
>
> (i) is of the complainant's sexual experience or lack thereof, or sexual activity or lack thereof, taken part in by the complainant, at or about the time of the commission of the alleged offence; and
>
> (ii) is of events alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offences was committed.

Note: See High Court judgment on s 293(4) in ***Cook (a pseudonym) v The King*** [2024] HCA 26; 98 ALJR 984 under '*High Court Cases'*, below.

Behi v R [2024] NSWCCA 89

The applicant, a chiropractor, was convicted of aggravated sexual assault of a female patient.

The CCA held that an application to adduce evidence of the sexual complainant's employment in a brothel was properly refused under s 293 *CPA*.

The application challenged the complainant's credibility from her answers about discomfort at strangers seeing her in underwear; lack of awareness of cultural customs in Australia, ability to complain and whether she worked after appointments with the applicant: at [276].

- Assuming that the complainant did work at the brothel over the indictment period, this would be evidence of sexual activity at "about the time" of the alleged offences. However, those events did not "form part of a connected set of circumstances" in which the alleged offences were committed: at [280]; ***Cook v The King*** **[2024] HCA 26.**
- Section 293(4)(a)(ii) is narrowed "to near-contemporaneous events … sufficiently integrated with the alleged offending so that it can be said that the events are part of the circumstances of the alleged occurrence of the sexual offence" (***Cook v The King*** at [44]). Services at the brothel over the indictment period and after the events in question were separate from the circumstances of, and not sufficiently integrated with, the offences. They are not part of the immediate aftermath of the offending (cf. *R v Morgan* (1993) 30 NSWLR 543). Nor is it more than an assumption that distress the complainant said she felt would have made it unlikely that she would be able to perform services at the brothel. There is no connection between the offending and whatever services were provided at the brothel: at [280]-[286].
- That the complainant may have worked as a sex worker says nothing about her ability as a chiropractic patient to discern precisely what was occurring during treatments, nor ability to voice complaints: at [284], [292].
- Suggestions that the jury may have assessed her evidence differently if aware of her employment seems based on a belief that juries will apply outdated stereotypical assumptions on how sex workers or sexual assault victims behave: at [291].

- Likely distress, humiliation or embarrassment likely was high, particularly in light of evidence as to the disgrace within her family if her employment were known: at [285].

Prior sexual experience or lack thereof - s 293 Criminal Procedure Act 1986 (now s 294CB) – complainant, aged 11, gave detailed description of ejaculation in police interview

GN v R [2024] NSWCCA 39

The applicant was convicted of child sexual offences by trial judge alone. The 11-year-old complainant, KN, gave a detailed description of ejaculation by the applicant (her grandfather) in a police interview 12 months after the last offence.

The Crown in closing address submitted an 11-year old would not be able to give such a detailed description unless subjected to the applicant's conduct.

In reasons for verdict, the judge found that a "child of the age of KN at the time of the interview simply should not have known about ejaculation."

The applicant submitted:

(1) the judge improperly took judicial notice (s 144 *Evidence Act*) of the fact that an 11-year-old would not know about ejaculation; and such reasoning was contrary to s 293 *CPA* which prohibits evidence of sexual experience or lack thereof.

(2) the Crown's closing submissions on the complainant's lack of sexual experience led to a miscarriage of justice.

The CCA dismissed the appeal. There was no error or miscarriage of justice arising from the judge's approach or the Crown's closing address: at [179], [213].

Consideration of the reasons for verdict

In isolation, the judge's statement would be an illegitimate mode of reasoning based on judicial notice and in breach of s 293 *CPA*.

However, the reasons for verdict read as a whole do not indicate error. The judge was entitled to infer that it would be unlikely that KN would be able to give such a detailed description of ejaculation unless she had seen it herself. KN's naïve descriptions tended to prove that she had only seen it in the context of the offences. This reasoning did not depend on "judicial notice" but on "common sense" and "life experience" which juries and judges sitting alone bring to bear in their assessments of facts (*HG v The Queen* (1999) 197 CLR 414). There was no breach of s 293 *CPA*: at [175].

Crown closing submissions

The CCA said the following propositions are established by the authorities (at [164]):

1. A prosecutor ought not resort in submissions to generalisations about the age at which a person of the complainant's age may become aware of sexual matters, including in circumstances where an accused has been prohibited by s 293 from adducing evidence of *prior* sexual experience (*Y v R [*2009] NSWCCA 287 at [61]; *Dries v R* [2022] NSWCCA 33 at [77]).

2. Unfairness created by a prosecutor's submissions to the effect of (1), unless remedied by an appropriate retraction by the Crown and/or a direction from the trial judge, may cause a miscarriage of justice (*Munn; Miller v R* [2006] NSWCCA 61 at [36]-[37]; *Y v R* at [61]; *Dries* at [63]).

3. When determining the weight of a complainant's evidence and, if relevant, when deciding whether the complainant's evidence, when seen in the context of the evidence as a whole, is inconsistent with concoction, the tribunal of fact is entitled to use its common sense and take into account all relevant factors, including the complainant's age, vocabulary and the way in which evidence is given (*HG v The Queen* at [13], [71]; *DH v R* [2020] NSWCCA 2 at [129]-[132]).

Lies – Crown relies on five specific lies as evidence of consciousness of guilt - trial judge erred in relying on other lies – adequacy of trial judge's reasons

Dawson v R [2024] NSWCCA 98

The applicant was convicted of the murder of his wife at trial by judge alone. The judge referred to five lies by the applicant specifically relied upon by the Crown (COG (1)-(5)), however, also referred to other alleged lies not specifically relied upon the Crown on a consciousness of guilt basis.

The CCA allowed the applicant's appeal on two grounds. The trial judge (1) erred by taking into account lies which the Crown did not assert were consciousness of guilt lies; and (2) failed to provide adequate reasons for why these lies supported a consciousness of guilt.

There is an important distinction between lies which may be used, under certain strict conditions as implied admissions because they evince a consciousness of guilt (*Edwards* lies) and other lies, which are relevant to the credibility of versions given by the accused to others, including the police, and, if the accused gives evidence, to that evidence (*Zoneff* lies): at [134]; *Edwards* (1993) 178 CLR 193; *Zoneff* (2000) 200 CLR 234.

The tribunal of fact can only use a lie as an implied admission (on the basis of consciousness of guilt) if the prosecutor relies on the lie for that purpose and each of the following is satisfied (the *Edwards* conditions):

1. the alleged statement was a deliberate lie: that is, it was false to the knowledge of the accused at the time it was made;
2. the only explanation for the lie is that the accused knew that the truth of the matter about which he lied would implicate him in the offence; and
3. the tribunal of fact, if a jury, is directed (or self-directs, in the case of a trial by judge alone) that there may be reasons for the telling of a lie apart from the consciousness of guilt: at [137].

The trial judge, as tribunal of fact, was entitled (and obliged) to consider the whole of the evidence and was not confined, when assessing the credibility of the applicant's versions, to specific matters relied on by the Crown. However, the judge was not permitted to use evidence as a consciousness of guilt not specifically identified as such by the Crown and could only use such evidence in that way if the *Edwards* conditions were met: at [146].

The judge erred by not making the distinction and making relevant findings as to the COG (1)-(5) lies, and lies relied on by the Crown for other purposes (to impugn the credibility of the applicant's version or to establish that it was not reasonably possible that a particular version was true). The judge's reasons were also inadequate in that they did not separately address COG (1)-(5) and whether the *Edwards* conditions were satisfied in respect of each, and if so, why. The reasons did not comply with s 133(2) *Criminal Procedure Act*: at [147].

However, no substantial miscarriage of justice occurred and the appeal was dismissed: at [413].

Witness evidence - affidavits - use of direct speech to recount past conversations - "words to the following effect"

Wild v Meduri [2024] NSWCA 230

This judgment could be equally applicable to witness statements in the criminal context.

The Court made observations on the long-standing practice in NSW of affidavit evidence whereby a witness' account of conversations is given in direct speech but prefaced by "words to the effect" or like expression.

The Court noted that some courts were critical of the practice stating that "evidence should be given in direct speech only if the witness can remember the actual words used": see at [345].

Bell CJ at CL said the traditional NSW practice of drafting of affidavits should not be departed from. Evidence in this form will represent the witness's best effort to capture the gist of a conversation which can then be tested in cross examination. Such witness is *not* providing a "verbatim recollection" of a conversation and should not be penalised or criticised for giving evidence in such a form: [244]-[254]; disapproving *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381, *Chu v Lin, Gold Stone Capital Pty Ltd* [2024] FCA 766, *Lantrak Holdings Pty Ltd v Yammine* [2023] FCAFC 156.

Kirk JA, concurring, said that insofar as the witness recalls only the substance of what was said then such evidence can be in the form of direct speech – after explaining that it is recording only the substance or gist of what was said – or in indirect speech. Where particular spoken words are the foundation of a legal claim it is desirable that the witness's recollection of the substance of those words be put into direct speech, in terms indicating that the witness is testifying to the substance or gist of what was said: at [356]; Bell CJ agreeing at [254].

2. DIRECTIONS

Liberato direction - both parties relied on evidence of applicant from previous trial - trial judge directions sufficient

Krivosic v R [2024] NSWCCA 166

The CCA dismissed the applicant's appeal against conviction for murder.

At trial, both the Crown and applicant relied on the applicant's evidence from his first trial (which had resulted in a hung jury).

The Crown case was that the applicant deliberately shot the deceased, relying on admissions at his first trial that he wore dark clothing and gloves, brought a loaded pistol, and aimed it at the deceased.

The applicant's case was that he attended the scene when he heard the deceased was assaulting his friend. He aimed the pistol at the deceased but relied on evidence from his first trial that he fired it involuntarily because another person startled him.

On appeal, the applicant submitted that the trial judge failed to give a complete *Liberato* direction - the third limb of the direction was not given and the judge should have given a modified form of that third limb.

In *De Silva v The Queen* (2019) 268 CLR 57 at [12] the High Court refined the *Liberato* direction into three limbs:

(i) if the jury believes the accused's evidence, it must acquit;

(ii) if the jury do not accept the accused's evidence but consider that it might be true, it must acquit; and

(iii) if the jury does not believe the accused's evidence, it should put that evidence to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

The trial judge directed the jury that *if there "was a reasonable possibility that what the accused said about accidentally discharging the pistol is true", the jury was bound to acquit*.

The CCA held the judge's directions were not erroneous. Given both the Crown and the applicant relied on the applicant's evidence from the first trial, a direction wholly in accordance with the third limb of the *Liberato* direction, which starts from the premise that the jury rejects all of the evidence of an accused, would likely have confused the jury: at [97], [101]; see *Harper v R* [2022] NSWCCA 211 at [154], [160]. The present case was not like *Haile v R* (2022) 109 NSWLR 288, in the sense that it did not involve a choice between the applicant's account and that of the other witnesses: at [103]-[105].

In light of the principal issue, it was plain from the directions that the onus and burden lay with the Crown at all times. Further, the *Liberato* direction by the judge was sufficient to ensure that the jury understood that they did not have to reach a positive state of acceptance of the applicant's evidence before they must acquit: at [105].

Failure to give Liberato direction - appeal allowed – where accused's version implausible or based on lies

In ***Evans & Evans v R*** [2024] NSWCCA 245 the CCA allowed the applicants' appeals against murder convictions on the ground that the trial judge erred in not giving a *Liberato* direction.

There were occasions during the summing up where it was put that the jury was confronted with competing versions of events, only one of which could be accepted. Those passages were apt to invite the jury to reason along the lines that rejection of one competing version would lead to acceptance of the other version: at [96].

It is not to the point that aspects of the case propounded by the applicants was implausible nor involved lies. Indeed, the probability that the jury would be disinclined to accept at least parts of their evidence, and form the view they had told lies, made the need for a *Liberato* direction all the greater: at [100].

Murder - Crown relied on alternative acts causing death – "extended unanimity" directions - whether failure to direct jury as to requirement of unanimity as to specific act causing death

AKB v R [2024] NSWCCA 169

The issue on appeal concerned the extent to which a jury must be unanimous, not only as to verdict, but also to the route taken. This is sometimes referred to as "extended jury unanimity": at [4], [58].

The applicant was convicted by jury of murder of his wife. The Crown's principal case was that the applicant caused death by preventing the deceased from leaving the bedroom when on fire; or alternatively, by putting petrol in her bedroom or had ignited the fire.

The trial judge gave the standard unanimity direction (unanimous as to verdict): at [43].

The appellant appealed on the ground that the judge failed to direct the jury that they had to be unanimous as to the conduct constituting the offence, that is, the act causing death.

The CCA (Gleeson JA; Walton J agreeing; Dhanji J agreeing with separate reasons) dismissed the appeal. The trial judge's directions were appropriate in the circumstances of the case: at [8], [92].

Legal Principles

- *Principles regarding unanimity directions*: see at [56]ff. A distinction has been recognised between alternative legal formulations of liability based on the same or substantially the same facts and alternative factual bases of liability. In the second type of case involving alternative pathways or routes to a verdict, some form of unanimity direction may be required: at [59].
- *Alternative pathways and unanimity*. Whether some form of unanimity direction is required in cases of murder, manslaughter and the like as to the specific act that caused death, directs attention to the alternative pathways or routes to a verdict, the nature and quality of the potential causes of the fatal injury, and live issues at the conclusion of the trial: see at [66]ff.
- *Case examples*. Cases where an extended unanimity direction was not required or was required are set out at [73]-[80].

The present case

- The judge's unanimity direction was appropriate. The Crown's principal and alternative cases were put as alternatives and not left to the jury in an open way. The alternatives were staged to be considered one after the other. The jury were not invited to reach different conclusions. There was no suggestion in the directions that jurors could pool their conclusions on the actus reus causing death: at [93]-[98].
- The judge properly directed the jury it could only convict if all satisfied beyond reasonable doubt on the Crown's principal case that the act that caused death was that the applicant prevented his wife from leaving the room when it was on fire; and if that conclusion was not reached - on the alternative case that the act that caused death was either putting the petrol in the room or igniting it: at [100].

Failure to leave alternative verdict of manslaughter based on excessive self-defence in murder trial - no evidence as to which accused committed act causing death - s 421 Crimes Act 1900 - where applicant pleaded guilty to manslaughter and not guilty to murder before jury

Robertson v R [2024] NSWCCA 99

> s 421 *Crimes Act 1900* provides: excessive self-defence applies where the person uses "*force that involves the infliction of death*" which is not a reasonable response in the circumstances as they perceive them, but the person believed it necessary to defend themselves or another.

The CCA (Harrison CJ at CL; Dhanji J agreeing with separate reasons; Cavanagh J dissenting) allowed the applicant's appeal against his murder conviction. The trial judge erred by not directing the jury as to the availability of an alternative verdict of manslaughter by reason of excessive self-defence.

On arraignment, the applicant's plea of guilty to manslaughter before the jury was rejected by the Crown.

At trial, the Crown case was that the applicant and three assailants took part in a joint criminal enterprise (JCE) to assault or inflict GBH on the victim. Prior to the assault, an assailant yelled the victim "has a gun."

The applicant's case was that when he was alerted of the possibility the victim had a gun, he was no longer a party to a JCE but acting in self-defence.

The trial judge left self-defence to the jury but did not direct on excessive self-defence on the basis there was no evidence proving which of the offenders committed the act which *caused* death.

Harrison CJ at CL:

- Under s 421(1)(a) there is no relevant distinction between the use of "force that involves the infliction of death" and force that causes death: see at [21]-[22].
- The trial judge was correct to conclude that there was no evidence capable of supporting an alternative verdict of manslaughter. However, having left the question of whether the Crown had negatived that the applicant was himself acting in self-defence to the jury, the judge should also have directed on availability of manslaughter by excessive self-defence: at [23], [30]-[32]; *Lane v R* (2013) 241 A Crim R 321.

Dhanji J:

- The presence of a lawful justification on the part of the applicant was not inconsistent with his continued participation in a joint enterprise. The acts of the other three assailants could be attributed to the applicant acting pursuant to a belief his participation in the JCE was necessary to defend himself or another. The relevant acts are justified (or partially justified) and acquittal (or conviction for manslaughter) will follow. The applicant was entitled to rely on self-defence and excessive self-defence: at [144]-[148]; *Osland v R* (1998) 197 CLR 316.

Proviso – new trial ordered

The miscarriage of justice lies in the fact that the options available to a jury have the capacity to affect their ultimate decision. Despite initial acceptance by guilty plea before the jury of being guilty of manslaughter based on excessive self-defence, by closing address applicant's counsel was forced to submit that the applicant was entitled to walk free without any punishment. The applicant was denied a trial on the issue he sought to contest: at [153], [157]-[158]; *Gilbert v R* (2000) 201 CLR 414.

Constructive murder – accessory before the fact in armed robbery where deceased shot - accessorial liability not consistent with charge of constructive murder - error to direct jury that foresight of act causing death is an element of constructive murder

Batak v R [2024] NSWCCA 66

Note: The High Court revoked Crown special leave to appeal in this matter (The King v Batak [2025] HCA 18).

> s 18(1)(a) *Crimes Act 1900* provides murder is committed where the act or omission causing death was done with reckless indifference to life, with intent to kill or inflict GBH; or in the course of attempting to commit (or during or immediately after the commission of) a crime punishable by imprisonment for life or 25 years.

The applicant was convicted of murder (s 18(1)(a) *Crimes Act*) and attempted armed robbery (s 97(2)).

The Crown alleged the applicant acted as accessory before the fact for both offences by supplying a loaded pistol and 'high vis' shirt to Coskun. Coskun and an unknown man attempted a home invasion to steal drugs and money. Gunshots were fired, killing one occupant and wounding another.

The Crown case was that the applicant was an accessory before the fact to constructive murder, the foundational offence being the s 97(2) offence.

The CCA allowed the appeal on ground 1 with respect to the murder conviction, ordered a retrial of that count, and otherwise dismissed the appeal.

Error to leave constructive murder to the jury on the basis of accessorial liability (Ground 1)

- For liability based on accessory before the fact it would be necessary for the prosecution to show that the accessory knew all the essential facts which made what was done a crime, and then intentionally aided, abetted, counselled or procured the acts of the principal (*Giorgianni v The Queen* (1985) 156 CLR 473)).
- A charge of constructive murder under s 18(1)(a) involves proof not only of the foundational offence but of a distinct element of there being an act or omission causing death. *Giorgianni* would thus require knowledge in the accessory before the fact of an intent to do so such an act. Yet such a plan would fall within the first category of murder under s 18(1)(a). To require foresight of the act causing death is inconsistent with the notion of constructive murder. Liability as an accessory before the fact cannot work together coherently with liability for constructive murder and is implicitly excluded by s 18(1)(a): at [184].

Error as to constructive murder elements, however, no miscarriage of justice (Ground 2)

It was an error to direct the jury that it was an element of constructive murder that the applicant was aware when he provided assistance to Coskun there was a possibility the gun would be discharged during the attempted armed robbery.

- The direction was based on the "third element" in *R v Sharah* (1992) 30 NSWLR 292 at 297: that it was necessary on a charge of constructive murder to establish that a party to a JCE to commit the foundational offence foresaw the act or omission causing death.
- It is not generally required to make out the third element in *Sharah* to establish constructive murder pursuant to s 18(1)(a). Specifically, it is not necessary when the doctrine of JCE is relied upon. Any suggestion to the contrary in *Sharah* should no longer be followed. If the accused is liable for the foundational offence, in the course of which death results by the action of another participant in the JCE, then the accused can be found guilty of constructive murder without establishing any further mental element: at [143]-[156]; *R v Surridge* (1942) 42 SR (NSW) 278; *IL v The Queen* (2017) 262 CLR 268; *Mitchell v The King* (2023) 276 CLR 299, followed; *R v Sharah*, distinguished.

However, the error does not establish a miscarriage of justice. The jury being told it needed to find an additional, unnecessary element established could cause no prejudice or practical injustice to the applicant. It made a conviction more difficult for the prosecution, not easier: at [155]; *authorities cited*.

***Constructive murder – joint criminal enterprise (JCE) – self-defence unavailable – discussion of Mitchell v The King* (2023) 276 CLR 299**

Coskun v R [2024] NSWCCA 67

Note: The High Court refused special leave to appeal in this matter ([2024] HCASL 305).

The facts are referred to in ***Batak***, above. The applicant was convicted of murder (s 18(1)(a)) and attempted armed robbery (s 97(2)), on the basis of constructive murder. The Crown case was that the applicant fired the fatal shot, but even if it was the other unidentified person, the applicant was liable on the basis of JCE to carry out the armed robbery.

The CCA dismissed the applicant's appeal.

Error as to constructive murder elements, however, no miscarriage of justice

- The trial judge erred in directing the jury in accordance with *R v Sharah* that it was necessary to be satisfied that while the applicant participated in the JCE to commit the foundational offence, "he was aware that the gun might be fired either by himself or the second intruder": see ***Batak***, above.

- A person can be liable for constructive murder pursuant to a JCE even if their agreement does not involve doing an act liable to cause death. If the accused is party to a JCE to carry out a relevant foundational conduct/offence then no further mental element is required as regards the death. If the accused was liable for the foundational conduct/offence, and death resulted in the course of that conduct/offence by another participant in the JCE, then the accused could be found guilty of constructive murder. It is not necessary to establish that the accused foresaw the possibility of death occurring in the course of the conduct/offence: at [52]; *R v Surridge* (1942) 42 SR (NSW) 278; *Johns v The Queen* (1980) 143 CLR 108; *R v Jacobs* [2004] NSWCCA 462; (2004) 151 A Crim R 452; *IL v The Queen* (2017) 262 CLR 268, applied.

However, the error did not give rise to any miscarriage of justice. It simply put a further unnecessary hurdle in the way of the Crown: at [58]-[61].

No error in self-defence directions

The judge did not err in directions on self-defence: at [76].

- A defence of self-defence is not available to constructive murder where the act done is done for the purpose of both carrying out the foundational offence and from a genuine belief that the act is necessary to defend oneself or another: at [68], [74]; ss 418-422 *Crimes Act*; *R v Burke* [1983] 2 NSWLR 93.

Discussion of High Court in Mitchell v The King (2023) 276 CLR 299 - See ***Note*** to ***Mitchell v R*** under *'High Court Cases'*, below.

s 61HE(8) (rep) Crimes Act 1900 (NSW) - relevance of complainant's substantial intoxication to issue of consent - confusing drafting of statutory provision

Smee v R [2024] NSWCCA 121

From 1 December 2018 - 31 May 2022:

> s 61HE(8) (rep) *Crimes Act 1900* provides that it may be established that the person does not consent if they consent while substantially intoxicated by alcohol or any drug.

Section 61HE(8) (rep) applied to the applicant's trial. The applicant was convicted of aggravated sexual intercourse without consent (s 61I *Crimes Act 1900*). Consent was in issue as the complainant had consumed a significant amount of alcohol.

The trial judge directed the jury as (then) suggested by the *Criminal Trial Courts Bench Book* [5-820] 'Sexual intercourse without consent - until 31 May 2022':

> "a person does not consent … if the person consented while substantially intoxicated by alcohol" and "the Crown will succeed if it proves … the complainant did not freely and voluntarily agree to the sexual intercourse … because her consent … was while she was substantially intoxicated": at [22].

The CCA allowed the appeal on the ground the jury was misdirected as to consent and substantial intoxication. The conviction was quashed and retrial ordered.

There was a real chance that the jury would have been led to understand that it was enough to find that the complainant did not consent if the jury found that she was substantially intoxicated. A miscarriage of justice has been established: at [31], [35].

Section 61HE(8) confusingly provided that it may be established that the person does not consent if they consent while substantially intoxicated. It presumes that the person has consented but provides that that may be taken not to be consent: at [10]. There is no basis for suggesting that it is necessary to show that what was said or done to convey consent was done because the person was intoxicated: at [15].

The question is whether it is established that the person did not freely and voluntarily agree to the sexual activity, taking account of all the circumstances, including what they said or did along with the fact that they were substantially intoxicated. A substantially intoxicated person can still be taken to freely and voluntarily agree to sexual activity. Whether or not they did so is a question of fact assessed in all the circumstances: at [14].

This is consistent with how the predecessor s 61HA is construed: at [16]; *authorities cited*.

A clearer direction would be along the lines:

> "If you are satisfied that anything the complainant said and did to indicate consent occurred while they were substantially intoxicated by alcohol or any drug, then you can take the fact that they were substantially intoxicated into account in assessing whether they freely and voluntarily agreed to the sexual activity": at [19].

Note:

The *Criminal Trial Courts Bench Book* has since been amended to accord with the above.

The CCA observed that since 1 June 2022 the issue has been addressed more simply in s 61HJ(1)(c): a person "does not consent to a sexual activity if … the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity": at [13].

3. JURY

Error to direct jury there was no alternative but to reach unanimous verdicts - Black v The Queen (1993) 179 CLR 44

Profilio v R [2024] NSWCCA 219

At the applicant's trial, after deliberating for over 5 hours, the jury asked a question about disagreement. The trial judge gave a direction and his last statement was that the jury "*must reach a unanimous verdict, whatever it is*".

The CCA allowed the appeal and ordered a new trial. The judge failed to properly direct the jury in accord with the central part of the model direction in *Black v The Queen* (1993) 179 CLR 44, that the jury could be discharged if they were unable to reach a unanimous verdict. A *Black* direction should refer to the judge's power to discharge the jury in order to avoid pressure being placed on a juror or jury: at [79]; *Haile v R* [2022] NSWCCA 71.

4. PROCEDURE

Evidence by sexual assault complainant by AVL – directions inconsistent with s 294B(7) Criminal Procedure Act 1986 - Crown interlocutory appeal allowed - sample direction where there is weakness in manner in which evidence was given

R v Walker [2025] NSWCCA 62

Section 294B *Criminal Procedure Act* provides:

> *Giving of evidence by complainant in prescribed sexual offence proceedings—alternative arrangements*
>
> …
>
> (7) In any proceedings in which evidence is given as referred to in subsection (3), the judge must—
>
> (a) inform the jury that it is standard procedure for complainants' evidence in such cases to be given by those means or use of those arrangements, and
>
> (b) warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because it is given by those means or by use of those arrangements.

At the accused's sexual assault trial, the trial judge directed the jury that, in the event that there was difficulty assessing the complainant's credibility because the evidence had been given by way of AVL, the difficulty should be "resolved in favour of the accused" so they were entitled to, as per s 294B(7)(b), "give the evidence … lesser weight because it [was] given by those means".

The Crown appealed the judge's refusal of the Crown's application to discharge the jury (s 5F *Criminal Appeal Act*).

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

- The directions breached the prohibition in s 294B(7). The direction raised the relationship between the assessment of the witness's demeanour and the means by which the evidence was given. A subsequent direction that the means by which the evidence was given might lead to a doubt as to whether the evidence could be relied on was to similar effect. The judge's reasons for refusing to order the discharge were wrong as they were premised on his view that the directions were not inconsistent with s 294B(7). He thereby erred: at [24]-[25].
- The CCA made observations on research and views of judges as to evidence in sexual offence proceedings given by alternative arrangements, and impact of evidence given by AVL: at [30] ff.

Sample direction where there is weakness in manner in which evidence was given

- If it is suggested that there is some weakness in the Crown case because of the manner in which evidence was given, it may be open, in an appropriate case, to point out the potential difficulties in the evidence.
- An *example direction* is provided for where the impact of AVL is capable of being identified; for example, the image was blurry, there was a delay, or for some other reason: see at [59].

Protection for publishing or broadcasting name of accused children and child victims - ss 15A, 15E Children (Criminal Proceedings) Act 1987 (NSW)

R v IP [2024] NSWCCA 16

ss 15A, 15E *Children (Criminal Proceedings) Act 1987* provide for prohibition and exceptions on publishing of children's names (the accused and deceased) in criminal proceedings.

The 13-year-old accused IP was found not guilty of murder of the deceased child BM. The child deceased's senior next of kin applied to waive their right to protection of anonymity under s 15E *CPPA* to lift the publication restriction on a restricted judgment made during IP's trial. IP opposed the application pursuant to s 15A which prohibits publication of a child accused's name.

The CCA allowed the application. Reference to BM's full name in the Court's judgment when published in an unrestricted form will not, and would not be likely to, identify or lead to the identification of IP.

Section 15E directs attention to the question of whether publication of BM's name would *itself* identify IP or be likely to do so. The matter can be tested by assuming a reading of the judgment by a stranger to the relevant events. There is no issue IP would be *identified*. The statutory question directs attention in the particular circumstances of this case to the extent to which publication of BM's name would be *likely* to lead to identification of IP. The section does not speak in terms of whether or not it would be possible: at [13]-[14].

Publication of the judgment that included BM's name would not be likely to reveal the identity of IP to an otherwise uninstructed reader. Events and place are not described, and no individual whose name is not the subject of any restriction is referred to. The events could have occurred at any time in any location anywhere in NSW: at [15].

Temporary stay of proceedings - granted pending Crown's payment of costs thrown away - Crown at fault for delay

R v Abu-Mahmoud [2024] NSWCCA 21

AM was charged with intend to pervert the course of justice (s 319 *Crimes Act 1900*). The Crown case was that AM and others paid CC (not a witness) to provide an affidavit exonerating AM's family members for a murder.

Crown Witness C, who was previously CC's solicitor, made a statement annexing potentially privileged documents. CC sought privilege but the privilege claim was delayed because CC had difficulties obtaining legal representation. The DPP indicated it would not consider funding legal representation for CC.

After some delay, the trial judge ruled no privilege attached. On AM's application, the trial judge granted a temporary stay of the trial until the Crown paid AM the costs thrown away by the delay of one month.

The trial judge found the Crown was responsible for the delay and unfairness resulted to AM. Further, that the Crown was in possession of reliable evidence that two years previously CC had irrevocably waived his lawyer client privilege.

The CCA dismissed the Crown appeal against the trial judge's grant of the temporary stay (s 5F(2) *Criminal Appeal Act*).

- The judge did not take account of an irrelevant consideration that the DPP did not fund legal representation for CC: at [40]. The Crown is not responsible for legal fees of a non-party. However, the real issue is whether payment of CC's legal costs might have been a reasonable course for the Crown. The Crown had evidence CC had previously waived lawyer client privilege, and the Crown case revolved around Witness C's evidence of dealings with CC. That the unfair consequences for AM could have been avoided by securing legal advice for CC was a legitimate consideration: at [43]-[46].
- The judge did not err in finding the Crown at fault for the delays so that the principle in *R v Mosely* (1992) 28 NSWLR 735 applies. The Crown case relied principally, but not exclusively, on Witness C. Responsibility for any issues with evidence of a witness which the Crown ought reasonably have anticipated might cause delay, should be sheeted home to the Crown: at [49].
- The judge did not err in finding the respondent suffered unfairness due to delays. AM was funding his trial through borrowed money and funds were exhausted. The Crown assertion that CC's privilege claim was wholly without merit means it could have been dealt with at pre-trial stage using information in the Crown's possession that privilege had been waived: at [54].

Trial judge allowed witness to refresh memory in court in absence of jury - irregular process - no miscarriage of justice

Chiha v R [2024] NSWCCA 222

The CCA (Price AJA; Rigg J agreeing with additional reasons) held that the applicant's trial did not miscarry where the trial judge allowed Crown witness A to refresh memory from his statement in court before judge and counsel but in the jury's absence.

The unorthodox approach adopted by the judge was an irregularity: at [158]. It would have been a proper and regular course for the judge to permit a short adjournment to allow the Crown to provide witness A with his induced statement to read out of court before he gave evidence: at [132].

However, the irregularity did not create practical injustice, affect the trial result, or result in any material difference in evidence Witness A gave before the jury to his memory being refreshed by the Crown in a conference outside the courtroom. It gave the applicant's counsel a forensic advantage: at [140]-[142], [158], [213]. The majority of the material to which the witness' attention was taken in the absence of the jury was not adduced in evidence in chief: at [215] (Rigg J).

The trial judge did not put pressure on Witness A to give evidence in accordance with his induced statement: at [139], [159], [228].

Garling J (dissenting) found that the process was so irregular it constituted a miscarriage of justice. It did not accord with any known or accepted trial process, and should not have occurred in the Court, nor with any participation at all by the judge: at [198].

Orders requiring Commissioner Corrective Services to provide inmate with laptop – civil procedure

Commissioner of Corrective Services v Hamzy [2024] NSWCA 240

The respondent, an inmate at High Risk Management Correctional Centre Goulburn, sought declaratory relief in the Supreme Court concerning validity and application of the *Crimes (Administration of Sentences) Act 1999*.

Prior to the hearing, the respondent was successfully granted orders by the primary judge for access to a laptop with word processing: at [8]; (*Hamzy v Commissioner of Corrective Services* [2024] NSWSC 1090).

The primary judge:

- did not refer to affidavit evidence by Mr Brown, General Manager of State-wide Operations Corrective Services, as to proposed arrangements for the respondent's exclusive daily access to a modified "blue" computer with word processing and printing.
- concluded the orders were necessary to protect the respondent's common law right of access to the court, using the concept of "equality of arms" as "a suitable and relevant starting point".

The Court allowed the appeal and set aside the primary judge's orders. An undertaking was made by Commissioner that the respondent have access to above arrangements.

- The primary judge's failure to have regard to evidence by Mr Brown was an error which vitiated his decision. There was no real controversy between the parties as at the time the primary judge decided the application that the respondent had effectively secured what he had sought (access in his cell to material to be uploaded to his e-brief laptop; access in his day room to a "blue" computer with word processing, USB storage and printing): at [63]-[66].
- The primary judge erred in holding the orders were necessary to ensure effective access to court. Given the respondent's access to e-brief laptop etc., it is difficult to see how access to the court is "denied": at [69], [76].
- The "equality of arms" concept as the proper starting point involved a mistake as to scope of the Court's powers to make orders for ensuring effective access to the Court. Any discretion to make directions in the context of extant proceedings should not start with the "equality of arms" concept but focus on what is required for a "fair trial": at [92], [97].

5. PARTICULAR OFFENCES

Five judge bench – deemed commercial drug supply – mistaken belief as to particular prohibited drug in possession – whether applicant had requisite mental knowledge with regard to quantity - ss 25(2), 29 Drug Misuse & Trafficking Act 1985

Salameh v R [2024] NSWCCA 239

> A person who supplies a prohibited drug is guilty of an offence: s 25(1) *DMTA*.
>
> A person who supplies an amount of a prohibited drug which is not less than the commercial quantity applicable to the prohibited drug is guilty of an offence: s 25(2).
>
> Where the jury is not satisfied the amount of prohibited drug involved is equal to or more than the commercial quantity applicable to the prohibited drug, they may convict under s 25(1) or (2C): s 25(3).
>
> A person in possession an amount of a prohibited drug which is not less than the traffickable quantity shall be deemed to have the prohibited drug in possession for supply: s 29.

The applicant was convicted by trial by judge alone of supply fetanyl under s 25(2) *DMTA*. The trial judge found the Crown had proved the applicant knew or believed the drug was no less than the prescribed quantities.

Although not raised at trial, the applicant submitted at sentence that he believed the drugs were cocaine, not fentanyl.

On appeal, the applicant submitted that the trial judge had to be satisfied the accused knew he was in possession of an amount of drug not less than the aggravated quantity *applicable to the drug he believed it to be*: at [64].

The applicant's appeal raised for consideration the construction of s 25 and requisite knowledge required to be proved under s 25(2).

A five-judge bench dismissed the appeal.

- In s 25(2) "prohibited drug" refers to the actual prohibited drug the accused has supplied, not to a prohibited drug that an accused mistakenly believed was involved: at [14].

- An additional mental element, based on a defendant being mistaken as to the identity of the prohibited drug, is inconsistent with long established authority that an accused must know that what s/he is supplying is "a" prohibited drug, not a "particular" prohibited drug: at [20], [26]; *Dunn v The Queen* (1986) 32 A Crim R 203 and other authorities cited.
- The mental element of an offence under s 25(2) requires that the accused knows or believes that the substance in their possession is a prohibited drug and also knows, in the accepted sense, that the quantity of drug in fact in 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: at [126].
- This conclusion as to knowledge does not distinguish between a commercial quantity (where the quantity is an element of the offence-creating provision) and the large commercial quantity (where the quantity is identified in a separate provision fixing penalties): at [127].
- The reasoning in *He Kaw Teh v R* (1985) 157 CLR 523 and *Bahri Kural v R* (1987) 162 CLR 502 is inconsistent with any requirement to know or suspect the precise identity of the prohibited import, or its quantity: at [81].
- The conclusion in *R v Busby* [2018] NSWCCA 136 that the prohibited drug which the accused believed s/he possessed must be that which s/he in fact possessed cannot be supported: at [126].

Common law escape police custody - escape a continuing offence with temporal limitation - R v Tommy Ryan (1890) 11 LR (NSW) 171

Elali v R [2025] NSWCCA 9

The applicant, a prisoner, was being escorted by police from an outside hospital. He escaped, entered residential premises and hid.

The applicant appealed his conviction under s.114(1)(d) *Crimes Act* of entering a building with intent to commit an indictable offence, namely the common law offence of escape.

The question on appeal was whether the applicant was continuing to commit the common law offence of escape when he entered the premises; or, as the applicant submitted, that the offence was complete at the time police officers lost sight of him.

The CCA had not considered this issue since *R v Tommy Ryan* (1890) 11 LR (NSW) 171, which held that the common law offence of escaping is a continuing offence. The applicant relied on Victorian and NZ authority to argue that escape is not a continuing offence.

Held: Appeal dismissed.

- The common law offence of escaping from lawful custody is a continuing offence. It is not constrained by imposition of boundaries such as lack of immediate pursuit, loss of control or being out of sight: at [61]; *R v Tommy Ryan*, applied.
- However, there is a temporal limitation. 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. Whether an escape has ended is a question of fact: at [59]-[61].
- Here, the applicant was in the process of escaping when he entered the premises. A jury, properly instructed, could not reasonably reach any other conclusion: at [38], [62].

Should Tommy Ryan no longer be followed?

- It is not necessary in the present case to resolve whether *Tommy Ryan* should be overruled. However, the CCA did express reservation about the offence continuing so long as the person escaping is kept out of imprisonment. The CCA observed there will be a time when as a question of fact, the escape has been completed, but this was not an issue in the present case: at [64]-[65].

Murder trial – "honour killing" – religious, cultural stereotypes - conduct of Prosecutor – no miscarriage

Iskandar v R [2025] NSWCCA 33

The applicant was convicted of murder. The Crown case at trial was that the applicant and his father killed the male deceased for having an affair with the applicant's mother (and wife of the applicant's father).

The applicant appealed on grounds including the trial miscarried because the Crown Prosecutor addressed the jury and cross-examined in an improper manner, describing the murder as "an honour killing" and cross-examining the applicant about his religious beliefs and the approach of Islam to adultery.

The CCA found that:

- The concept of "honour killing" introduced by the Crown Prosecutor at the trial and its connection to the applicant's religion gave rise to a danger that the jury's deliberation may be infected with prejudice and emotion. Given the strength of the prosecution case, and the admissions made to a witness which indicated motive, attempting to categorise the crime as an "honour killing" or one motivated by the applicant's religion was unnecessary: at [88].
- However, the Prosecutor's conduct was not improper. She raised the issue at the beginning of trial. There was nothing underhanded or improper in approach. Trial counsel did not raise the matter and attempted to use it in the applicant's favour: at [88]-[93]. There was no miscarriage of justice: at [105] – [116].

"under authority of" in s 61H(2) Crimes Act 1900 – person receiving treatment from an osteopath is "in the care of" and thus "under the authority of" the osteopath

Hu v R [2025] NSWCCA 66

The applicant, an osteopath, was convicted of aggravated sexual intercourse (s 61J(1) *Crimes Act*) and aggravated indecent assault (s 61M(1), *rep*) in relation to two female patients.

The circumstance of aggravation was the victims being *under the authority* of the offender (ss 61J(2)(e), 61M(3)(c)). Section 61H(2) defines "under the authority of" as used in both s 61M(1) and s 61J(1):

> "... a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person."

The applicant submitted the trial judge erred in holding it was open to find that the mere fact of providing osteopathic treatment established the circumstance of aggravation, i.e., being under his authority.

Held: Appeal dismissed.

- On proper construction of relevant provisions, when there is a relationship of patient and health care professional and the patient is receiving treatment, the patient is "in the care of", and thus "under the authority of", the health care professional for the purposes of s 61H(2) and ss 61M and 61J: at [47]-[49].
- Each of the three elements in s 61H(2) - being in the 'care' , 'supervision' and 'under the authority' of a person - operate independently and not as a composite: at [46]-[47]; authorities cited.
- There was no misdirection by the trial judge. The directions were appropriately limited to the applicable aspect of the definition of "under the authority of" in s 61H(2) in the context of a health care professional's relationship with a patient, namely, that "[a] person is under the authority of another person if the person is in the care of the other person at the relevant time". In this context "care" is an ordinary English word. It was not necessary for the trial judge to define the word "care" and doing so would involve substituting a different word(s) for the very word used in the statute with the attendant risk of error or misdirection: at [65]-[66].

Legal concepts of extended joint criminal enterprise and committing offence "in company" able to stand together - specially aggravated break and enter, s 112(3) Crimes Act 1900

Ardestani v R [2024] NSWCCA 31

The applicant was convicted at trial of specially aggravated break and enter (s 112(3) *Crimes Act 1900*). An aggravating circumstance was that he was "in company" with others (s 105A(1)).

The applicant, co-offender, and unknown third offender entered the victim's house armed with an imitation pistol, as part of an agreed plan to assault the victim and steal money. The co-offender sat on the victim's stomach holding the imitation pistol to his face demanding money, punched him to the face and threw him around, causing facial injuries amounting to actual bodily harm.

The Crown relied upon *basic* joint criminal enterprise with regard to all elements of the offence, except the occasioning of actual bodily harm which was a consequence that had not been agreed to. Rather, the applicant foresaw the possibility of it occurring relying upon *extended* joint criminal enterprise (EJCE): at [38].

The applicant appealed on grounds including that the verdict was unreasonable or unsupported by the evidence. Particularly, that he could not be liable for the actual bodily harm inflicted on the basis of EJCE as the legal doctrine of EJCE and the aggravating circumstance of being "in company" cannot be combined.

The CCA dismissed the appeal.

- The two legal ideas of EJCE and the aggravating circumstance of being "in company" are capable of standing together. It is not necessary that, in order to be guilty of committing an offence in company, an offender must have been "directed towards" the completion of each and every element of the offence. So long as the offender was acting in company regarding the basal elements of the alleged offence, that is sufficient: at [68]-[69].

- The concept of being in company is not as rigorous or precise as the concepts underpinning the doctrine of complicity. The latter concepts require rigorous analysis of precisely which elements of an alleged offence an accused intended, or agreed to, or foresaw as possible: at [68]-[69]; *Markou v R* (2012) 221 A Crim R 48; [2012] NSWCCA 64, discussed.

It was open to the jury to return a guilty verdict. The applicant was proven to have agreed to an assault and a breaking; committed common assault, acts of breaking and entering in company; and was present when the actual bodily harm arising from the assault was being inflicted and foresaw it as possible: at [48], [70].

Appellant acquitted of assault officers in execution of duty (s 60(2) Crimes Act) because arrest unlawful - no impact upon charges of resist officer in execution of duty (s 58, rep) involving other officers

Kershaw v R [2024] NSWCCA 27

> s 58 (since amended) *Crimes Act 1900* provided for an offence of assault, resist or wilfully obstruct an officer while in the execution of their duty.
>
> s 60(2) provides for an offence of assault police officer in execution of duty occasioning actual bodily harm.

Four police officers attended an incident involving the applicant resulting in charged offences. At trial by judge alone, the applicant was acquitted of two s 60(2) charges on the basis the arrest by officers 1 and 2 (the "initial officers") was unlawful. The judge accepted guilty pleas to two offences under s 58 involving officers 3 and 4 which had taken place shortly after the alleged s 60(2) offences.

On appeal, the applicant submitted the trial judge erred in accepting guilty pleas to the s 58 offences because all four officers were seeking to arrest the applicant and the arrest was found to be unlawful.

The CCA dismissed the appeal. There was no miscarriage of justice in permitting the guilty pleas to stand.

The element of the offence charged under then s 58 was *not* 'resistance to a *lawful arrest'*, but 'resistance to a constable in *the exercise of duty'*. An element of the s 60(2) offence was that there was a lawful arrest. The s 58 charges turned merely upon whether, at the time the applicant was resisting, officers 3 and 4 were executing their duty: at [60]-[61], [71]; *R v Reynhoudt* (1962) 107 CLR 381.

Officers 3 and 4 were 'executing duties' in two ways distinct from assisting the initial officer's arrest. First, they intervened as part of their duty to keep the peace, being conduct wholly independent of validity or invalidity of the arrest by the initial officers. Second, they sought to arrest the applicant for assaulting the initial officers. Even if the arrest turned out to be unlawful because as soon as reasonably practicable the applicant was not told why he was being arrested, that did not prevent their actions from being in execution of their duty: at [69]-[71].

Note: The applicant's submissions might have had more force if he had been charged under the current s 58, which has as an element "the lawful apprehension or detainer" of a person: at [58].

Stated case - driving with prescribed illicit drug in system - offence of absolute liability - Road Transport Act 2013, s 111(1)

R v Narouz [2024] NSWCCA 14

The applicant appealed his Local Court conviction for drive motor vehicle with presence of a prescribed illicit drug (*Road Transport Act* 2013, s 111(1)). He gave evidence that a possible explanation for his positive cocaine reading when driving his friend's vehicle was that he drank from a sports bottle left in the car.

The District Court stated to the CCA:

> *Question 1. Is the offence of driving a motor vehicle with the presence of a prescribed illicit drug (RTA, s 111(1)) an offence of absolute liability?*
>
> *Answer – Yes.*
>
> *Question 2. Is it necessary for the prosecution to prove beyond a reasonable doubt that an accused did not drive under an honest and reasonable mistake of fact that there was not present in their oral fluid an illicit drug?*
>
> *Answer – Unnecessary to answer*. Given mens rea forms no part of an offence of absolute liability, where guilt is established by proof of the elements of the offence, the ground of exculpation cannot apply to an offence of that kind: at [28]; *He Kaw Teh* (1985) 157 CLR 523.

In finding s 111(1) to be an offence of absolute liability:

- The structure and language of s 111(2) – notably, the chapeau, "the offence is proved" in s 111(2)(b) and the separate consideration given to when one, or more than one, prescribed illicit drug are alleged to be present in ss 111(2)(b)(i) and (ii) – manifest legislative intent to displace the presumption that there is a mens rea element: at [60].
- The penalty is monetary and moderately sized: at [84]-[86].
- The possibility of 'hardship cases' (e.g. a person could "unknowingly or unwittingly" contravene s 111(1) if a person's drink is spiked with a drug) should not be taken to override public safety objectives, particularly where, in a suitable case, injustice could be avoided by sound exercise of prosecutorial or sentencing discretions: at [82]-[83]; *Tsolacis v McKinnon* (2012) 38 VR 260.

The CCA distinguished *DPP v Bone* [2005] NSWSC 1239 which held that the offence of driving with mid-range PCA (s 9(3) *Road Transport (Safety and Traffic Management) Act*) is an offence of strict liability. Under s 9(3) a person can be liable to imprisonment and the gradations of punishment evinces parliament's intention to differentiate between concentrations of alcohol: at [77]-[78].

Child sexual assault offences - unreasonable verdict on s 66C(2) Crimes Act 1900 - CCA can find applicant guilty of alternative count s 66C(4) where left to jury by trial judge

RM v R [2024] NSWCCA 148

The applicant was convicted of child sexual offences, including s 66C(2) (count 5) which requires proof the complainant was under 14 (aggravated sexual intercourse - complainant above 10 and under 14).

The complainant's evidence was that she was "13 or 14" years old.

The trial judge ruled that the statutory alternative offence, s 66C(4), could be left to the jury. Section 66C(4) is identical as to conduct to s 66C(2) but that the complainant is above 14 and under 16.

The CCA allowed the appeal in respect of the s 66C(2) charge. As contended by the Crown, the CCA substituted a conviction for the offence against s 66C(4).

Verdict of guilty on s 66C(2) unreasonable

- The evidence was insufficient to exclude the possibility that the offence was committed after the complainant turned 14. There was a reasonable doubt about the child's age at the time of the s 66C(2) offence: at [254]-[256], [280].

Effect of quashing conviction under s 66C(2)

- The CCA set aside the verdict in respect of the count under s 66C(2) and substituted a verdict in respect of the statutory alternative, s 66C(4). This approach is consistent with the authorities (*Gilson v The Queen* (1991) 172 CLR 353; *R v JGW* [1999] NSWCCA 116) and is authorised by s 80AB(9) *Crimes Act*: at [272]-[273].
- Where there are alternative charges, the trial judge should direct the jury which of the offences they should regard as the less serious and instructed that if they are satisfied beyond reasonable doubt that the accused is guilty of one or other of the offences but are unable to say which, they should return a verdict of guilty of the less serious offence: at [266]; *Gilson*.
- Matter remitted to District Court for sentencing under s 12(2) *Criminal Appeal Act 1912*: at [273].

Knowingly 'take part in' supply of prohibited drugs - drugs on premises jointly occupied by applicant and husband – 'suffers or permits' - directions as to applicant's power to prevent activities on premises - Drug Misuse and Trafficking Act 1985, s 6

Rabieh v R [2024] NSWCCA 154

s 6 *Drug Misuse and Trafficking Act 1985* provides for circumstances in which a person "*takes part in*" the supply of a prohibited drug, including if:

> (a) the person takes, or participates in, any step… in the process of … supply,
>
> …
>
> (c) the person provides the premises in which any such step in that process is taken, or *suffers or permits* any such step in that process to be taken in premises of which the person is the owner, lessee or occupier ….

The applicant was convicted of two counts of knowingly taking part in supply large commercial quantity of methylamphetamine. The drugs were found on premises jointly occupied by the applicant and her husband.

The applicant's defence was she would not have been guilty of '*suffering or permitting*' her husband to have the drugs on the premises. She had no knowledge of the drugs; and had she known, she could not have them removed given the nature of her relationship with her husband.

The trial judge directed the jury that proof of the offences "requires that she not only knew about [the drugs], but that she willingly and knowingly provided the premises at which they could be held or stored for the purposes of supply": at [40]-[43].

The applicant submitted that the judge erred by not giving a further direction that as a joint tenant she had no legal right to stop her husband storing drugs and no ability to control him given his violence when using drugs (relying on *Regina v Tao* [1977] 1 QB 14; *R v Jasper* (NSWCCA) (2003) 139 A Crim R 329; *R v Sheen* (NSWCCA) (2007) 170 A Crim R 533).

The CCA dismissed the appeal. There was no error in not giving the further direction. Appropriate directions in relation to "taking part in" a drug supply turn upon the circumstances of the case: at [47].

- The issue on appeal concerned whether the applicant had either the legal power to control her husband's activities on the premises or, assuming she did, whether she had a practical capacity to do so: at [8].
- The question of resistance only comes up because participation or involvement is unwilling. The power or capacity of the applicant to stop her husband's criminal activities did not arise in circumstances where the prosecution case was that she was a knowing and willing participant: at [48].

- A prosecution based on knowing and willing involvement did not call for directions as to what might, hypothetically, have been in issue had the applicant been unwilling or resisting the activities of her husband. If the jury had accepted that her evidence in that regard raised a reasonable doubt, they were required to acquit. What she could or might have been able to do, if not a willing participant, was irrelevant: at [50].

s.52A Dangerous driving occasioning death - applicant's vehicle did not come into contact with another vehicle - causation - "involved in an impact"

Omigie v R [2024] NSWCCA 205

> s 52A(1)(c) *Crimes Act* provides that a person will be liable for dangerous driving occasioning death if the vehicle they drive "*is involved in an impact occasioning the death*" of another and at the time of the impact the driver drove in a manner dangerous to others.
>
> "*Involved in an impact*" includes where a vehicle causes an impact between other vehicles: s 52A(6).
>
> It is a defence if the death occasioned by the impact was not in any way attributable to the manner in which the vehicle was driven: s 52A(8)(c).

The applicant was convicted by jury of dangerous driving occasioning death (s 52A *Crimes Act 1900*).

A key issue was causation. The applicant stopped his car in Lane 4 of a busy highway. A series of collisions subsequently followed in Lanes 4 and 5. A truck struck another car killing the car's driver. The applicant's vehicle did not come into contact with any another vehicle. The Crown relied upon the extended definition of being *"involved in an impact"* in s 52A(6).

The CCA dismissed the applicant's appeal. The behaviour and position of the applicant's vehicle was a substantial and operating cause of the collisions between the other vehicles immediately behind and around him: at [93].

Causation

The Crown must prove that the applicant's conduct in driving his vehicle was a substantial or significant cause or a sufficiently substantial cause of the outcome. It need not be the only operating cause and the question of causation does not necessarily require a comparison of various operative causes. The offence is committed where there is objectively a quality in the manner of driving which either intrinsically in all the circumstances or because of the particular circumstances surrounding the driving it is in a real sense potentially dangerous. The matter is objectively assessed and involves demonstrating that the driving subjected another person to a level of risk greater than that ordinarily associated with driving a motor vehicle: at [58]-[59].

Applicant's conduct

The applicant's conduct 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]). He came to a complete stop on a busy motorway with a speed limit of 80km p/h when traffic was increasing, in darkness, subjecting others to a level of risk greater than that ordinarily associated with driving a motor vehicle. It was open to the jury to be satisfied beyond reasonable doubt that he seriously breached proper standards of management and control of his vehicle in a way that resulted in a real danger to others: at [97].

Section 81 (rep) Crimes Act, Indecent assault on male, can only be committed by males

Lam v R [2024] NSWCCA 6**:** The offence of 'indecent assault on male' under the now repealed s 81 *Crimes Act* does not apply to conduct committed by a female upon a male. Section 81 was directed to sodomy upon a male and other male homosexual conduct and is applicable only to an indecent assault by a male upon a male.

Grant v R [2024] NSWCCA 78 : The female applicant's conviction for s 66EA maintaining an unlawful sexual relationship with a child was quashed because the unlawful sexual acts relied upon were s 81 offences.

Weight of prohibited drug included weight of dried mushrooms in which psilocybin naturally found – meaning of "other substance" in s 4 Drug Misuse and Trafficking Act 1985

Jenkinson v R [2024] NSWCCA 34

> s 4 *Drug Misuse and Trafficking Act 1985* provides: "In this Act, a reference to a prohibited drug includes a reference to any preparation, admixture, extract or other substance containing any proportion of the prohibited drug."
>
> Psilocybin is a prohibited drug specified in Schedule 1.

Police located 98 grams of dried mushrooms in the appellant's car. The appellant was convicted by judge-alone of supply commercial quantity of a prohibited drug (psilocybin) (s 25(2) *DMTA*).

The CCA (Mitchelmore JA and Wilson J agreeing, Rothman J agreeing in separate reasons) held that the trial judge was correct to find that the quantity of psilocybin should be presented as 98 grams of the bulk vegetable matter (the mushrooms) of which the psilocybin was part. The CCA rejected the applicant's submission that he should only have been charged by reference to the quantity of psilocybin *in* the mushrooms and which would not meet the threshold for s 25(2).

The expression in s 4, "or other substance containing any proportion of the prohibited drug", is intended to capture material that contains a prohibited drug and other material that is not prohibited. Read as a whole, the focus of s 4 is not human involvement in mixing of substances, but with the fact of mixed contents, any proportion of which is a substance specified in Schedule 1: at [22].

6. APPEALS

Appeal raising issue materially indistinguishable from co-accused's earlier appeal - principle of equality before the law - differently constituted bench should follow earlier decision unless compelling reason to depart

Kwu v R [2024] NSWCCA 199

The applicant and two co-accused, Nolan and Ilievski, were convicted at joint trial of aggravated robbery. The applicant and Nolan were also convicted of a stolen vehicle offence. Nolan and Ilievski's convictions were quashed and new trial ordered on the ground of a miscarriage of justice due to the trial judge's refusal to discharge the jury after a witness gave evidence that Nolan was known to have previously robbed a bank (*Ilievski; Nolan v R (No 2)* (2023) 112 NSWLR 375).

The applicant sought leave to appeal out of time on the same ground upheld with respect to his co-accused.

The CCA made orders extending time, granted leave to appeal, and allowed the appeal.

The principle of equality before the law militates in favour of this Court applying the conclusion reached by the majority in the earlier case without simply reconsidering the issue for itself: at [40].

- Taking account of the explanation for the significant delay and that there is some merit in the appeal given the decision in *Illievski (No 2)*, time should be extended to permit the application for leave to appeal: at [25]-[26].
- The established "plainly wrong/compelling reason" test is not applicable. What divided the Court in *Ilievski (No 2)* was not the content of legal principle, and no dispute as to legal principle is raised in this case. Rather, the issue in both appeals is the application of accepted legal principles to a particular set of facts: at [31]. However, the case law may still throw some light. Underlying that threshold test "are the important goals of fostering stability and predictability in the law and consistency and certainty in the administration of justice" (*Totaan v R* (2022) 108 NSWLR 17 at [74]): at [31]-[32].
- Assistance may also be gained from cases in the sentencing context. Although the decision required of this Court is not discretionary, the principle of equality before the law has significance. This case is clearly a like case to *Ilievski (No 2)*, involving the same point arising from the same trial for a co-accused in the same position as Ilievski himself. The two cases are materially indistinguishable. For the Court to set aside the prior decision and simply reconsider for

itself whether there has been a miscarriage of justice, potentially reaching a different conclusion, has potential to be an affront to the principle of equality before the law: at [38]-[39].

- There can be no invariable rule that the second bench must always follow the first. Where the court is determining an appeal materially indistinguishable from an earlier appeal decision from the same trial raising the same point, then the court should follow the earlier decision unless there is compelling reason to depart from it: at [42].

Appeal against refusal of permanent stay of special hearing - standard of appellate review for decisions whether to grant a permanent stay of criminal proceedings is the "correctness" standard, GLJ [2023] HCA 32 - "common humanity" test in Subramaniam v R [2004] HCA 51

Koschier v R [2024] NSWCCA 24

> *Subramaniam R* [2004] HCA 51; (2004) 79 ALJR 116 established the "common humanity" test: whether, in light of the applicant's deteriorating condition, it "would be out of accord with common humanity" to allow the special hearing to proceed.

The applicant, aged 88, faced a special hearing (*Mental Health and Cognitive Impairment Forensic Provisions Act 2020*) for historical child sexual offences. The primary judge rejected his application for a permanent stay brought on the basis of cognitive impairment, substantial delay, and forensic disadvantage from loss of evidence.

The applicant appealed pursuant to s 5F(3) *Criminal Appeal Act 1912* submitting the primary judge erred by:

(i) applying the "common humanity" test from *Subramaniam* where more than mental infirmity is relied upon to found a stay; and

(ii) failing to consider whether, having regard to the likely outcome of the special hearing, there remained sufficient public interest in the proceedings continuing.

The CCA refused leave to appeal.

Standard of appellate review of decision whether to grant permanent stay

- Importantly, the CCA held the "correctness standard" endorsed by the High Court in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; 97 ALJR 857 in respect of decisions whether to grant a permanent stay of *civil* proceedings applies to *criminal* proceedings: at [33]-[35].
- It is no longer correct to characterise the power to stay criminal proceedings as "discretionary" or say that the applicable appellate standard of review is that identified in *House v King* [1936] HCA 40: at [33]-[34].
- The correctness standard as the applicable standard for review of decisions in relation to stay applications means that any appeal following the grant of leave to appeal is by way of rehearing. The primary judge's reasoning, except where some special advantage in the *Fox v Percy* (2003) 214 CLR 118 sense is present, diminishes in significance. An appellate court may still endorse some or all of the primary judge's reasoning and adopt unchallenged intermediate findings of fact: at [35]-[42].

Question of leave

Leave to appeal pursuant to s 5F(3)(b) will not readily be granted: at [46]; *authorities cited*.

As the decision whether to grant leave may be affected by consideration of whether a substantial injustice would result if leave were not granted, reference is made to the principles relevant to the grant of a permanent stay of criminal proceedings in *La Rocca v R* [2023] NSWCCA 45 at [34], supplemented in the present case by *Subramaniam v R* and the fact that the proceedings sought to be stayed are a special hearing: at [52]-[53].

Leave is refused for reasons including:

(i) Application of the *Subramaniam* "common humanity" test.

The test forms part of the analysis where a stay of proceedings is sought by reference to the mental infirmity of the applicant in combination with other aspects of prejudice: at [51]-[57]; *Subramaniam; Kitchingman v R* [2023] NSWCCA 4.

(ii) Public interest considerations

Prognostications as to the likely outcome of any hearing, let alone a special hearing, are inappropriate on a stay application which should not involve a "mini-trial" or assessment of the strength of a case unless, exceptionally, it is contended that a case is so hopeless that it is liable to be summarily dismissed or struck out and constitutes an abuse of process for that reason. Whether the continuation of proceedings is in the public interest has never been an established test for grant of a permanent stay: at [62]-[63].

Appeal against refusal of permanent stay of special hearing - "common humanity" test in Subramaniam v R [2004] HCA 51 correctly applied - no error in judge finding "mere risk" of abuse of process insufficient for stay, R v Edwards [2009] HCA 20

RC v Director of Public Prosecutions [2024] NSWCCA 95

The CCA dismissed the applicant's interlocutory appeal (s 5F *Criminal Appeal Act 1912*) against the primary judge's dismissal of an application for a permanent stay of his special hearing for historical child sexual offences. The stay application was brought on the basis of the applicant's terminal cancer and risk of committing suicide.

The applicant submitted the judge erred by:
(i) failing to apply the *Subramaniam* test; and

(ii) refusing a permanent stay on the basis that the evidence established a 'mere risk' that the special hearing could result in an abuse of process, based on the principle in *R v Edwards* [2009] HCA 20 at [23].

The CCA held the primary judge did not fail to apply the *Subramaniam* test. While *Subramaniam* at [31] described a "relevant test" (whether to proceed by way of a special hearing "would be out of accord with common humanity"), that requires an evaluative judgment with no precise criteria to guide. The primary judge had regard to application of the test in other circumstances, to assist in articulating the concerns about the applicant's health, balanced against the importance of justice to the complainants, and to satisfy the community's need to see allegations of serious offending are not too readily disregarded: at [25], [30]; *Subramaniam*; *Walton v Gardiner* (1993) 177 CLR 378.

The primary judge addressed the evidence in detail. The reference to establishment of a "mere risk" was a conclusion that a "real risk with grave consequences" had not been established. The reference to "risk" did not demonstrate error, but the correct application of principle. *Subramaniam* at [35] did not suggest that a "mere risk" should result in a stay, but that "if the risk were a *real* one, *and* the likely exacerbation grave", that would "argue in favour of a stay": at [31].

The primary judge was not wrong to translate the principle in *Edwards*, a case dealing with forensic disadvantage, to the present case, involving no forensic disadvantage, but a claim of inhumanity. Inhumanity is readily seen as an example of unjustifiable oppression and thus abuse of process: at [32].

It was factually wrong to imply that, by use of the word "merely", that there had been a failure to assess all of the relevant evidence against the relevant legal test: at [33].

7. OTHER CASES

Unlawful detention and arrest, ss 21, 99 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) – deprivation of liberty an 'injury' so that s 43A Civil Liability Act 2005 did not apply to exclude civil liability – malicious prosecution

NSW v Madden [2024] NSWCA 40

Police stopped Ms M and her male companion T. T was carrying a bag containing a knife and new male clothing. M was arrested for custody of a knife (s 11C *Summary Offences Act 1988*), and later charged with having goods in custody (clothing) (s 527C *Crimes Act*) and resist officer (s 58 *Crimes Act*). The charges were dismissed in the Local Court.

In District Court proceedings brought by M, the primary judge held M's detention and arrest were unlawful (ss 21, 99 *LEPRA*) such that conduct of police officers amounted to battery, false imprisonment and

malicious prosecution. Further, s 43A of the *Civil Liability Act 2005* did not apply to M's claim to exclude any civil liability arising from the police officers' conduct.

The Court of Appeal (Bell CJ, Stern JA agreeing; Leeming JA dissenting as to lawfulness of detention but otherwise agreeing) dismissed the appeal by the State of NSW against the District Court decision.

Lawfulness of detention and arrest

- The primary judge's conclusion that stopping and detention of M was unlawful and constituted a battery was based on rejection of police evidence. *The* State did not overcome the high hurdle required to challenge such credit-based findings: at [128]; *Fox v Percy* (2003) 214 CLR 118.
- Regarding lawfulness of arrest, Mr T was in possession of and carrying the bag containing the knife at all material times, and it was never in M's custody or possession. Section 527C(1)(a), "any thing in his or her custody", refers to that thing being in the person's custody at the time of apprehension by police. There is no material difference between the reference to "custody" in s 11C(1) *Summary Offences Act* and s 527C: at [26]-[27]; *R v English* (1989) 44 A Crim R 273.

Civil liability

- s 43A *Civil Liability Act* did not apply to exclude any civil liability arising from the conduct of the police officers. Section s 43A does not apply in respect of an intentional act done with intent to cause injury (s 3B(1)(a)). Deprivation of a person's liberty effects an "injury" upon that person: at [146], [238], [239]; *NSW v Ibbett* (2005) 65 NSWLR 168.

Malicious prosecution

- The judge properly found that the 'custody of a knife' and 'resist officer' charges were brought without reasonable and probable cause and with malice. The 'goods in custody' charge was also brought without reasonable and probable cause: [166]-[173], [177], [235]-[239].

Stated Case - meaning of phrase "mental illness within the civil law of the State or Territory" in s 20BQ Crimes Act 1914 (Cth) - whether determined with reference only to the definition of "mental illness" in s 4 of the Mental Health Act 2007 (NSW)

R v Skapik [2025] NSWCCA 19

By stated case the following question was submitted for determination:

> "For the purpose of s 20BQ(1)(a) of the *Crimes Act 1914* (Cth), was the question of whether [Mr Skapik] was suffering from a mental illness within the meaning of the civil law of the State to be determined with reference only to the definition of "mental illness" in section 4 of the *Mental Health Act 2007* (NSW)?"

Section 20BQ *Crimes Act 1914* confers various sentencing options upon a court where, in summary proceedings in respect of a federal offence, the person charged is suffering from "*a mental illness within the meaning of the civil law of the State or Territory*".

The Crown argued the answer was "Yes" – that "*mental illness within the meaning of the civil law of the State or Territory*" in s 20BQ(1)(a) means "mental illness within the meaning of the State or Territory law providing for the involuntary detention of the mentally ill" (civil commitment law). Thus, the relevant definition in NSW was s 4 *Mental Health Act 2007*, which defines a "mental illness" as "a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person" that is characterised by certain symptoms.

Mr Skapik argued that the expression is simply a reference to mental illness as that term is understood as a matter of State or Territory civil, as opposed to criminal, law.

Held: Answer - No.

- As a matter of statutory construction, Parliament used the words "mental illness within the meaning of the State or Territory" in s 20BQ(1)(a) to direct attention to the meaning of "mental illness" in the State or Territory as a matter of civil, as opposed to criminal, law.
- Further, given the range of sentencing options available under s 20BQ, and the breadth of the notion of "intellectual disability", it would be surprising if Parliament had intended the sentencing options conferred by s 20BQ to be conditional upon a person having a mental illness of a

character and severity which would justify civil commitment under State or Territory law: at [14]-[26].

8. BAIL

Bail refused on weekend Saturday until following morning - false imprisonment – police bail obligations - s 46 Bail Act 2013

State of NSW v McLaughlin [2024] NSWCA 137

> s 46(1) *Bail Act 2013* provides that a police officer must ensure a person charged with an offence who is refused bail is brought before a court as soon as practicable.

The Court of Appeal (Meagher and Adamson JJA) refused the State leave to appeal from the District Court primary judge's decision that the State was liable for false imprisonment.

The respondent was bail refused at 12:30pm on a Saturday morning. A Court Attendance Notice (CAN) was not filed until the following Sunday morning, and bail granted in the Local Court.

On appeal, the State argued:

- the primary judge misconstrued s 46 *Bail Act 2013*;
- the appeal raised a question of public importance, as the primary judge's decision meant "wholesale changes" would be required to weekend procedures for persons refused bail with respect to the "12pm cut off time" after which a detainee could not be brought before the court on the relevant day;
- the appeal raised a reasonably clear injustice.

The Court of Appeal refused leave. Police obligations to bring the respondent before a court were governed by express statutory provisions with no ambiguity. The officers were required to file the CAN and reasons for refusal of bail as soon as bail was refused. Where the State did not present evidence in the court below to show the bail application would not have been dealt with by the Local Court on the Saturday had the CAN been filed, there is no reasonably arguable injustice in the primary judge's finding. Questions of statutory construction do not squarely arise, given the way the proceedings were conducted in the Court below: at [45], [49], [52]-[56].

No question of public importance could arise where the primary judge's finding of unlawful detention did not have to grapple with the weekend bail procedures, as there was no evidence regarding these procedures before him: at [9]-[15].

s 22C Bail Act 2013 – observations on s 22C – "high degree of confidence" does not require court to be certain - involves probabilistic assessment of future conduct - court only required to undertake s 22C(1) evaluation after assessment of bail concerns and consideration of bail conditions (s 22C(2))

RB v R (No 2) [2024] NSWSC 845 (Walton J)

> Section 22C(1), (6) *Bail Act 2013* provides bail must not be granted to a young person (14-17y) for a relevant offence (incl. motor vehicle theft, serious B&E, and performance crime offences) whilst 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 whilst on bail.
>
> A determination under s 22C(1) may be made only *after* an assessment of bail concerns and consideration of whether any conditions could reasonably be imposed to address risk the young person will commit a further serious indictable offence: s 22C(2).

The 17-year-old applicant faced charges including aggravated B&E with intent, knowingly carried in stolen conveyance, steal vehicle and driving offences. He was on Supreme Court bail for BE&S motor vehicle and other offences.

The Court refused his release application, finding an unacceptable risk pf commission of a serious offence and endangering safety of the community: at [66]-[67]; s 19(1).

Application of s 22C(1)

The Court found s 22C(1) is not engaged: at [68].

The Court will be only required to undertake the evaluation under s 22C(1) if it has determined, by assessment of bail concerns and the considerations of bail conditions under Div 2, that there is not an unacceptable risk pursuant to s 20: at [18]-[19]; s 22C(2).

The Court considered that if s 22C(1) had applied, then bail would be refused. The conclusions as to unacceptable risk would not permit the Court to form the requisite degree of confidence required by s 22C(1): at [70].

Observations regarding s 22C: at [69]

- "A high degree of confidence" (s 22C(1)) is a test unknown to the criminal law: ***R v RB*** [2024] NSWSC 471 (Lonergan J).
- The meaning of 'confidence' in s 22C(1) is "an assured expectation, the state of feeling certain (of)". The evaluation involved under subs (1) involves a consideration of the future conduct of the young person; an evaluation of a future occurrence.
- The evaluation involved in reaching a "high degree of confidence" will involve a probabilistic assessment, not a state of certainty that the young person will not commit a further relevant offence.
- By s 22C(2)(a), the factors under s 18 remain relevant to s 22C(1) because they are required to be considered prior to a determination being made. This means that relevant subjective features and changes relevant to a risk assessment should inform the ultimate determination under s 22C(1).

s 22C Bail Act 2013 (NSW) - Supreme Court bail granted - applicant 14-year-old Aboriginal child – "high degree of confidence" does not require certainty applicant will not reoffend – application of s 6 Children (Criminal Proceedings) Act 1987 (NSW) to bail proceedings

R v BH [2024] NSWSC 1577 **(Yehia J)**

The applicant, a 14-year-old Aboriginal child, was charged and bail refused for BES, steal motor vehicle and other offences. He was on bail for another relevant offence, per s 22C.

Yehia J granted conditional bail.

Observations regarding s 22C

- There is no guidance as to what "high degree of confidence" means, or the matters that may inform that assessment. In ***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": at [12].
- 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: at [14].
- The test is a more onerous one than the "show cause" requirement which applies to adults under s 16A *Bail Act*. Furthermore, considerations such as delay appear to have no bearing on the assessment required under s 22C: at [14].

  It is curious and troubling that a stricter and higher test applies to children than adults who seek bail (***R v TW*** [2024] NSWSC 1504 per Rothman J at [11]). On its face, it is inconsistent with the principles set out in s 6 *CCPA*: at [15].
- s 6 CCPA applies to bail proceedings: at [18]; s 4 *CPPA*, s 5(1)(b) *Bail Act*.

  The desirability, wherever possible, to allow a child to reside at home, in education and employment, and reintegrate into the community, are relevant considerations. A child's dependency and immaturity require 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. Each case must depend upon its own facts: at [19].

Bail concerns and unacceptable risk

The Court assessed bail concerns and unacceptable risk under ss 17, 18, 19 *Bail Act*.

Two bail concerns are established - a risk of commission of a serious offence and a risk of endangering safety of individuals and the community. However, these do not rise to the level of being unacceptable risks in this case. The applicant has strong support and no criminal history nor lengthy history of non-compliance with court orders: at [34].

Having regard to the proposed intervention and support, the Court is satisfied, to a high degree of confidence, that the young person will not commit a serious indictable offence while on bail (s 22C). The Crown has not discharged its onus in asserting that bail should be refused: at [35]-[37].

District Court pending - bail granted in Supreme Court and subsequently varied in Local Court – CCA had jurisdiction to hear application

Markovic v DPP (NSW) [2024] NSWCCA 251

The applicant was due to stand trial in the District Court. Bail was granted in the Supreme Court and subsequently varied in the Local Court. The applicant made an application to the CCA for bail to be varied. The Crown submitted the CCA did not have jurisdiction as the bail decision made in the Supreme Court was superseded by the subsequent Local Court decision to continue and vary bail.

The CCA held it had jurisdiction pursuant to s 67(1)(e) *Bail Act 2013*, which provides that the CCA has power to hear a bail application in circumstances including where a 'bail decision' has been made by the Supreme Court.

Section 8(1) defines a "bail decision" as a decision to (a) release the person without bail; (b) dispense with bail; (c) grant bail with or without conditions); or (d) refuse bail.

The Local Court had not made a "bail decision" as defined in the Act (s 8(1)), only a decision to vary the bail conditions originally imposed by the Supreme Court. The bail decision of the Supreme Court thus remains operative: at [26]-[27].

A. HIGH COURT

1. **Xerri v The King [2024] HCA 5**

s 66EA Crimes Act 1900 (NSW) – persistent sexual abuse of a child – maximum penalty

Appeal from NSW. Appeal dismissed.

The appellant was sentenced for persistent sexual abuse of child under s 66EA *Crimes Act 1900*. The maximum penalty at time of offending was 25 years imprisonment.

From 1 December 2018, a new s 66EA provision commenced with an increased maximum penalty of Life imprisonment. The sentencing judge held the penalty of Life imprisonment applied. The appellant's appeal to the NSW CCA was dismissed (*Xerri v R* [2021] NSWCCA 268).

The appellant appealed to the High Court.

> Section 19(1) *Crimes (Sentencing Procedure) Act 1999* provides if an Act increases the penalty for an offence, an increased penalty applies only to offences committed after commencement of that Act.
>
> Section 25AA(1), which also commenced on 1 December 2018, required a court to sentence an offender for a 'child sexual offence' in accordance with sentencing patterns and practices as at the time of sentencing, not at the time of the offence. Section 25AA(4) stated that s 25AA does not apply to prevent the effect of s 19.

Held: Appeal dismissed (Gageler CJ and Jagot J in a joint judgment; Gordon, Steward and Gleeson JJ agreeing in a joint judgment).

- The current s 66EA creates a new and distinct offence carrying a maximum penalty of Life imprisonment applying retrospectively. There are significant differences between the current and previous s 66EA: see at [15]-[22]; [26]; [55]-[57]; [62]-[65].
- Section 19 does not apply. The interaction between ss 19 and 25AA has nothing to do with the operation of the new s 66EA which contains its own provision on sentencing in s 66EA(8): at [32]-[33]; [66].

2. **Hurt v The King; Hurt v The King; Delzotto v The King [2024] HCA 8**

Commonwealth minimum sentences - s 16AAB Crimes Act 1914 (Cth)

Appeals from NSW and ACT. Appeals dismissed.

Each appellant was convicted and sentenced in accordance with s 16AAB *Crimes Act* 1914 (Cth) for offences under s 474.22A *Criminal Code 1995* of Possessing or controlling child abuse material obtained or accessed using a carriage service.

Section 16AAB prescribes minimum penalties for a second or subsequent child sexual abuse offence.

The child abuse material was accessed before the date s 16AAB commenced, i.e., 23 June 2020.

Held: Appeals dismissed (Gageler CJ and Jagot J in a joint judgment; Edelman, Steward and Gleeson JJ in a joint judgment):

- The correct approach to statutory minimum sentences under s 16AAB is the double function approach - that the minimum sentence serves a double function as: (i) a restriction on sentencing power to the minimum period of imprisonment, subject to limited exceptions; and (ii) and as a yardstick, the opposite of the maximum term of imprisonment, for calculation of the appropriate penalty.

  As a yardstick that imposes an increased starting point for the appropriate term of imprisonment for the offence in the least serious circumstances, the minimum term operates to increase the appropriate term generally: at [54].

  The exceptional circumstances in which a discount can lead to a sentence below the minimum prescribed sentence do not detract from the role of the minimum sentence as a yardstick. Section 16AAC(2) provides that a plea of guilty and / or co-operation with law enforcement agencies could result in reduction of sentence below the prescribed minimum. The discretion applies where it is "appropriate to reduce the sentence" implying that this will involve determining a prima facie sentence with the use of the prescribed minimum sentence as a yardstick, prior to considering the discount: at [104].

- Section 16AAB applied to each appellant. The transitional provision to s 16AAB, which applies to a Commonwealth child sexual abuse offence where the "relevant conduct" was "engaged in" on or after 23 June 2020, is concerned only with acts, not results of those acts or the circumstances in which they occur. "[A]ccess" in s 474.22A(1)(c) *Criminal Code* is a circumstance, not conduct. The "relevant conduct" was the possession of child abuse material (s 474.22A(1)(a)) which each appellant had possession of after the commencement date for s 16AAB: at [80]-[82].

3. **The King v Anna Rowan – a Pseudonym [2024] HCA 9**

Defences - duress - "operative threat"

Crown appeal from Victoria. Appeal dismissed.

The female respondent was convicted of sexual offences, with her partner JR, against their children. The Victorian Court of Appeal set aside her convictions, holding that the trial judge erred in refusing her application to raise duress on the basis she believed JR, due to threatening controlling behaviour, would harm her and the children if she refused to commit the offences (*Rowan (a pseudonym) v The King* [2022] VSCA 236).

In Victoria, common law duress was abolished in 2014 and replaced by s 322O *Crimes Act 1958* (Vic).

The Crown appealed to the High Court, submitting that the Court of Appeal ignored the element in common law duress that an accused must be subject to a threat of harm of the relevant form of harm (such as death or GBH) if they failed to undertake those acts (*R v Hurley* [1967] VR 526 at 543 per Smith J, dissenting); and instead adopted the English doctrine of "duress of circumstances", whereby duress can be established by objective circumstances that caused an accused to commit the acts to avoid death or serious injury, provided their response was reasonable and proportionate (*R v Martin* [1989] 1 All ER 652 at 653).

Held: Crown appeal dismissed (Gageler CJ, Gordon, Jagot and Beech-Jones; Edelman J separately).

- The Court of Appeal applied the accepted form of threat as in *Hurley*: at [3], [57]. The evidence was sufficient to raise duress at common law and under s 322O *Crimes Act*. Evidence of pervasive violence, intimidation, control and sexual abuse by JR over a sustained period raised a reasonable possibility that any express or implicit demand on the respondent to join in the abuse carried the implication that serious violence and more severe sexual abuse would be inflicted on her or their children if she refused. There was a reasonable possibility of an operative threat to inflict the relevant form of harm unless the respondent committed the acts the subject of the charges against her: at [62]-[63].
- Smith J in *Hurley* specified the so-called "elements" of the defence of duress:

  "Where the accused has been required to do the act charged against him

  (i) under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act and

  (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did and

  (iii) the threat was present and continuing, imminent and impending … and

  (iv) the accused reasonably apprehended that the threat would be carried out and

  (v) he was induced thereby to commit the crime charged and

  (vi) that crime was not murder, nor any other crime so heinous as to be excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and

  (viii) he had no means, with safety to himself, of preventing the execution of the threat,

  then the accused, in such circumstances at least, has a defence of duress."
- The threat being "present and continuing, imminent and impending" does not require that all conduct relied upon be immediately prior to the crime being committed, but that the threat be "operative" or "effective" at the time of the acts. The antecedent conduct of the maker of the threat and their character is relevant to whether there is a threat: at [40]–[43]; *DPP for Northern Ireland v Lynch* [1975] AC 653.

  A continuing or ever-present threat *of serious violence per se* is not sufficient for a defence of duress, as it would not constitute a threat to inflict the relevant form of harm if the accused failed to commit the acts that constitute the offence: at [53].

4. **Director of Public Prosecutions (Cth) v Kola [2024] HCA 14**

Conspiracy to import commercial quantity of border-controlled drug, ss 11.5(1), 307.1(1) Criminal Code (Cth) - scope of the agreement - co-conspirators rule

Crown appeal from S.A. Appeal allowed.

The Court of Appeal of South Australia allowed the respondent's conviction appeal for conspiracy import commercial quantity cocaine (ss 11.5(1), 307.1(1) *Criminal Code (Cth)*) on grounds that the following directions by the trial judge were erroneous:

- the "substance to be imported *pursuant to the agreement* was to be a commercial quantity" but that the prosecution did not need to prove the respondent intended to import a commercial quantity;
- statements made by alleged co-conspirators in the respondent's absence could be used to "prove the existence of the conspiracy and the extent of [his] participation in it" (the 'co-conspirators rule') but to exercise caution before acting upon such statements.

The DPP (Cth) appealed to the High Court.

Held: Crown appeal allowed (Gageler CJ, Steward, Gleeson, Jagot, and Beech-Jones JJ).

- By ss 11.5 and 307.1, the prosecution must prove that the accused was a party to an agreement to import a commercial quantity of a border-controlled drug, but not that the accused knew or believed that the amount to be imported pursuant to the agreement would be a commercial

quantity The directions had the advantage of not introducing any potential confusion that the requisite intention to enter into the agreement extended to an intention to import a commercial quantity or knowledge or belief that would occur. The directions made clear that the scope of the agreement had to be such that, "pursuant to [that] agreement", the quantity to be imported was to be a commercial quantity: at [20]-[27], [40]-[41].

- There was "reasonable evidence" of the respondent's participation in the alleged conspiratorial agreement independent of the conduct of his alleged co-conspirators outside his presence. Thus, evidence of the acts and declarations of the co-conspirators was evidence of the existence and scope of the conspiratorial agreement and also evidence of the fact, nature and extent of the respondent's participation in that agreement: at [5], [45]-[47]; *Ahern* (1988) 165 CLR 87.

  There was nothing to suggest that the co-conspirators were not putting into effect what was agreed upon with the respondent. Thus, the judge's general warning about the operation of the co-conspirators rule was sufficient: at [46].

5. **DPP v Roder [2024] HCA 15; 98 ALJR 644**

Tendency evidence – error to direct jury that charged acts must be proved beyond reasonable doubt when used as tendency evidence

Crown appeal from Victoria. Appeal allowed.

> s 61 *Jury Directions Act 2015* (Vic) provides that the only matters a trial judge may direct the jury must be proved beyond reasonable doubt are: (a) the elements of the offence charged or an alternative offence; and (b) the absence of any relevant defence.
>
> s 62 provides that "any rule of common law under which a trial judge in a criminal trial is required to direct the jury that a matter, other than a matter referred to in section 61, must be proved beyond reasonable doubt is abolished." [Note 1 to s 62 states the provision abolishes the rule in *Shepherd v The Queen* (1990) 170 CLR 573].

In the applicant's trial for multiple sexual offences, the prosecution sought to rely on 33 pieces of tendency evidence made up of both charged and uncharged acts. The trial judge ruled that the jury would be directed that, before they could use the charged acts for tendency purposes, the jury must find that conduct to be proved beyond reasonable doubt. The Court of Appeal refused the Crown leave to appeal. The Crown appealed to the High Court.

Held: Crown Appeal allowed. Matter remitted to County Court Victoria.

The trial judge erred in ruling the jury should be directed that, to use the evidence of the charged acts for tendency purposes, the jury must find those charged acts proved beyond reasonable doubt: at [31]. Such a direction is also precluded by s 61: at [16].

- Tendency is an "intermediate fact" that the prosecution seeks to establish and rely on as circumstantial proof of the elements of the offence. Unless the tendency is an "intermediate fact" which is "indispensable" to proof of guilt, it need not be proved beyond reasonable doubt: at [24]; *Shepherd v R* (1990) 170 CLR 573; *R v Bauer (a pseudonym)* (2018) 266 CLR 56.
- For a tribunal of fact to find that an alleged tendency has been proved to a lesser standard by relying on, inter alia, direct evidence of charged acts, and then deploying that tendency in determining whether the charged acts have been proved beyond reasonable doubt, does not involve circular or incoherent reasoning. It simply means that the jury may consider the same evidence "at different stages of its deliberations with a different onus of proof and for a different purpose: at [26]-[27]; *Decision Restricted* [2023] NSWCCA 119 at [8]–[9]; *JS v The Queen* [2022] NSWCCA 145, *Decision Restricted* [2023] NSWCCA 89; *Decision Restricted* [2023] NSWCCA 119.
- Where the prosecution relies on both uncharged and charged acts to establish an alleged tendency, a single separate tendency direction should ordinarily be given. Such a direction should not direct the jury to make findings in respect of charged conduct, but instead should indicate the evidence relied on to support the alleged tendency, direct the jury to consider whether they are satisfied of the alleged tendency and then advise the jury that, if they are so satisfied, they can use that tendency in considering whether it is more likely that the accused committed the specific offences: **at [37].**

- *Jury Directions Act*: It follows from the express abolition of *Shepherd v R* that ss 61 and 62 remove any doubt about whether a direction can be given to the jury requiring proof beyond reasonable doubt of the facts said to support the existence of a tendency, including charged acts: at [16].

6. **The King v Hatahet [2024] HCA 23**

s 19ALB Crimes Act 1914 (Cth) - prospects of parole not relevant to judicial task of sentencing

Crown (DPP Cth) appeal from NSW. Appeal allowed.

> Section 19ALB of the *Crimes Act 1914* (Cth) provides that parole be refused to a person involved in, or convicted of, certain terrorist-related activities unless the Attorney-General is satisfied that exceptional circumstances exist to justify making a parole order.

The NSWCCA allowed the respondent's sentence appeal for offending involving a 'terrorist act' (s 6(1)(b) *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)). The CCA held it was an error by the sentencing judge not to apply s 19ALB and on re-sentence reduced the respondent's term of imprisonment to reflect that the applicant was unlikely to obtain parole.

The Commonwealth Director of Public Prosecutions appealed to the High Court.

Held: Appeal allowed; reduction in sentence set aside (Gordon A-CJ, Steward, Gleeson; Jagot and Beech-Jones JJ each agreeing in separate judgments).

- The NSW CCA, in allowing the respondent's sentence appeal, erred by taking into account the likelihood that parole would be refused under s 19ALB *Crimes Act 1914* (Cth).
- The prospects of securing release on parole are not relevant to the judicial task of sentencing. The power to grant parole is vested in the executive, not the judiciary. It is too speculative for a judge to make a prediction about the probability of a parole order being made and would lead to outcomes inconsistent with a core object of sentencing, namely, the need to ensure adequate punishment of an offender. Decreasing a sentence because of low probability of parole would also turn the legislative purpose of s 19ALB "on its head": at [16], [21]-[28].
- In exercising the sentencing discretion in accordance with s 16A *Crimes Act 1914*, a sentencing court must not take into account the potential or lack of potential for the offender to obtain parole including by reason of s 19ALB applying (or likely applying) to the offender: at [60] per Jagot J.

7. Cook (a pseudonym) v The King [2024] HCA 26

Prior sexual experience - Criminal Procedure Act 1986, s 293 (now s 294CB) - relevant principles concerning s 293(4).

Appeal from NSW. Appeal allowed, in part.

> Section 293(3) *Criminal Procedure Act 1986* provides that evidence of a complainant's sexual experience, or lack thereof, is inadmissible.
>
> s 293(4)(a) provides that s 293(3) does not apply if the evidence -
>
> (i) is of the complainant's sexual experience or lack thereof, or sexual activity or lack thereof, taken part in by the complainant, at or about the time of the commission of the alleged offence; and
>
> (ii) is of events alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offences was committed.
>
> Section 293(4)(b) permits evidence that:
>
> 'relates to a relationship that was existing or recent at the time of the offence, between the accused and complainant.'

The appellant was convicted of multiple sexual offences. The complainant disclosed to the appellant previous abuse by another uncle in Queensland. The trial judge rejected the appellant's application the evidence was admissible under s 293(4)(b) but permitted him to cross-examine the complainant on the basis that the Queensland conduct be referred to as "physical assaults."

The NSW CCA by majority found the trial judge did not err in excluding the Queensland evidence but allowed the appellant's conviction appeal on a separate ground and ordered a retrial.

In the High Court, the appellant submitted the CCA erred in construction of s 293(4).

Held: Appeal allowed on this ground. The NSW CCA's ruling regarding an error on a separate ground and order for a retrial is undisturbed.

s 293(4)(a)(i) – sexual experience or activity at or about the time of the commission of the alleged offence

- The starting point for any application of s 293(4)(a)(i) is clear identification of the evidence that discloses or implies sexual "experience" *or* "activity" (or lack thereof) - there is an important difference: at [38]. Sexual experience is a characterisation that can persist separately from a sexual act e.g. "virgin", "sex worker", or continuing experience of a survivor of sexual assault: at [39]; *GEH v R* [2012] NSWCCA 150 at [63]–[64].
- Provided the characterisation continues at the time of the alleged sexual offence, the evidence will also usually be evidence of sexual experience "at or about the time of the commission of the alleged prescribed sexual offence": at [40]; *GEH*.
- The Queensland evidence was evidence about the complainant's sexual experience as a survivor of sexual assault: at [41].

s 293(4)(a)(ii) - events alleged to form part of a connected set of circumstances

- The exception in s 293(4)(a) did not apply to the Queensland evidence because s 293(4)(a)(ii) limits s 293(4)(a) to contemporaneous or *"near-contemporaneous events sufficiently integrated with the alleged offending so that the events are part of the circumstances of the alleged occurrence of the sexual offence itself"*. Connected events are not sufficient. s 293(4)(a)(ii) contains an additional requirement that the events must "form part of" the connected set of circumstances "in which" the alleged sexual offence was committed: at [44].

s 293(4)(b) - a relationship existing or recent at the time of the offence, between the accused and complainant

- The NSW CCA majority erred by finding s 293(4)(b) did not apply on the basis there was no relationship between the appellant and complainant. There is insufficient material to identify the nature and scope of the relationship between the complainant and appellant for the High Court to determine applicability of s 293(4)(b).
- The exception in s 293(4)(b) is potentially applicable at a retrial: at [48]-[55].

8. BQ v The King [2024] HCA 29

s 79 Evidence Act – expert evidence

Appeal from NSW. Appeal dismissed.

The appellant was convicted of child sexual offences against two nieces. The issue on appeal was whether opinion evidence given by expert witness Associate Professor Shackel went beyond her area of expertise concerning how victims of child sexual abuse may respond to that abuse and whether that evidence therefore did not meet the test for admission under s 79 *Evidence Act*.

Dr Shackel's PhD was on the use of expert testimony in child sexual assault cases and reviewed the research on how child sexual assault victims respond to their victimisation.

Dr Shackel's evidence to the jury included: "in the context of intrafamilial child sexual assault, the abuse often takes place within the home" and "in the course of everyday activities"; and "one of the strongest risk factors for child sexual assault taking place is opportunity, and that opportunity is linked to families, cohabitation, and the familiarity of the offender to the location."

Held: Appeal dismissed.

- Portions of opinion evidence given by expert witness Dr Shackel did not go beyond her area of expertise concerning how victims of child sexual abuse may respond to that abuse. The evidence was admissible.

9. Steven Moore (a pseudonym) v The King [2024] HCA 30; 414 ALR 161

Interlocutory appeal – standard of appellate review - application of "correctness" standard in reviewing trial judge's decision under s 137 Evidence Act - representations by deceased sexual assault complainant - trial judge correct not to exclude under s 137.

Appeal from Victoria. Appeal dismissed.

The appellant was charged with sexual assault offences against the complainant, who later passed away in unrelated circumstances. The trial judge allowed the prosecution to adduce evidence of "representations" made by the complainant to the police and other persons identifying the appellant as the perpetrator (s 65 *Evidence Act*). The Victorian Court of Appeal upheld the trial judge's ruling not to exclude the evidence under s 137 *Evidence Act*.

In the High Court, the applicant submitted that the Court of Appeal, in an interlocutory appeal, erred in reviewing the trial judge's refusal to exclude the evidence of the representations under s 137 by reference to *House v The King* (1936) 55 CLR 499 principles instead of the "correctness standard".

Held: Appeal dismissed.

- *Applicable standard of review*: The Victorian Court of Appeal was obliged to apply the "correctness" standard as opposed to the principles in *House v The King*: at [3]; [18]; *R v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56; *DAO v The Queen* (2011) 81 NSWLR 568 disapproved.
- *Section 137*: The trial judge was correct not to exclude the evidence under s 137. There was no basis for concluding that inability to cross examine the complainant will substantially affect the ability of the trier of fact to rationally assess the weight to be attached to the evidence of the representations: at [38]-[39].

10. Director of Public Prosecutions v Smith [2024] HCA 32

Meeting between trial judge, complainant and both counsel before complainant gave evidence authorised - s 389E(1) Criminal Procedure Act 2009 (Vic)

Appeal from Victoria. Appeal allowed.

The trial judge directed that the judge and counsel for both prosecution and accused meet with the complainant (aged 16y) before the complainant gave evidence at a "special hearing" pursuant to s 389E *Criminal Procedure Act 2009* (Vic). The meeting took place upon recommendation by a witness intermediary report stating the complainant indicated it would assist her confidence to meet counsel and the judge on the day she gave evidence.

The Victorian Court of Appeal held the meeting was not authorised by s 389E and was inconsistent with the principle of open justice in *Alec (a pseudonym) v The King* [2023] VSCA 208. Therefore the complainant's evidence must be taken at a further special hearing before a different judge.

Held: Appeal allowed.

- The meeting was authorised by s 389E. The subject meeting was distinguishable from the meeting in *Alec* where the judge had met with the complainant "privately" (in the presence of an intermediary, but in the absence of counsel for the prosecution or accused).
- The meeting and admission into evidence of the recording of the special hearing did not constitute a fundamental irregularity. It could not be concluded that a fair-minded observer might reasonably apprehend the judge might not being an impartial mind.

11. Chief Commissioner of Police v Crupi [2024] HCA 34

Adequacy of primary judge's reasons - s 130 Evidence Act

Appeal from Victoria. Appeal allowed.

Section 130 *Evidence Act 2008* (Vic) requires weighing of competing public interests for and against disclosure of information or documents relating to matters of State.

The respondent was charged with murder. The primary judge rejected the applicant's objection to disclosure of documents concerning a police informer on the grounds of public interest immunity under s 130.

Held: Appeal allowed.

- The primary judge's reasons were inadequate. The reasons were extremely brief (five paragraphs). They did not disclose any process of weighing the competing public interests for and against production as required by s 130(1). The judge did not comply with his obligation to give adequate reasons: at [2], [24].
- Even though the primary judge's decision was interlocutory, his Honour was obliged to explain how the balancing exercise was undertaken and what its outcome was. If his Honour undertook the balancing exercise, then his reasons were clearly inadequate in failing to reveal any aspect of how that was undertaken and the result. If, which is less likely, his Honour did not undertake that exercise then his Honour fundamentally failed to apply s 130(1). Either way, his Honour's decision cannot stand: at [23].

12. **The King v ZT [2025] HCA 9**

NSW CCA did not view or listen to recorded evidence from trial - Error in concluding reasonable doubt not capable of being explained away by jury's natural advantages in having listened to recorded evidence

Crown Appeal from NSW. Appeal allowed.

The NSW CCA by majority allowed the respondent's appeal against his murder conviction. The Crown at trial relied on alleged inconsistent admissions in telephone calls and police interviews. Without listening to the recorded evidence, the CCA majority found that the admissions were insufficiently reliable and concluded that the reasonable doubt they held as to guilt was not capable of "being explained away by the natural advantages" held by the jury had in considering the material.

The Crown appealed to the High Court.

Held: Crown Appeal allowed.

- The NSW CCA majority erred in concluding the jury did not have any advantages without listening to a sufficient part of the recorded evidence to identify whether there were any such advantages: at [4]; [52]–[53].
- Several critical aspects of the majority's conclusion that the admissions were unreliable were matters upon which the jury was in a significantly better position to evaluate: the contested contextual meaning of particular words; and whether the respondent was a general fantasist or prone to exaggeration: see at [54]-[55].

M v The Queen (1994) 181 CLR 487

Three aspects of *M v The Queen* should be noted:

- The jury's advantages are not confined to witness testimony but may extend to all the evidence adduced at trial. The existence, nature and scope of those advantages will vary depending on the form in which the evidence was adduced and nature of issues at trial: at [9].
- The appellate court is to give "full allowance" to the advantages of the jury in seeing and hearing the evidence. The advantages may extend to assessment of matters such as: tone and manner witnesses spoke or conducted themselves; maturity; emotional state and intelligence; and how they interact with others: at [10].
- The appellate court undertakes an "independent assessment" in a context of an adversarial process. It is for the parties to identify the evidence that the appellate court must review and assess: at [11].

Pell v the Queen [2020] HCA 12

- Ordinarily, there will be a *real forensic purpose* to the appellate court's examination of a video-recording. Such cases will be *exceptional*. It would be expected that the forensic purpose will be

adopted by the parties, rather than upon independent scrutiny by the court: at [15]-[16], [85]-[86]; *Pell v The Queen* [2020] HCA 12.

- Nothing in *Pell v The Queen* prevents watching and listening to exhibits containing recorded statements, provided there is a "real forensic purpose". It is expected the parties identify whether there is a real forensic purpose; if not, or it is not persuasive, then it is unlikely that the appellate court had any obligation to undertake that task: at [18]-[20].

13. **The King v Ryan Churchill (a pseudonym) [2025] HCA 11**

Evidence of distress of complainant when making complaint

Crown Appeal from Victoria. Appeal allowed.

The respondent was convicted of sexual offences against the child complainant. The trial judge gave a circumstantial evidence direction in relation to evidence of the distress of the complainant when making a complaint to her mother: see at [15]-[17].

The Victorian Court of Appeal allowed the respondent's conviction appeal and quashed his convictions. The Court stated that a distress direction required a trial judge to warn the jury that: "(1) the jury had to be satisfied that there was a causal link between the distress and the alleged offending; and (2) such evidence generally carries little weight."

The Crown appealed to the High Court.

Held: Crown appeal allowed. Set aside order of Victorian Court of Appeal.

- No such directions are required. The Court's error was to assimilate requirements of the *Evidence Act 2008* (Vic) and the *Jury Directions Act 2015* (Vic) with common law requirements regarding corroboration, circumstantial evidence and hearsay. Each of those evidentiary rules has been superseded in Victoria by statute: corroboration by s 164 *Evidence Act*; hearsay by ss 59 and 66 *Evidence Act*. The notion that evidence of distress should only be treated as corroborative evidence if there was no reasonable explanation consistent with innocence has been swept away by ss 61 and 62 *Jury Directions Act*: at [38]-[52].
- Though circumstances might exist in which evidence of distress when making a complaint is not relevant, those circumstances must be rare: at [26]; *Papakosmas v The Queen* [1999] HCA 37. Ordinarily, like evidence of the complaint itself, evidence of distress at time of making a complaint is relevant under s 55 *Evidence Act* as evidence that, if accepted (1) could support the credit of the complainant if the jury were to find a causal connection between distress and making of the complaint, and/or (2) could support the occurrence of the offending if the jury were to find a causal connection between the distress and the offending: at [27].
- The evidence, having been admitted as indirect or circumstantial evidence, is then left to the jury to determine whether to accept it and weight to be given. In appropriate cases the jury may be given a general direction about the drawing of conclusions and the distinction between direct and circumstantial evidence: at [30].

14. **Cherry v Queensland [2025] HCA 14**

'No body-no parole' provision not constitutionally invalid

The High Court held that the "no body-no parole" provision in s 175L of the *Corrective Services Act 2006* (Qld) is not constitutionally invalid. Section 175L provides, if the parole board is not satisfied a "no body-no parole prisoner" (i.e. a prisoner serving imprisonment for homicide where the body of the victim has not been located) has given satisfactory cooperation, the parole board must make a "no cooperation declaration" and the prisoner cannot apply for parole.

NSW has a similar provision under s 135A of the *Crimes (Administration of Sentences) Act 1999* (NSW).

15. **Brawn v The King [2025] HCA 20**

Error or irregularity must be material to establish miscarriage of justice for the purpose of the common form appeal provision - 'test for materiality' - (s 6(1) Criminal Appeal Act 1912 (NSW))

Appeal from SA. Appeal allowed.

In this case, there was a breach of the prosecution's duty of disclosure in the appellant's criminal trial. The High Court held *the error or irregularity was material in the sense that the error or irregularity could realistically have affected the reasoning of the jury to its verdict*. The appellant's child sexual abuse offence conviction was set aside and a new trial ordered.

The principal issue in the High Court was whether a materiality threshold exists for an error or irregularity to amount to a "miscarriage of justice" for the purpose of the common form appeal provision; and if such a materiality threshold does exist, what it is.

Weiss (2005) 224 CLR 300 stated *any* irregularity or departure from trial according to law amounts to a "miscarriage of justice". Other statements have referred to a materiality threshold which must be overcome before an error or irregularity amounts to a miscarriage of justice, although the formulations of that threshold have differed (*Hofer v The Queen* (2021) 274 CLR 351; *Edwards v The Queen* (2021) 273 CLR 585; *HCF v The Queen* (2023) 97 ALJR 978): at [8].

The High Court "harmonised those formulations" – setting out the '*test for materiality'* **at [9]ff.**

'*Test for materiality'*

- To establish a miscarriage of justice it must be shown that the error or irregularity was material in the sense that the error or irregularity could realistically have affected the reasoning of the jury to its verdict. "Could" is understood as meaning "having the capacity to", and "realistically" distinguishes the relevant assessment of the possibility of a different outcome from a possibility that is fanciful or improbable. This threshold to establish that an error or irregularity is material must be satisfied by the appellant, but that burden is not onerous. It does not invite an analysis of whether, but for the error, the accused might or might not have been found guilty: **at [10].**
- The inquiry required by this materiality threshold / test does not collapse into the inquiry for applying the proviso. The question posed by the materiality test looks to the possible effect of the error or irregularity on the trial. In contrast, the task required of an appellate court in applying so much of the proviso that requires it to address the "negative proposition" in *Weiss* (2005) 224 CLR 300, namely by asking whether "the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt ..", is qualitatively different from asking whether an error or irregularity could realistically have affected the jury's reasoning to the verdict of guilty: **at [11].**
- A material error or irregularity will establish a miscarriage of justice warranting the allowing of the appeal subject to any invocation of the proviso. The burden of satisfying the proviso rests upon the prosecution and the proviso, including the negative proposition, is to be addressed by the appellate court in accordance with existing authority, principally *Weiss*. If the burden imposed on the prosecution by the proviso is discharged, the appeal must be dismissed. Otherwise, the appeal must be allowed: **at [16].**

B. SUPREME COURT

Evidence – Murder – Accused's iPhone health app data purporting to show steps taken on the date of and "around the time of the shooting" – evidence excluded.

R v Youseff (No 2) [2024] NSWSC 1260 (McNaughton J)

> J Peter van Zandwijk and A Boztas "The iPhone Health App from a forensic perspective: can steps and distances registered during walking and running be used as digital evidence?" (2019) 28 *Digital Investigations* S126-S133.

The Court excluded evidence adduced by the Crown of a Cellebrite extraction report of the accused's iPhone activity sensor data purporting to contain data showing number of steps taken around the time of

the alleged shooting. The data cannot be said to be an accurate record of the number of steps taken by the person at a time proximate to the time at which they were taken. Accordingly, the data is not relevant (ss 55, 56, 146, 147 *Evidence Act*): at [42].

- The Article, above, examines results from experiments using iPhones whereby people's steps and distance measured by the iPhone was compared to manual tracking data. The study revealed significant variation in the distances registered: at [36].
- This is enough to show that the step count data is not necessarily an accurate representation of steps taken in this case: see at [40]-[42].
- Note the Crown did not call expert evidence where the defence gave late notice only at trial of objection to the evidence.

Children's Court - aggregate control order for multiple offences - 3 year limit applicable only to new order extending term of existing order - ss 33(1)(g), 33A(4) Children (Criminal Proceedings) Act 1987

PD v DPP (NSW) [2025] NSWSC 16 (Basten AJ)

> The Children's Court may make a control order for a period not exceeding 2 years: s 33(1)(g) *CCPA*.
>
> s 33A(4) states that the Children's Court must not make a new control order, or give a direction, if it would require a person to be detained for a continuous period of more than 3 years (taking into account any other control orders).

The Court held the Children's Court erred in sentencing the young person for multiple offences to a 3-year aggregate control order with NPP period of 18 months.

The Children's Court's powers are limited to a 2-year control order under s 33(1)(g). The assumption in the Children's Court that for multiple offences, a control order could be made so long as it did not require detention for a continuous period of more than 3 years on the basis of s 33A(4) is not accepted: at [30]-[32].

The purpose of s 33A is to deal with a second or further control order to be served cumulatively on, or partly concurrently with, an existing control order. The object is to limit the overall effect of two (or more) control orders by preventing a new order, when added, exceeding the 3-year limit: at [32], [36]. Similarly, s 58 *CSPA,* whereby the Local Court may not impose "*a new sentence of* imprisonment to be served consecutively (or partly concurrently and partly consecutively) with an existing sentence of imprisonment" if the effect would be to extend the date beyond the prescribed limit: at [37].

Facial tattoos depicting knives - Judge alone application granted in murder trial

Saliba (No.2) [2025] NSWSC 155 (Hamill J)

The Court granted the accused an application for trial by judge alone where the accused, charged with a stabbing murder, had prominent facial tattoos depicting knives or scythes. There is genuine risk the jury will, even sub-consciously (and despite directions), be inclined to accept the prosecution case more readily for reasons of emotion rather than logic or rational thought. The correlation between the tattoos when considered against nature of the killing and issues at trial (did the accused deliberately stab the victim and what was his intention and belief at that time) is a matter of significance on whether it is in the interests of justice to order a judge alone trial: at [49]-53].

Court Attendance Notice (CAN) can be amended or replaced by prosecutor without leave before hearing - Criminal Procedure Act 1986, s 20 - CAN required only to briefly state the particulars

Marium v Van Zuylen [2024] NSWSC 258 **(Davies J)**

The Court held a prosecutor does not require leave before a Local Court hearing to amend a CAN and is entitled to add further CANs containing further offences. Section 20 *Criminal Procedure Act 1986,* which requires leave to amend an "indictment" after it is presented, does not apply to a CAN because CANs are never 'presented': at [31]-[37].

The Court further held that the Magistrate properly found extensive particulars were provided in the Facts Sheet in the brief of evidence. The latest CAN precisely identifies time, location and date. A CAN is

required only to briefly state the particulars of the alleged offence: ss 50, 275 *Criminal Procedure Act 1986*; *Johnson v Miller* [1937] HCA 77.

C. LEGISLATION

Jury Amendment Act 2024

Commenced 10 March 2025.

Jury Act 1977

- Exemption from jury service: To be exempted/excused from jury service, "other reasons" may include temporary disabilities or other physical and mental conditions: s 14A(d).
- Additional jurors: In criminal proceedings in Supreme and District Court, the Court may order the selection of no more than 3 additional jurors if the nature, likely duration or complexity of proceedings, or any other factor that may result in a juror being discharged during the trial of the proceedings, necessitates the selection of additional jurors: s 19(2).
- Separation of jury: The jury may, subject to a contrary order of the court, separate at any time either before or after retiring to consider its verdict. (The requirement for a court to make such an order is removed): s 54.

Not yet commenced - Replacement jurors:

- A court or coroner may order selection of a replacement juror if, before the judge or coroner gives oral directions to the jury in a trial or coronial inquest, a juror dies or is discharged, provided an order would not give rise to risk of a substantial miscarriage of justice: s 53D.
- If the court orders the selection of a replacement juror and the number of allowed peremptory challenges has already been exhausted, one additional peremptory challenge without restriction may be made by each person prosecuted and the Crown: s 53D(5).
- The Supreme or District Court may order selection of a replacement juror in criminal proceedings even if the Court ordered the selection of an additional juror (under s 19(2)) before the jury was selected: s 53D(6).
- Selection of a replacement juror may be made even if the court or coroner has previously ordered continuation of trial / inquest with a reduced number / remaining jurors and replacement juror: s 53D(7).

Crimes Legislation Amendment (Racial and Religious Hatred) Act 2025

Commenced 2 March 2025.

Crimes Act 1900

- Increased penalties for displaying a Nazi symbol by public act, including graffiti, on or near synagogue, Jewish school or the Sydney Jewish Museum. Maximum penalties: Individual – 200pu or 2y imprisonment, or both; Corporation – 1000pu (ss 93ZA(1AA), 93ZA(5)(a)).

Crimes (Sentencing Procedure) Act 1999

- Insert "partially or wholly" into s 21A(2)(h) to state, "(h) the offence was partially or wholly motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged …". This is to remove doubt where hatred or prejudice is just one of the motivations of an offender (Second Reading Speech).
- The amendment applies to offences committed, and proceedings commenced, before or after commencement of the Act: Sch 2, Pt 36, cl 96(1).

Graffiti Control Act 2008

- For aggravated offence of intentional marking of premises or property, circumstances of aggravation include marking "a place of worship": s 4(6)(c).

- The amendment applies to offences committed after the Act's commencement: Sch 1, Pt 5, cl 5(1).

Law Enforcement (Powers and Responsibilities) and Other Legislation Amendment (Knife Crime) Act 2024

Commenced 9 December 2024.

Summary Offences Act 1988

Increases maximum penalty for sale of a knife to a child under 16 -100 pu, 12m imprisonment, or both (s 11F(1)).

New offence prohibiting sale of knife to child aged 16 or 17 without reasonable excuse. Maximum penalty: 100 pu, 12m imprisonment, or both (s 11F(1A)).

Provides circumstances when it is a reasonable excuse to sell a knife to a child (s 11F(2A)).

Law Enforcement (Powers and Responsibilities) Act

New Pt 4A (ss 45D-45Q) provides for trial of police officers' power to scan persons with hand-held scanners, without warrant, for knives and other weapons in designated areas for maximum 12-hour period.

s 45N: New offence for a person, without reasonable excuse, to fail or refuse to comply with a requirement by a police officer under Pt 4A Div 3. Maximum penalty: 50 pu.

s 45R: Pt 4A expires three years after commencement.

Crimes (Domestic and Personal Violence) and Other Legislation Amendment Act 2024

Commenced 1 December 2024.

Crimes (Domestic and Personal Violence) Act 2007

New s 8(1)(b1): Expands definition of "stalking" to include monitoring or tracking a person's activities, communications or movements-

(i) whether by using technology or in another way, and

(ii) whether or not the monitoring or tracking involves contacting or otherwise approaching the person.

Bail and Other Legislation Amendment (Domestic Violence) Act 2024

Bail Act 2013

Commenced 11 October 2024:

New s 28B: For bail for a serious domestic violence offence, the bail authority is required to impose a bail condition the accused be subject to electronic monitoring unless sufficient reasons exist in the interests of justice.

An accused must remain in custody until fitted with an electronic monitoring device: s 28B(2A).

Commenced 1 July 2024:

s 4(1) Definitions: New definitions inserted of 'intimate partner'; 'domestic violence offence' and 'serious domestic violence offence'

s 16B(1): New (c1) serious domestic violence offences; and (c2) coercive control (*Crimes Act*, s 54D) as offences to which the show cause requirement applies.

s 18(1): Amended to include matters to be considered in bail assessment-

New s 18(1)(d1): behaviour which may constitute domestic abuse under *Crimes (Domestic and Personal Violence) Act 2007*, s 6A(2);

s 18(1)(o): amended to include domestic violence offences, and views of the victim/their family member.

s 40(5): amended to include offences for which bail decision may be stayed in Supreme Court detention application - serious domestic violence offences, coercive control offences (*Crimes Act*, s 54D), and sexual assault offences (*Crimes Act,* Pt 3, Div 10, Subdiv 2).

Transitional provision: The amendments apply to offences committed/charged before the Act's commencement (Sch 3, Pt 5, cl 15).

Crimes Legislation Amendment (Coercive Control) Act 2022

Commencement as indicated.

Crimes Act 1900

Commenced 1 July 2024.

New Div 6A, ss 54C – 54J inserted into Pt 3 *Crimes Act*.

- New s 54D coercive control offence. It is an offence for an adult to engage in a course of conduct that consists of abusive behaviour against a current or former intimate partner, where the adult intends the course of conduct to coerce or control the other person, and a reasonable person would consider the course of conduct would be likely to cause any or all of the following, whether or not the fear or impact is in fact caused—

  (i) fear that violence will be used against the other person or another, or

  (ii) a serious adverse impact on the capacity of the other person to engage in some or all of the person's ordinary day-to-day activities.

  Maximum penalty: 7 years imprisonment.

Transitional provision: Part 3 Div 6A applies only in relation to behaviour that occurred/alleged to have occurred, on or after commencement of the Division: Sch 1[2].

Crimes (Domestic and Personal Violence) Act 2007

Commenced 1 February 2024.

New s 6A provides a meaning of 'domestic abuse', to provide that the coercive control offence, and certain offences in relation to domestic abuse, fall within the definition of domestic violence offence.

Domestic abuse means violent or threatening behaviour, behaviour that coerces or controls, or causes fear for one's safety or wellbeing or that of others. Behaviour that may be 'domestic abuse' includes behaviour that:

- is physically abusive/violent; sexually abusive, coercive or violent; economically/financially abusive;
- prevents one from (i) making or keeping connections with family, friends or culture, (ii) participating in cultural or spiritual ceremonies or practice, (iii) expressing cultural identity,
- otherwise isolates the person;
- deprives, restricts liberty or otherwise unreasonably controls or regulates day-to-day activities.
- may, in the context of the relationship, be constituted by a single act, omission or circumstance, or a combination of acts, omissions or circumstances over a period of time.

Transitional provision, Part 9, cl.25: the amendments apply only in relation to behaviour or an offence that occurred on or after the commencement of the proposed amendment.

***Criminal Code Amendment (Deepfake Sexual Material) Act 2024* (Cth)**

Commenced 3 September 2024.

Amendments apply to material transmitted after 3 September 2024 (regardless of whether the material was created or altered before or after commencement): Sch 1[7].

Criminal Code 1914 (Cth)

New s 474.17A(1) replaces previous s 474.17A (aggravated offences of use carriage service to menace, harass or cause offence by sharing of "private sexual material") with an offence of transmitting sexual material without consent including material created or altered by technology.

The new offence applies where:

- a person transmits sexual material depicting an adult person, using a carriage service, and
- the person knows the person depicted does not consent to the transmission of the material, or is reckless to whether the other person consents.

Maximum penalty - 6 years imprisonment.

The new offences are based on a 'consent' model to better cover both artificial and real sexual material.

Two Aggravated offences apply where a person commits an offence against s s 474.17A(1) and:

- the person transmitting the material is also responsible for creating or altering the material (s 474.17AA(5))
- three or more civil penalty orders were previously made against the person for contraventions under the Online Safety Act 2021 (s 474.17AA(1)).

Maximum penalty - 7 years imprisonment.

Bail and Crimes Amendment Act 2024

Commenced 3 April 2024.

Crimes Act 1900

Performance crime offences - New s154K(1) A person commits a performance crime offence if:

(a) the person's act or omission constitutes a motor theft or breaking and entering offence, and;

(b) the person disseminates material to advertise their involvement in the offence, or the act or omission constituting the offence.

Maximum penalty: The maximum penalty for motor theft offence or B&E offence plus 2 years imprisonment: s 154K(2).

An offender convicted under s 154K cannot also be convicted of a motor theft or B&E offence: s 154K(3).

Section 154K(4) provides relevant definitions:

Break and enter offence: offence under Pt 4, Div 4 *Crimes Act*.

Motor theft offence: ss 154A, 154C or 154F *Crimes Act*.

Bail Act 2013

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

New s 22C: Bail must not be granted to a young person (aged 14 or more but less than 18: s 22C(6)) for a relevant offence if alleged while on bail for another relevant offence, unless the bail authority has a high degree of confidence the person will not commit a serious indictable offence whilst on bail: s 22C(1).

Section 22C(6) provides definitions:

Motor theft offence: ss 154A, 154C or 154F *Crimes Act*.

Relevant offence: motor theft offence, serious B&E offence, or performance crime offence (s 154K) if the underlying offence is a motor theft offence or serious B&E offence.

Serious break and enter offence: offence under Pt 4, Div 4 *Crimes Act* with maximum penalty of 14y imprisonment or more.

Serious indictable offence: As per s 4(1) *Crimes Act*.

Section 22C is repealed on 1 October 2026: s 22C(5).

Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023

Commenced 29 January 2024.

Amends *Criminal Procedure Act 1986* to expand throughout NSW:

- the pre-recorded evidence program for children in prescribed sexual proceedings to give evidence in a pre-recorded evidence hearing in the absence of the jury.
- the use of witness intermediaries whose role is to facilitate the communication of, and with, a witness if the witness is less than 16, or is 16 or more years of age and the Court is satisfied the witness has difficulty communicating.

Previously, the Child Sexual Offence Evidence Pilot Scheme applied only in the District Court in the Downing Centre, Sydney and Newcastle.

Transitional provisions

Contained in new Part 44. The previous CSOEP scheme continues to apply to prescribed proceedings already commenced before commencement of the new provisions: Part 44, Clause 120.

New ss 294E-S, Division 1A, Ch 6, Pt 5 *Criminal Procedure Act*

Main provisions include:

New Div 1A, applies to "prescribed sexual offence proceedings" (defined in *CPA* s 3) where a complainant or prosecution witness is giving evidence, and is:

- less than 18 at that time, or
- was less than 18 at the time the accused was committed for trial or sentence (even if they are now an adult): s 294E.

s 294E - expanded definition of a 'witness' to specifically include a complainant or prosecution witness who was under 18 when the accused was committed for trial or sentenced but has since become an adult.

s 294G - unless the Court makes an order to the contrary, the evidence of a child who is a complainant or prosecution witness must be given at a pre-recorded evidence hearing.

- The primary factor to be considered by the Court in determining whether to make an order under 294G(1)(a) are the wishes and circumstances of the witness (s 294G(3)).
- Discretionary factors to be considered by the Court in determining whether to make a contrary order including availability of court and facilities (previously a primary factor), preparation time of the parties, and availability of counsel (s 294G(4)).

s 294H - a pre-recorded evidence hearing must be held as soon as practicable after the date listed for the accused's first appearance in the Court in the proceedings, but not before the prosecution's pre-trial disclosure required by s 141.

s 294I – Manner in which evidence is taken and heard at the pre-recorded hearing, including:

- the witness is entitled to give evidence in chief as provided by s 306U and other evidence by audio visual link
- hearing must take place in the absence of the jury
- accused must be able to see and hear the evidence and communicate with their legal representative during the recording
- it does not matter whether or not the judicial officer presiding is the same judicial officer presiding at the proceeding at which the recording made is viewed or heard
- it does not matter if, while the pre-recorded evidence hearing is conducted, the judicial officer, legal representative, accused, witness and witness intermediary are at different places appearing by audio visual link.

s 294J - the accused and legal representative must be given reasonable access to a recording, however, are not entitled to possession of the recording or a copy. The Court may order a transcript be supplied to the Court or jury.

ss 294L-N – make provision and clarifies the role of witness intermediaries.

- To communicate to the court whether the witness can understand questions put to them, and explain to the court and the person asking questions the best way a witness can be asked questions that the witness can understand (s 294L).
- A person must not be appointed as a witness intermediary, if they have assisted the witness in a professional capacity, other than as a witness intermediary, unless the court, in the interests of justice and on its own motion or on the application of a party (ss 294M(5), (6)).

s 294O – Warnings. The Court must:

- inform the jury it is standard procedure to give evidence by a pre-recording or to use a witness intermediary in the proceedings, and
- warn the jury not to draw an inference adverse to the accused or to give the evidence greater or lesser weight because the evidence was given by a pre-recording or a witness intermediary was used.

Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Act 2023 (Cth)

Commenced 8 January 2024.

Amends *Crimes Act 1914* and *Criminal Code Act 1995* to:

- Establish new criminal offences for public display of prohibited Nazi symbols and performance of the Nazi salute in a public place; and trading in goods that bear a prohibited Nazi symbol: ss 80.2E – 80.2M, penalty 12 months imprisonment.
- Establish new criminal offences for public display and trade of symbols that a terrorist organisation, or members, use to identify the organisation: ss 80.2E – 80.2M, penalty 12 months imprisonment.
- Establish criminal offences for using a carriage service for violent extremist material and possessing or controlling violent extremist material obtained or accessed using a carriage service: ss 474.45A-D, penalty 5 years imprisonment.

Criminal Code Act 1995

- Expand the offence of advocating terrorism in s 80.2C to include instructing on, and praising the doing of, a terrorist act in specified circumstances; and increase the maximum penalty from 5 to 7 years imprisonment.

Criminal Code Act 1995 and *Legislation (Exemptions and Other Matters) Regulation 2015*

- remove the sunsetting requirement for instruments which list terrorist organisations and bolster safeguards.

Crimes Amendment (Prosecution of Certain Offences) Act 2023

Commenced 1 January 2024.

Crimes Act 1900

Amends s 93Z by removal of requirement for the Director of Public Prosecutions to approve any prosecution for an offence against s 93Z. Section 93Z makes it an offence for a person to, by public act, intentionally or recklessly threaten or incite violence towards another person or group of persons on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.