CRIMINAL LAW UPDATE 2023

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PUBLIC DEFENDERS' CRIMINAL LAW CONFERENCE

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2. DIRECTIONS

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5. PARTICULAR OFFENCES

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Crimes (Domestic and Personal Violence) Act 2007, ss 72, 72A - application to vary or revoke an AVO applies only to unexpired AVOs - Wass v DPP (NSW); Wass v Constable Wilcock [2023] NSWCA 71

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6. APPEALS

Five-judge bench – judge's refusal of application for disqualification based on bias an "interlocutory order or judgment" - s 5F(3) Criminal Appeal Act 1912 - Maules Creek Coal Pty Ltd v Environment Protection Authority [2023] NSWCCA 275

Pre-recorded evidence of child witnesses – judge's refusal of leave to recall child witnesses not an "interlocutory judgment or order" - s 5F(3) Criminal Appeal Act 1912 - Sch 2, Cl 87(3)(b) Criminal Procedure Act 1986 - PJ v R [2023] NSWCCA 105

Jurisdiction of CCA to entertain second application for leave to appeal where first application refused - extension of time refused - s 10(1)(b) Criminal Appeal Act 1912 - Gould v R [2023] NSWCCA 103

Where fitness to be tried not raised at the trial and first raised on appeal – test in R v RTI (2003) 58 NSWLR 438 continues to apply - Roberts v R [2023] NSWCCA 187

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Basis for challenging factual findings by trial judge on conviction appeal - alleged error in reasoning does not raise issue under "first limb" but is capable of raising separate issue under "third limb" s 6(1) Criminal Appeal Act 1912 - EE v R [2023] NSWCCA 188

Legal principles - whether jury verdict unreasonable or cannot be supported by evidence - Russell v R [2023] NSWCCA 196

7. OTHER CASES

Drug Court terminated applicant's program - constructive failure to exercise jurisdiction in s 10 and s 10(1)(b) Drug Court Act 1988 - Cooper v DPP (NSW) [2023] NSWCA 65

Child Protection (Offenders Registration) Act 2000 - juvenile offender - possess child abuse material, s 91H(2) Crimes Act 1900 - whether offender a "registrable person" - whether possession of child abuse material is an offence "committed against" a person - Commissioner of Police, NSW Police Force v TM [2023] NSWCA 75

Whether arrest reasonably necessary - Law Enforcement (Powers and Responsibilities) Act 2002, s 99 - AD v State of NSW [2023] NSWCA 115

8. BAIL

Section 77(1) Bail Act - police officer may take actions to enforce bail requirements - Bugmy v DPP (NSW) [2023] NSWSC 862

Crown detention application to CCA following grant of bail by Supreme Court - relevant principles for determining whether cause has been shown – Bail Act 2013, ss 16A, 50(1), 67(1)(e) - Decision Restricted [2023] NSWCCA 287

A. HIGH COURT

Intensive correction order - failure to comply with s 66(2) CSPA amounted to jurisdictional error - Stanley v Director of Public Prosecutions (NSW) [2023] HCA 3; 296 ALJR 107; 407 ALR 222

Combination of extended joint criminal enterprise at common law and constructive murder - Mitchell v The King [2023] HCA 5; 97 ALJR 172; 407 ALR 587

Break and enter dwelling-house - appellant joint tenant - "break and enter" must involve trespass - person with lawful authority to enter premises not liable for "break" - BA v The King [2023] HCA 14; 97 ALJR 358

Children - presumption for incapacity - doli incapax - RP v The Queen (2016) 259 CLR 641- BDO v The Queen [2023] HCA 16; 97 ALJR 377

Inquiries into convictions - federal offences - Crimes (Appeal and Review) Act 2001 (NSW) can be picked up by Judiciary Act 1903 (Cth), s 68 so as to apply to a conviction for a federal offence - Attorney-General (Cth) v Huynh [2023] HCA 13; 97 ALJR 298

Expert evidence at common law – expert opinion – s 79 Evidence Act 1995 - Lang v The Queen [2023] HCA 29; 97 ALJR 758

Jury misconduct – juror conducted internet research – no miscarriage of justice - HCF v The Queen [2023] HCA 35; 97 ALJR 978

"a party" in s 135(a) Evidence Act 1995 includes a co-accused in a joint criminal trial - McNamara v The King [2023] HCA 36

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EAGP case conference obligations – s 76 Criminal Procedure Act 1986 - Elwood v Director of Public Prosecutions [2023] NSWSC 772 (Davies J)

EAGP – commencement and transitional provisions - R v Tiriaki [2023] NSWSC 1480 (Rothman J)

Accused detainee to appear by audio-visual link (AVL) for sentencing proceedings - Indigenous cultural values and principles - s 5BB Evidence (Audio and Audio Visual Links) Act 1998 - R v Knight (No 1) [2023] NSWSC 195 (Yehia J)

Committal proceedings - extension of time to file charge certificate beyond six month statutory time limit - Zahed v Director of Public Prosecutions (NSW) [2023] NSWSC 368 (Hamill J)

Appeal from Local Court to Supreme Court - s 53(3)(a) Crimes (Appeal and Review) Act 2001 - not available to Commissioner of Police - Commissioner of Police, NSW Police Force v Alahmad [2023] NSWSC 762 (Garling J)

C. LEGISLATION

Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023

Crimes Legislation Amendment (Coercive Control) Act 2022

Voluntary Assisted Dying Act 2022

Crimes Amendment (Prosecution of Certain Offences) Act 2023

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

Criminal Legislation Amendment (Knife Crimes) Act 2023

Crimes Legislation Amendment (Assaults on Retail Workers) Act 2023

CRIMINAL LAW UPDATE 2023 CASES

SENTENCE

1. GENERAL

Intensive Correction Order (ICO) - Stanley v DPP (NSW) [2023] HCA 3 – domestic violence related offence - s 66 CSPA

Zheng v R [2023] NSWCCA 64

The CCA allowed the applicant's appeal against sentence of full-time imprisonment (wounding reckless as to actual bodily harm, s 35(4) *Crimes Act 1900*) and resentenced the applicant to a lesser term of imprisonment to be served by ICO: at [261].

The applicant stabbed her husband thinking there was a cover on the knife, causing a small wound.

Five points emerge from the High Court decision in *Stanley v DPP (NSW)* [2023] HCA 3: at [281]-[286].

1. Power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2) *CSPA*. The issue is not merely the risk of reoffending, but the narrower risk of reoffending in a manner that may affect community safety (*Stanley* at [72], [75]).
2. s 66(2) is premised upon the view that the risk of reoffending may be different depending upon how the sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention will most effectively promote community safety (*Stanley* at [74]).
3. The nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending (*Stanley* at [75]).
4. Consideration of community safety required by s 66(2) is undertaken in a forward-looking manner having regard to risk of reoffending (*Stanley* at [74]).
5. While community safety is not the sole consideration, it will usually have a decisive effect unless the evidence is inconclusive (*Stanley* at [76]).

Applying the forward-looking approach in *Stanley* to the evaluative exercise of whether community safety as the paramount consideration, together with the subordinate considerations in s 66(3), warrant full-time detention or an ICO, the Court is satisfied that the risk of reoffending in a manner that may affect community safety would be better reduced by an ICO for the following reasons:

1. the assessment report assessed risk of reoffending as "Medium-Low";

2. the sentencing judge found the applicant was not violent or anti-social and assessed prospects of rehabilitation as good;

3. compliant with onerous bail conditions over four years, including non-contact with complainant; and

4. the standard supervision condition of an ICO (s 72(2)(a)) is more likely to promote the applicant's rehabilitation, given her major depressive disorder: at [291].

The CCA further found exceptional circumstances do not to require any additional condition under s 73A(2) if the sentence was directed to be served by way of an ICO: see at [288]-[290].

Prohibition on power to make an ICO for domestic violence offences

Sections 4A and 4B *CSPA* prohibit an ICO for domestic violence, which includes reckless wounding in the context of this case.

> Section 4A provides that full-time imprisonment or a supervised order must be imposed for a domestic violence offence unless a different option is more appropriate.
>
> Section 4B(1) provides an ICO must not be imposed unless the court is satisfied the victim, and any person with whom the offender is likely to reside, will be adequately protected.

As to s 4A, the applicant did not contend for a different sentencing option than a supervised order, an ICO. As to s 4B, the Court is satisfied that the complainant will be adequately protected by an ICO and there is no safety issue regarding the older son (a prosecution witness): at [294]-[295].

ICO – federal offences – s 3A CSPA 1999 (NSW) and s 16A Crimes Act 1914 (Cth)

Chan v R [2023] NSWCCA 206

The CCA considered when a court, in considering an ICO for federal offences, is to have regard to the general purposes of sentencing set out in s 16A *Crimes Act 1914* (Cth) and s 3A *CSPA* 1999 (NSW). Sections 16A and 3A are not sufficiently similar that it makes *no* difference which one a judge has regard to: at [104].

The CCA held that that when considering an ICO for federal offences,

- the first two steps (determining whether a sentence of imprisonment is required, and if so the length of that term) require a sentencing judge to have regard to s 16A *Crimes Act 1914* (Cth).
- the third step (when considering whether to impose an ICO), require a judge to have regard to s 3A *CSPA* 1999 (NSW). There are *mandatory* considerations in s 66 *CSPA*. Section 66(3) requires the court must have regard to the purposes of sentencing in s 3A even when sentencing a federal offender: at [79], [100].

The sentencing judge made the following errors-

- considered s 16A factors instead of s 3A factors at the third step: at [101]-[116]; and
- made a positive finding about community safety in s 66(2) but failed to state that she was giving it 'paramount consideration' (s 66(1)) or to disclose why she was satisfied that other sentencing principles were more important. This leaves open the inference that the judge did not have regard to it in the manner required by s 66(1): at [147]-[148].

ICO – aggregate not to be reduced by period on remand rather than backdated to date of arrest so that aggregate less than 3 years – s 68(3) CSPA

DG v R (No 1) [2023] NSWCCA 320

> Section 68(3) *CSPA* states that an ICO must not be made where the aggregate sentence exceeds 3 years.

The applicant was sentenced to an aggregate term of 3 years 6 months imprisonment, NPP 2 years 4 months. He had been in pre-sentence custody for 1 year.

On appeal, the applicant submitted that the judge ought to have considered whether to reduce the term to 2 years and 6 months commencing on the day the sentence was pronounced and give credit for 1 year pre-sentence custody, instead of backdating the sentence to commence on the day of arrest; and then whether to order that the sentence, being less than 3 years, be served by way of an ICO (s 7).

The CCA dismissed the appeal.

A judge must first determine whether there is any alternative to a term of imprisonment; if not, then how long the term should be "without regard to whether the sentence will be immediately served or the manner in which it is to be served": at [12]; *R v Zamagias* [2002] NSWCCA 17; *Zheng v R* [2023] NSWCCA 64 at [270]-[272].

Where a period on remand is referable to the offence for sentence, credit is given by backdating pursuant to ss 24(a) and 47(3) *CSPA*, not by shortening the term with commencement on the date of sentencing. Where an aggregate sentence of more than 3 years is appropriate and the offender has served presentence custody, it is an impermissible exercise of the sentencing discretion to reduce the term to 3 years or less, with a commencement date that is not backdated, for the purpose of satisfying s 68(3) and facilitating an order that the shortened sentence be served by ICO: at [20], [25].

Five judge bench - standard non-parole period, s.61M(2) Crimes Act 1900 – increased 8-year SNPP does not apply retrospectively to offences pre-1 January 2008

AC v R [2023] NSWCCA 133

A five-judge bench held, by majority (Bell CJ, Adamson JA, Ierace J, Chen J agreeing; Beech-Jones CJ at CL contra), that for s 61M(2) offences committed before 1 January 2008, the correct SNPP is 5 years, not the increased 8-year SNPP. The sentencing judge incorrectly applied the 8-year SNPP instead of the 5-year SNPP for the applicant's offences committed between 1987 and 2007.

The Court followed the Court's earlier decision in *GL v R* [2022] NSWCCA 202 where the majority judges had arrived at the same conclusion in relevantly identical circumstances.

In 2007, the SNPP for s 61M(2) was 5 years.

From 1 January 2008, the SNPP was increased to 8 years with retrospective effect - Cl 57, Sch 2, *CSPA*.

In 2018, s 25AA *CSPA* (rep) commenced.[1] Section 25AA(2) provided the SNPP to be applied is the SNPP that applied "at the time of the offence, not sentencing."

Cl 91, Sch 2 - the transitional provision for the 2018 amendments - provides that the SNPP Table as in force prior to the 2018 amendment continued to apply in respect of offences against s 61M(2) committed before the 2018 amendment.

The Court held:

- s 25AA(2) prevails over cl 57, being later in time and extraordinarily clear in its language: at [59]–[61]; *Shergold v Tanner* (2002) 209 CLR 126.
- there is no necessary inconsistency between s 25AA(2) and cl 91. Clause 91 does not in terms qualify s 25AA; it is simply a statement to the effect that a Table continues to apply for a s 61M(1)-(2) offence committed before the 2018 amendments: at [63]-[64], [68].
- Section 25AA is not subject to cl 91. Transitional provisions are important and must be given effect according to their terms. However, absent extremely clear language, a transitional provision would not be expected to limit the scope or operation of a very clearly drafted substantive provision introduced into the Act at the same time: at [68]-[70].

'Moral culpability' – 'objective seriousness' - extent to which matters personal to offender might impact on assessment of objective seriousness

R v Eaton [2023] NSWCCA 125

The CCA discussed the "vexing issue" of the interaction between assessment of the 'objective seriousness' of an offence and the concept of 'moral culpability'; and subsidiary controversy of the extent to which matters personal to an offender might impact on the assessment of objective seriousness. There is often blurring of terminology and conflation of concepts: at [45].

The Crown appealed the respondent's sentence for aggravated dangerous navigation causing death. The CCA held the sentencing judge erred in reducing objective seriousness by reference to matters personal to the respondent; however, dismissed the Crown appeal in its residual discretion.

- While there are occasions where matters personal to an offender may impact on assessment of objective gravity, those occasions require more than a simple or indirect causal connection between the relevant subjective feature of the case and offending. Here, a traumatic and deprived childhood had a substantial and profound impact on moral culpability but did not impact on objective criminality of the conduct and its consequences: at [49]; *DS v R; DM v R* (2022) 109 NSWLR 82; *Bugmy v The Queen* (2013) 249 CLR 571.

- The references to 'moral culpability' in *R v Whyte* - the 2002 guideline judgment for dangerous driving occasioning death - were references to 'objective criminality' of the offending. This Court has since clarified that 'moral culpability' and 'objective seriousness' are different concepts. The sentencing judge's use of 'moral culpability' in the context of submissions concerning the guideline judgment was at times used synonymously with 'objective gravity'. This was understandable but apt to cause confusion: at [56].

[1] Sub-sections 25AA(1), (2) and (4) *CSPA* have been repealed and replaced by s 21B (from 18.10.2022 by the *Crimes (Sentencing Procedure) Amendment Act* 2022). The main change is that s 25AA was limited to *child sexual offences*, whilst s 21B applies to *all offences*. Like s 25AA, ss 21B requires a court to sentence an offender according to sentencing patterns and practices at the time of sentencing, not the time of the offence (s 21B(1)), and that the standard non-parole period is the one that applied at the time of the offence, not sentencing (s 21B(2)).

Absence of specific reference to reduced 'moral culpability' – appeal dismissed

TA v R [2023] NSWCCA 27

The CCA dismissed the applicant's appeal, where the applicant submitted the judge failed to make findings on whether childhood deprivation and mental health reduced moral culpability. Absence of specific reference to "moral culpability" did not diminish the comprehensive nature of sentencing remarks. The judge considered all relevant matters and the applicant's background was fully referred to. Sentencing remarks must be read as a whole. Conflicting purposes of punishment are the matters which are of substance, and if properly addressed, it is not essential for a judge to expressly use the phrase "moral culpability": at [81]-[86]; *Egan v R* [2017] NSWCCA 206 at [37]; *Prince v R* [2020] NSWCCA 268 at [47].

Mental health – failure to assess impact on moral culpability

Richards v R [2023] NSWCCA 264

The CCA allowed the applicant's appeal on the ground the sentence judge failed to consider the applicant's mental health at the time of the offence and their impact on moral culpability.

It was unchallenged that the applicant suffered from the mental health issues. There was an issue about whether there was a causal link between them and the offending. However, the sentencing judge noted the evidence without saying how it was used in reaching sentence, and that the applicant was "not an inappropriate medium for general deterrence" with no reasons for that conclusion. The judge noted the expert report that the applicant's mental health was related to Family Court proceedings. It was incumbent on the judge to make an assessment of whether or not those mental health issues impacted on moral culpability and, if so, to what extent, where the issue had squarely been raised in submissions. This was not an ex-tempore judgment delivered at the conclusion of the sentence hearing: at [40]-[45].

Assessment of objective seriousness - no obligation to place offending at a particular point on a scale or use adjective to describe seriousness of offending

In these cases, the CCA dismissed the appeals where it was submitted the sentencing judge erred by making no express assessment of objective seriousness.

In ***Su v R*** [2023] NSWCCA 207, involving Commonwealth offences, the CCA said a judge is not required to fix offence seriousness on a scale of "low", "mid-range" or "high". It is only for a State offence with a standard non parole period that a court is obliged to fix an offender's position in relation to the middle of a range of seriousness (s 54A(2) *CSPA*). While error does not arise from fixing objective seriousness on a scale for an offence without a standard non parole period, it is neither necessary nor desirable (*R v Harris* [2015] NSWCCA 81 at [57]). The correct approach is to identify and assess factors relevant to objective seriousness and take them into account as an essential element of the process of instinctive synthesis (*Bresnahan v R* [2022] NSWCCA 288): at [69].

In ***Kochai v R*** [2023] NSWCCA 116, under a heading "Objective Seriousness", the judge listed relevant *factors* over which there was no dispute. The only dispute was where on the "scale" of objective seriousness the combination of those factors landed. As there is no requirement to make such a finding, that the judge identified all (uncontested) factors relevant to objective seriousness meant that there was transparency as to the basis upon which the applicant was sentenced: at [46], [50]-[52]; [61]-[62]; *DH v R* [2022] NSWCCA 200.

In ***R v Walker*** [2023] NSWCCA 219 the judge did make an express assessment after being invited to do so by counsel. The judge appropriately engaged with submissions by the parties, and her findings were open. When parties are not far apart on the issue of objective seriousness, scrutinising a judge's placement of an offence on a hypothetical range is usually unhelpful in determining error: at [56]-[57]; *R v Sharrouf* [2023] NSWCCA 137 at [274].

Failure to backdate sentence to account for pre-sentence custody - practice of only telling judge of pre-sentence custody in years or months unhelpful and should be eschewed

Mattiussi v R [2023] NSWCCA 289

The applicant was bail refused on the index offences. Before trial, he was sentenced for unrelated offences to 1 year 2 months imprisonment, NPP 9 months. That sentence expired and his 5-month parole period was not revoked.

The CCA found the sentencing judge was led into error where the parties did not include the 5-month parole period for the unrelated offences in the pre-sentence custody as referable to the index offences. The 5-month period should have been regarded as a period of custody solely referable to the index offences. The CCA re-sentenced the applicant, backdating the sentence by 6 months: at [7], [47], [51]-[53], [57]; ss 126, 158 *Crimes (Administration of Sentences) Act 1999*; ss 24, 47 *CSPA 1999*.

> A court must take into account any time the offender has been held in custody in relation to the offence: s 24(a) *CSPA*.
>
> A sentence may be taken to commence on a day before the sentence is imposed and in deciding whether to do so a court must take into account any time for which the offender has been held in custody: s 47 *CSPA*.
>
> Section 158 *CASA* provides an offender subject to a sentence of 3 years or less, for which a non-parole period has been set, is taken to be subject to a parole order directing release on parole at the end of the non-parole period if eligible for release in accordance with s 126:- that s/he has served the non-parole period of a sentence and is not subject to any other sentence, is not required to be kept in custody in relation to a Commonwealth offence, and is not a Commonwealth post sentence terrorism or NSW post sentence inmate.

Here, the only circumstance that prevented the applicant's release was being bail refused for the index offences. That was not a matter in s 126 that qualified entitlement to be on a statutory parole order: at [41].

It was open to the judge to backdate the sentence to the date the applicant was bail refused for the index offences, having regard to the 9 months NPP served for the unrelated matters; and in applying the totality principle, to consider that the sentence could be backdated to a date on or between the date he was bail refused and the date 9 months later: at [54].

Need for simplicity in providing information as to pre-sentence custody

The practice of *only* telling a judge that there was a period of pre-sentence custody of years, months or days is unhelpful and should be eschewed.

The only thing that matters is the date to which a sentence should be backdated. In some cases, it might be a range of dates that should be considered, depending upon how the totality principle is to be applied. That is an essential matter of which the judge should be informed in addition to any information about actual period of custody: at [70]-[73].

Immigration detention - backdating commencement of sentence

Marai v R [2023] NSWCCA 224

The applicant was sentenced for Commonwealth offences. The CCA held the judge failed to provide reasons for not taking into account the period where the applicant was on bail but held in immigration detention, when that matter had been raised in the sentence proceedings as a significant matter to be taken into account: at [7], [91].

The CCA said that it is not clear that the relevant statutory provisions (below), which refer to persons held "in custody", were intended to encompass immigration detention, although courts have interpreted them to that effect: at [102]; see cases discussed at [65]-[76].

> A State law which allows for time in custody "for an offence" to be taken into account applies to a federal offence: s 16E *Crimes Act 1914* (Cth).
>
> A court must take into account any time the offender has been held in custody in relation to the offence: s 24(a) *CSPA* (NSW).
>
> In deciding when a sentence should commence, the court must take into account any time the offender has been held in custody in relation to the offence: s 47(3) *CSPA*.
>
> The court may direct that a sentence of imprisonment is taken to have commenced on a day occurring before the day on which the sentence is imposed: s 47(2) *CSPA.*

The CCA found that although ss 24(a) and 47(3) *CSPA* mandate that a court **must** take into account time spent in custody "in relation to the offence", the broader discretion in s 47(2) is not so circumscribed. A sentencing discretion should be exercised fairly and reasonably: at [84].

The period in immigration detention should be treated as referable to the offence. The commencement of sentence should be backdated pursuant to the general discretion in s 47(2), by the whole of the time in immigration detention: at [95]-[100].

Backdating commencement of sentence by more than actual time spent on remand to take into account conditions and occurrences while offender on remand

Kljaic v R [2023] NSWCCA 225

The sentencing judge found that the applicant, whilst on remand, sustained extra-curial punishment due to factors including Covid-19 restrictions and lockdowns. The judge took these factors into account in backdating the sentence by a further 30 days in addition to 199 days of pre-sentence of custody. The applicant appealed, submitting that the sentencing discretion miscarried and he should be resentenced.

Dismissing the appeal, the CCA said that ss 24(a) and 47(3) *CSPA* should not be construed so as to limit the words "any time" in the phrase "any time for which the offender has been held in custody in relation to the offence" only to the duration of pre-sentence custody so that occurrences or conditions during that period cannot be taken into account. The ordinary construction of "time" naturally includes what occurred, or conditions experienced, during that event or events: [21]-[22], [36].

Uncredited time in custody - wrongful imprisonment on unrelated charges – no basis for departing from existing position in NSW

Dib v R [2023] NSWCCA 243

The applicant was sentenced for a federal drug offence. The applicant had spent 5 ½ years in custody following an unrelated conviction for murder of which he was subsequently acquitted on appeal. The applicant submitted the sentencing judge erred in not backdating his sentence to take into account this uncredited time of 5 ½ years in custody.

The CCA dismissed the appeal. It is well established in NSW that an offender will not be given quantified reductions to take account of periods spent in custody other than those referable to the offence(s) for which the sentence is to be imposed and neither will sentences be backdated to achieve the same result: at [52]; *R v Niass* (CCA (NSW), 16 November 1988, unrep); *Hampton v R* (2014) 243 A Crim R 193; *SY v R* [2020] NSWCCA 320, considered. There is not a contrary "common law principle" or sentencing practice established in other States or Territories which would lead this Court to reconsider or depart from that authority: at [53]-[104].

Further, this is a federal offence. Sections 16E(2), (3) *Crimes Act 1914* (Cth) permit the court to reduce or backdate a sentence or non-parole period to reflect time spent in custody "*for* the offence" for which the offender is being sentenced (emphasis added), but do not say anything of pre-sentence custody attributable to other offences: at [84], [88].

Error to post-date sentence where serving revoked parole for unrelated sentence – s 47(5) CPSA

Primmer v R [2023] NSWCCA 301

The applicant was on parole for an unrelated offence when he committed the index offence. At time of sentence, his parole for the unrelated offence had been revoked and he was serving a balance of parole period.

On appeal, the Crown conceded that the sentencing judge erred in imposing an order that the sentence commence on a date (22.9.2022) after the date he imposed sentence (1.7.2022), contrary to s 47(5) *CSPA* which provides that a court may not direct a sentence commence on a day after the day on which the sentence is imposed, if a person is serving a sentence of imprisonment of which the non-parole period has expired and s/he is still in custody under that other sentence. The CCA ordered the sentence to commence on 12.10.2021, taking into account delay and that parole had been revoked due to commission of the subject offence. The appropriate commencement date would be closer to the time the applicant entered his plea of guilty (12.10.2021), part way between the commencement of his balance of parole period (September 2020) and the commencement date chosen by the sentencing judge: at [51]-[52]; [60] *White v R* (2016) 261 A Crim R 302.

Covid-19 - failure to take into account impact of pandemic on custodial imprisonment – where raised at sentence and judge indicated would take judicial notice

PH v The Queen [2023] NSWCCA 176

Error was established where the applicant at sentence specifically raised the impact of COVID-19 restrictions on their experience in custody and the sentencing judge said they would take judicial notice of its impact, but made no reference to it in remarks.

The mere fact that a specific matter is not mentioned in remarks on sentence is not of itself a ground to demonstrate error (*Church v R* [2012] NSWCCA 149). However, where the applicant specifically raised the impact of COVID-19 restrictions on his experience in custody and the judge said she would take judicial notice of its impact but did not mention the factor at all, the only available inference is that it was overlooked: at [53]-[55].

There may be cases in which, on a fair reading of remarks, this Court can conclude that the sentencing judge had regard to a relevant factor even though not expressly considered. This is not one of those cases. The onerous conditions imposed on a person in custody during the COVID-19 pandemic is a relevant factor on sentence (*McKinnon v R* [2020] NSWCCA 106): at [54].

See also ***Nunez v The Queen*** [2023] NSWCCA 136 at [80].

Remorse – denial of procedural fairness - s 21A(3)(i) CSPA requires offender to provide (not give) evidence of remorse - continued reliance on Qutami (2001) 127 A Crim R 369 questionable

Carl v R [2023] NSWCCA 190

The applicant was denied procedural fairness where the Crown conceded genuine remorse based on the applicant's reports and written submissions, but the sentencing judge found "limited remorse" without affording the applicant an opportunity to be heard. The applicant was entitled, given the Crown's concession, to proceed on the basis genuine remorse was established: at [85]; authorities cited.

The sentencing judge was troubled that the applicant did not *give* evidence from the witness box. Section 21A(3)(i) *CSPA* requires an offender to *provide* evidence they have accepted responsibility for their actions - this is not a requirement they *give* evidence of remorse before remorse can be given full weight as a mitigating factor: at [78]-[80]; *Butters v R* [2010] NSWCCA 1 at [16]–[17]; *AH v R* [2020] NSWCCA 279 at [73].

Untested out-of-court statements by offenders to third parties - *Qutami v R* (2001) 127 A Crim R 369

The Crown's reliance on *Qutami v R* (2001) 127 A Crim R 369, that untested out-of-court statements made by offenders to third parties are to be treated with caution where the offender does not give evidence about the issue, is misconceived as the complaint here is denial of procedural fairness not weight given to remorse: at [82].

Continued reliance upon *Qutami* is questionable. The general observations made by Smart AJ in *Qutami* are not statements of principle: at [83]; *Lloyd v R* [2022] NSWCCA 18 at [43]–[46].

Fail to take into account custody being more onerous due to mental health - where raised at sentence

Ney v R [2023] NSWCCA 252

The applicant was sentenced for murder. The CCA allowed the appeal on the ground that the sentencing judge failed to take into account impact of custody on the applicant's mental health. The applicant made both written and oral submissions at sentence, referring to custody being more onerous for the applicant due to mental health, supported by the expert evidence and not challenged by the Crown: at [69], [71]-[73].

Beech-Jones J observed that there is nothing in the legislative regime that makes every component of a party's submission, per se, a matter the sentence judge is obliged to take into account. Ultimately, it may turn on the argument raised and the significance of the point to the party's overall case: at [3].

In this case, failure to address this issue may be characterised as an error by failing to take into account a material consideration in accordance with *House v The King* (1936) 55 CLR 499: at [2]-[5], [75].

The judge took into account four of the five principles concerning the effect of an offender's mental health for sentencing purposes, as set out in *De La Rosa* (2010) 79 NSWLR 1. Taking the sentencing reasons at face value, the judge did not consider whether the mental condition, which he found affected the applicant by his acceptance of the diagnoses of the expert witness, might have had a mitigatory effect by reason of the applicant's experience in custody being more onerous. While the *De La Rosa* principles may not all point in the same direction in a given case, given the judge accepted the expert's diagnosis, it was an error to have failed to disclose how this was considered on sentence: at [69], [71]-[76] (Campbell J), [113] (Weinstein J agreeing).

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

The applicant was sentenced for obtain financial advantage by deception (s 134.2(1) *Criminal Code 1995* (Cth)). At sentence proceedings, the applicant did not give evidence and tendered a psychiatric report without objection. The Crown accepted the applicant's major depressive disorder had impaired decision-making. The sentencing judge found the applicant's mental health condition did not reduce moral culpability to a significant degree. On appeal, the applicant submitted she was denied procedural fairness in respect of the sentencing judge's findings regarding her subjective case.

The CCA dismissed the appeal. There was no denial of procedural fairness:

- At no stage did the sentencing judge give any indication that he would not draw an adverse inference, except in relation to the issue of where the fraudulent funds went. 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 matters contained in an expert report simply because it is tendered without objection or cross-examination. The onus is on the applicant to persuade the sentencing judge on the balance of probabilities of the position in the expert report. The sentencing judge considers all of the evidence, not just the report. Where there was conflicting evidence in the agreed facts and medical evidence tendered by the applicant, it is not surprising that the sentencing judge was *not* satisfied on the balance of probabilities that the applicant's position was as outlined in the expert report: at [59]–[62].

The CCA distinguished *Edmonds v R* [2022] NSWCCA 103. In *Edmonds*, the CCA found a denial of procedural unfairness where, at sentencing, a psychological report was tendered by the applicant without objection, the sentencing judge indicated he was "not in a position to reject the version of events given by the offender" and it was unnecessary for defence counsel to address on the content of report – but the judge subsequently made adverse findings: see at [41]-[48].

Children - obligation to consider whether to suspend control order where applicant submitted available and appropriate course - Children (Criminal Proceedings) Act 1987, s 33(1B)(a)

ZXT (a pseudonym) v R [2023] NSWCCA 222

The CCA held the judge erred by failing to consider, pursuant to s 33(1B)(a) *Children (Criminal Proceedings) Act 1987*, whether to suspend a control order imposed under s 33(1)(g). The judge was obligated to do so where the applicant had submitted that this would be an available (and appropriate) course. Section 33(2) prohibits imposition of a control order under s 33(1)(g) unless the court is satisfied it would be wholly inappropriate to impose an order under s 33(1)(a)-(f). The judge addressed s 33(2), but did not refer to s 33(1B)(a) leading to the inference that whether to suspend the sentence was not considered. The sentencing discretion miscarried: at [44]- [46], [60].

2. MITIGATING FACTORS

Child sexual offences - error not to take good character into account where not active use of good character - s 21A(5A) CSPA 1999

Bhatia v R [2023] NSWCCA 12

Section 21A(5A) *CSPA* provides that in sentencing for a child sexual offence, good character is not to be taken into account as a mitigating factor if it assisted in the commission of the offence.

The CCA allowed the applicant's appeal for sexual intercourse with child under 10 (s 66A(1) *Crimes Act 1900*). The sentencing judge erred in finding the applicant's good character allowed access to the complainant and that s 21A(5A) applied. However, the applicant was a family friend years before the complainant was born and there was nothing to suggest he befriended the family to gain access to the child. Neither parent gave evidence that the applicant's character played any role in their decision to allow him to babysit: at [141]-[143].

Application of s 21A(5A) turns on the facts of each case. Reference in the Second Reading Speech for s 21A(5A) to "misusing perceived trustworthiness and honesty" suggests active use of good character, of which there was no evidence: at [144]-[146].

Advanced age - principles in Gulyas v Western Australia [2007] WASCA 263; (2007) 178 A Crim 539

Liu v R [2023] NSWCCA 30

The applicant was sentenced for causing GBH with intent to murder (s 27 *Crimes Act 1900*). The CCA dismissed the applicant's sole appeal ground that the sentencing judge failed to apply principles regarding advanced age in *Holyoak v R* (1995) 82 A Crim R 502 at 507 and Steytler P in *Gulyas v Western Australia* [2007] WASCA 263; (2007) 178 A Crim 539 at [54].

The only decision the judge was referred to was *R v Mammone* [2006] NSWCCA 138, where special circumstances based on advanced age and a degree of ill health reduced the NPP to 60 percent of the head sentence, which the judge did. The judge had regard to advanced age as a mitigating factor as required by the law, and which had a real and direct effect on sentence: at [46]-[48].

The principles in *Gulyas* are not capable of mechanical application. There is no principle that advanced age leads automatically to imposition of a lesser sentence than the objective circumstances require: at [40]. The principles as set out in *Gulyas* -

(1) Where moral culpability is reduced by advanced age (which inevitably mean age coupled with some consequence e.g. age related mental impairment), allowance should be made.

(2) Where there is sufficient evidence that circumstances associated with advanced age (e.g. continuous ill health, or ill health with physical or mental frailty) will make imprisonment more arduous than is normal, allowance should be made.

(3) Account may be taken of hardship out of knowledge that lengthy imprisonment is likely to destroy any reasonable expectation of useful life after release. However, punishment must still reflect the crime.

(4) Deterrence and denunciation are important even in advanced age. However, where age justifies a more lenient sentence, the public will understand why the sentence is less severe and purposes of deterrence and denunciation will still be served. However, to be achieved, punishment must still reflect seriousness of the crime.

Advanced age and ill-health - unforeseen onerous custodial conditions during COVID-19 pandemic

Valentine v R (No 2) [2023] NSWCCA 189

The applicant, aged 82 with medical conditions, was sentenced in 2019 for historical sexual assault offences. Following a successful conviction appeal on one count, the applicant stood to re-sentenced for remaining offences.

The CCA took into account the impact of the Covid-19 pandemic to hold that some greater reduction is now appropriate where the offender has spent three years in custody in conditions which were not only far more onerous, but which would have impacted more heavily on a man of his age and ill health than they would on less vulnerable members of the prison community: at [22].

These impacts are heightened stress and anxiety from risk of infection in an elderly man with serious health issues, lengthy periods of lockdown, and no visitors permitted for 9-12 months. Whilst there is a limit to which such circumstances can reduce the minimum appropriate period of custody, each case must be addressed by its particular circumstances: at [9]-[13]; [17]; *McKinnon v R* [2020] NSWCCA 106.

Bugmy v The Queen (2013) 249 CLR 571 - latent error in relation to Bugmy factors - application of Bugmy principles have no bearing upon assessment of objective seriousness

Chandler v R [2023] NSWCCA 59

The CCA, by majority (N Adams J; Hamill J agreeing with additional reasons; Beech-Jones CJ at CL dissenting on manifest excess ground), allowed the applicant's sentence appeal against manslaughter on the ground of manifest excess. The applicant, aged 22, drove through a fence killing an 18-month-old child whilst evading police. The sentencing judge found the applicant had a dysfunctional upbringing and suffered mental health issues.

Manifest excess: latent error in regard to *Bugmy* factors

The manifest excess ground was upheld based on a combination of four factors (the first three concerned the sentence and comparative cases): see at [99].

The fourth factor concerned latent error in relation to *Bugmy* (2013) 249 CLR 571. There was a causal connection between the offence and offending. When there *is* evidence of such a connection there can be no doubt moral culpability is reduced (*R v Millwood* [2012] NSWCCA 2 at [69]).

There is *latent* (as opposed to patent) error as it is not apparent that reduction in moral culpability is reflected in the starting point of 20 years' imprisonment for manslaughter where the judge found moral culpability only modified "to an extent", that dysfunctional background operated "to a degree" to compromise capacity to mature and learn from experience and that it was still necessary to keep in mind the need for protection of the public: per N Adams J at [150]-[151].

Application of *Bugmy* principles have no bearing upon assessment of objective seriousness

The judge did not err in assessment of objective seriousness. The argument that moral culpability was reduced on account of *Bugmy* necessarily affected the judge's assessment of objective seriousness as the "gravest type" is rejected. The application of *Bugmy* principles have no bearing upon the assessment of objective seriousness: at [48]-[49]; [81]; [90]; *DS v R; DM v R* [2022] NSWCCA 156.

Bugmy Bar Book - relevance in sentencing proceedings of generalised research on effects of background of disadvantage

Baines v R [2023] NSWCCA 302

The CCA allowed the applicant's sentence appeal for murder on the ground that the sentencing judge erred in finding no causal connection between the applicant's deprived background and offending, and failing to mitigate sentence (*Bugmy v The Queen* (2013) 249 CLR 571): at [71]-[76].

A separate appeal ground was that the judge erred in expressly disregarding the *Bugmy Bar Book*. While not strictly necessary, the Court considered this Ground given the issue will arise in resentence, and the Bugmy Bar Book will be sought to be used in future cases: at [77].

Simpson AJA (McNaughton JJ agreeing) dismissed this appeal ground. The Bugmy Bar Book may qualify as "expert evidence", that is, "expert knowledge" drawn from academic research capable of assisting a sentencing judge to understand specific evidence about circumstances of a particular offender, placed in a wider context: at [77]-[91]. It is not possible to draw any general conclusions about the usefulness of its content. In some cases, it may lay the foundation for acceptance of the relevance of evidence of an offender's personal circumstances. In another, general propositions may assist in understanding an offender's background. In this case, there was ample evidence to establish deprived background. The Bugmy Bar Book added little. It was not established that the judge's treatment of the Bugmy Bar Book materially affected the sentencing decision: at [91]-[98].

Dhanji J dissented on this Ground, stating that if the evidence had no relevance to the sentencing exercise the judge would have been right to disregard it. However, the evidence was capable of bearing on determination of sentence. The material supported the possibility that background had a role in decisions leading to the offence, and of assisting in understanding the basis for the psychologist's opinion of a causal link between background and offending. It is possible that, had the report been read in conjunction with the material, the judge would have been more inclined to accept that opinion: at [131], [149]-[151].

Family hardship – federal offenders - sole ground of appeal based upon Totaan v R [2022] NSWCCA 75 – appeal dismissed

AE v R [2023] NSWCCA 74

The applicant (drug importation) was sentenced pre-*Totaan v R* (2022) 108 NSWLR 17 which held that s16A(2)(p) *Crimes Act 1914* (Cth) did not require there to be exceptional hardship to family and dependents before the probable effect on them of a sentence imposed on a federal offender could be taken into account.

The CCA found that the sentencing judge failed to apply the principle in *Totaan* and the judge's discretion miscarried, however, no less severe sentence is warranted in law. Whilst the judge did not find exceptional hardship, the judge did not fail to take the relevant evidence into account: at [52]-[55].

N Adams J (Button J agreeing) observed it should not be presumed that in *every* such application where an offender has been sentence pre-*Totaan* that, error having been conceded, a less severe sentence will be warranted: at [57].

Post-offence good character of little weight - distinction between lack of further convictions and finding that offending behaviour ceased

Richards v R [2023] NSWCCA 107

The applicant was sentenced for historical child sexual offences committed between 1969-1985. He had no recorded convictions for offences committed after 1986. He had been previously sentenced for unrelated child sexual offences committed from 1966-1987.

The CCA held the sentencing judge did not err in finding that: "there is very limited evidence of otherwise good character in the years after the offences were committed and it is a matter of very little weight."

The weight to be given to post-offence good character fell within the judge's discretion and varies according to all the circumstances: at [81]; authorities cited.

The applicant is entitled to have taken into account in mitigation that he has no further convictions recorded after 1986. However, this does not mean that the Court ought to infer that there was none. To be sentenced on the basis that the offender *ceased* the offending conduct at a particular time is a matter in mitigation, to be proved on the balance of probabilities (*The Queen v Olbrich* (1999) 199 CLR 270 at [27]). If there is no evidence, the Court may neither sentence on the basis that the offending conduct has continued nor that it has ceased: at [82]-[87].

Unlikely to re-offend - s 21A(3)(g) CSPA – failure to take into account where issue addressed in unchallenged written submissions

Li v R [2023] NSWCCA 112

The applicant's appeal was allowed on the basis the sentencing judge failed to take into account the applicant's likelihood of re-offending pursuant to s 21A(3)(g) *CSPA*. A psychologist report found a "low risk of re-offending" and the issue was addressed in unchallenged written submissions. A finding that the applicant was unlikely to re-offend was open: at [45], [49]-[50].

The judge made no reference to likelihood of re-offending. It could not be inferred that the judge, having considered the material, was not satisfied that the offender is unlikely to re-offend: at [43]-[50]; cf. *Meoli* [2021] NSWCCA 213 where absence of any reference to unlikelihood of re-offending was explained by absence of submissions, and there was no evidence to support a finding of unlikely to re-offend.

The judge's finding of "reasonable prospects of rehabilitation" (s 21A(3)(h)) is separate and distinct from likelihood of re-offending (*TL v R* [2020] NSWCCA 265 at [369]). Reasons are required to make evident that relevant factors have been taken into account, particularly where evidence is relied on and submissions made: at [40]-[42], [46].

Children – 15-year-old offender – fail to have regard to young age in assessing moral culpability and weight given to general deterrence

TM v R [2023] NSWCCA 185

The sentencing judge failed to take into account the applicant's young age (15 years) in assessing moral culpability, and the weight to be given to general deterrence, for aggravated robbery causing grievous bodily harm (s 96 *Crimes Act 1900*): at [6]-[63]; [75]-[76]. The appeal was allowed and the applicant re-sentenced.

Failure to take into account young age when assessing moral culpability

Moral culpability and objective seriousness are separate but related concepts: at [55]; *R v Eaton* [2023] NSWCCA 125 at [45]; *DS v R; DM v R* (2022) 109 NSWLR 82.

The remarks do not reveal whether young age was taken into account in assessment of moral culpability. The judge referred to age and s 6 *Children (Criminal Proceedings) Act 1987*. None of the principles in s 6 directly address the concept of moral culpability: at [56]-[57].

The judge made a finding that moral culpability was high but did not have regard to whether the applicant's immaturity, poor self-regulation, and reduced capacity for consequential thinking, as a result of young age, may have impacted upon moral blameworthiness. The only reference was that deprived background reduced moral culpability "to an extent". A young offender's moral culpability may be reduced by a combination of factors which may include a background of dysfunction and youth, two separate considerations: at [62]-[65].

In assessing moral blameworthiness, the judge was required to take into account particular features relating to young age which were directly relevant to moral culpability because they did not involve any of the indicia of mature decision-making: at [66].

Failure to have regard to young age when considering general deterrence

General deterrence is encapsulated in the judge's remark that the sentence "has to be an example to others". Accepting the need to articulate remarks in a way to be understood by a 16-year-old, it was still necessary to articulate how, if at all, general deterrence was moderated, and the importance of rehabilitation: *KT v R* (2008) 182 A Crim R 571; *BP v R* (2010) 201 A Crim R 379; *Sarhene v R* [2022] NSWCCA 79.

Children - 16-year-old offender - fail to make findings in subjective case - s 16A(2)(m) Crimes Act 1914 (Cth) - doing an act in preparation for a terrorist act

AH v R [2023] NSWCCA 230

> Section 16A(2)(m) *Crimes Act 1914* (Cth) mandates that a sentencing court take into account (if relevant and known to the court) "character, antecedents, age, means and physical or mental condition".

The applicant, aged 16 at the time of the offence, was sentenced for doing an act in preparation for, a terrorist act (*Criminal Code 1995* (Cth), ss 101.6(1), 11.5(1)). The CCA allowed the applicant's appeal on the ground that the sentencing judge failed to have explicit regard to the mandatory considerations in s 16A(2)((m) of the applicant's prior good character and failed to make any finding as to whether and, if so, to what degree moral culpability was reduced by youth and/or mental illness: at [68], [78]; *Patel v R* [2022] NSWCCA 93; (2022) 366 FLR 314 at [52], [80].

A significant amount of material was put before the judge relevant to the applicant's subjective case, but was summarised in a few paragraphs at the conclusion of reasons with no separate heading or how the material bore on moral culpability: at [69].

The judge noted the principle that in terrorist cases general deterrence and denunciation "must be given primacy above the ameliorating effect of youth". However, it is not clear that the judge made any finding as to the degree to which the applicant's youth ameliorated the weight to be attributed to general deterrence and denunciation given it was "a live issue". No reference was made to s 6 *Children (Criminal Proceedings) Act* nor relevant principles concerning the sentencing of children: at [73]–[75]. The applicant was re-sentenced.

No extra-curial punishment – named in media and social media

Melville v R [2023] NSWCCA 284

The applicant, convicted for child sexual abuse, submitted he "suffered a campaign of harassment" via e-mail, social media and media, and that the sentencing judge erred by finding this did not amount to extra-curial punishment.

The CCA dismissed the appeal. Extra-curial punishment is "some serious loss or detriment" suffered as a punishment for committing the offence, other than the punishment imposed by a court: at [80]; *R v Daetz; R v Wilson* (2003) 139 A Crim R 398; *Silvano v R* (2008) 184 A Crim R 593.

Whilst each case is assessed on its facts, the courts have generally resisted that public denunciation that often follows conviction for criminal conduct of itself is extra-curial punishment: at [82].

Being named in media and social media does not, without more, constitute extra-curial punishment: at [87]. Evidence of "extra-curial punishment" here was limited. There was no evidence of public opprobrium and "pillorying" in the media that might enliven considerations of extra-curial punishment. The matters were directed at informing others of crimes in another State, and stopped when undertakings were given by the two protagonists. The applicant returned to business, was regarded favourably, and established a home with his wife. The applicant mistakes ordinary consequences of crime (e.g, loss of employment, diminution of reputation, disapproval of friends and associates) for a punishment that goes beyond that of the imposition of sentence. Such matters may be of significance as part of the subjective case: at [83]-[85].

3. AGGRAVATING FACTORS

Crown appeal – sexual offences – dissemination offences – substantial harm - s 21A(2)(g) CSPA 1999

R v Packer [2023] NSWCCA 87

The applicant was sentenced for multiple sexual intercourse without consent offences and dissemination offences of recording, threaten to distribute and distribute intimate image (ss 61I, 91R(2), 91Q(1), 91P(1) *Crimes Act 1900*). The Nepalese complainant stated in her Victim Impact Statement (VIS) that sexual assault victims are not accepted in Nepal, she had lost family support and could not return to Nepal.

The CCA allowed the Crown appeal. The sentencing judge failed to take into account that emotional harm suffered by the complainant was substantial pursuant to s 21A(2)(g), whether in relation to each of the offences ([110] per Davies J, Wilson J agreeing), or to the aggregate sentence ([11]-[16]) per Simpson AJA).

The sentencing judge declined to do so on the basis that he could not tie the emotional harm to any of the individual offences and wished to avoid 'double counting.' The CCA said that the purpose of s 21A(2)(g) is that for some offending the injury, emotional harm, loss or damage goes beyond what could ordinarily be expected and amounts to substantial injury or harm. No double counting is involved: at [82].

Regarding the dissemination offences, that some were offences of 'threatening' does not alter the offences being aggravated by s 21A(2)(g). The complainant was considerably harmed by the threats to the extent that she did what the respondent required because of fear that her family would find out.

Regarding the intercourse without consent offence, although on one approach the substantial harm was caused by distribution of the intimate image, the evidence at trial and in the VIS made clear that the reason for the substantial harm was the fact that the complainant's family and friends became aware of her sexual relations with the respondent. It is artificial to distinguish the sexual intercourse counts from the circumstances of their being recorded and distributed: at [84]-[85].

s 21A(2)(k) CSPA -'position of authority' as part of the instinctive synthesis – no De Simoni error

Kilby v R [2023] NSWCCA 247

The applicant submitted the sentencing judge fell into *De Simoni* error ((1981) 147 CLR 383) in describing the applicant's position of authority as an "aggravating feature" for offences under ss 66C(1), 61N *Crimes Act 1900*. The applicant submitted that the aggravated offences (then s 66C(2), s 61O) provide a circumstance of aggravation of the victim being 'under authority.' Section 21A(2)(k) *CSPA* provides a factor of statutory aggravation of 'abuse of a position of trust or authority'.

The CCA dismissed the appeal. The judge did not breach *De Simoni*. A factual feature of an offence, like 'position of authority', can be considered as part of the instinctive synthesis without being treated as proof of a more serious offence or of statutory aggravation under s 21A(2). Reference to an "aggravating feature" was *not* a specific phrase used to pick up factors of statutory aggravation under s 21A(2). The judge's reference to "the position of authority" is clearly distinguishable from a conclusion that the aggravating feature in s 66C(2) and s 61O, or s 21A(2)(k), had been made out: at at [44]–[46]; [49]–[52], [54].

s 21A(2)(k) CSPA - abuse of a position of trust or authority – De Simoni error established

HA v R [2023] NSWCCA 274

The applicant was sentenced for sexual intercourse with person under 10 (s 66A(1) *Crimes Act 1900).* The CCA held the sentencing judge erred in finding that the complainant was "under the offender's authority at the time", in addition to the applicant being in a position of trust. The judge relied on matters which fell within the more serious aggravated offence under s 66A(2) in breach of *De Simoni* (1981) 147 CLR 383: at [112].

A number of matters distinguish the present case from cases where there is no analogous *De Simoni* error in the sentencing judge taking into account that an offender was in a position of authority or trust in relation to the victim: at [93]-[110]; ***Kilby v R*** [2023] NSWCCA 247 (above); *Rainbow v R* [2018]

NSWCCA 42, *Cordeiro v R* [2019] NSWCCA 308, *Burr v R* [2020] NSWCCA 282, discussed and distinguished.

- the judge found that the victim was "under authority" at the time, in the precise terms of the circumstance of aggravation under s 66A(3)(d).
- the judge made findings both as to "position of trust and the special relationship between the offender and the victim" *and* as to the complainant being "under the authority at the time" of the offending. The judge took both matters into account.
- The judge's findings went beyond the parties' submissions and cannot be read merely as an adoption of their submissions.
- the sentencing remarks cannot be construed as merely reflecting a finding, in ordinary parlance, as to the applicant having been in breach of a position of trust. The finding that an aggravating feature additional to position of trust was that the complainant was under authority at the time goes well beyond that.
- the judge was not cautioned to avoid making any finding as to a circumstance of aggravation for the purposes of s 66A(2).

4. DISCOUNTS

Discount for promised assistance in respect of unrelated offending

Owens v R [2023] NSWCCA 198

Section 23 *CSPA* relevantly provides:

> 23 Power to reduce penalties for assistance provided to law enforcement authorities
>
> (1) A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.
>
> (2) In deciding whether to impose a lesser penalty for an offence …, the court must consider the following matters—
>
> ……
>
> (i) whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence,

The CCA allowed the applicant's sentence appeal for one count of murder and two unrelated firearm offences. The sentencing judge had applied a discount of 38% to the indicative sentence for the murder – made up of the applicant's guilty plea (25%) and assistance to authorities (13%). Only the discount for the guilty plea (25%) was applied to the indicative sentences for the two firearms offences.

The CCA held the judge erred in applying s 23(2)(i) *CSPA* by proceeding on the wrong principle that the offender was not "entitled" to any discount for assistance in respect of the firearms offences as the assistance promised was not "relevant" to those offences as the assistance promised was only in respect of the unrelated offence of murder. The provisions of s 23(1) establish that a lesser penalty or discount may be imposed because of assistance not only in relation to "the offence concerned" but also in relation to "any other offence". The assistance does not have to be "relevant", or related, to the offence for which the offender is being sentenced before a discount can be applied: at [81].

On re-sentence, the combined discount of 38% for assistance was applied to all offences: at [94].

EAGP - guilty plea "as soon as practicable" after being found fit to be tried – ss 25D(5)(a), 25D(6) CSPA

Stubbings v R [2023] NSWCCA 69

> A 25% discount applies if the offender pleaded guilty as "soon as practicable" after being found fit to be tried: s 25D(5)(a) *CSPA*.
>
> In determining whether the offender pleaded guilty "as soon as practicable", the court is to take into account whether the offender had a "reasonable opportunity" to obtain legal advice and give instructions to their legal representative: s 25D(6).

The applicant was found fit for trial. He received a 10% discount as his plea of guilty was entered more than 14 days before trial. The applicant appealed, submitting that the sentencing judge's finding that

his plea was not entered "as soon as practicable" occasioned a miscarriage of justice. The applicant sought to rely on a solicitor's affidavit stating that the applicant gave instructions to offer a plea to a lesser charge.

The CCA refused the affidavit and dismissed the appeal.

The meaning of "as soon as practicable" and "reasonable opportunity"

After an offender is found fit following committal, whether s/he pleaded guilty "as soon as practicable" within s 25D(5)(a) is to be evaluated from the point of view of the offender.

As required by s 25D(6), the determination takes into account a period of time which, viewed objectively, is appropriate or suitable in the circumstances of the particular case for the offender to obtain legal advice and give instructions: at [51].

Leave to rely upon affidavit / new evidence refused

The affidavit is "new" evidence, rather than "fresh" evidence, because it was available, but not used, or in the exercise of reasonable diligence it could have been obtained at the time of sentence: at [36].

The affidavit concerned difficulties the legal representatives had in obtaining access to the applicant, time spent on plea negotiations with the Crown and obtaining an expert report: at [45].

The explanation for the non-production of such evidence is incomplete. The affidavit does not disclose whether the solicitor was aware of the s 25D(5) discounts, that he discussed these provisions with trial counsel, and whether he and/or counsel formed the view the applicant was not entitled to a higher discount because he had not pleaded guilty "as soon as practicable": at [45]-[46].

On the hypothesis that such evidence is admitted on appeal, the applicant has not shown procedural irregularity in the sentencing proceedings. The new evidence, circumstances and mandatory consideration in s 25D(6) show that the plea was not entered as soon as practicable: at [56].

EAGP - no reference to discount for guilty plea - failure to take into account plea of guilty or how applied – s 25F(7) CSPA

Borri v R [2023] NSWCCA 166

The CCA allowed the applicant's appeal (child sexual assault offences) on the grounds that the sentencing judge failed to take into account the applicant's plea of guilty and failed to comply with the requirement under s 25F(7) *CSPA* to indicate to the offender, and to record – "when passing sentence" – whether the sentencing discount was applied and how the sentence imposed was calculated.

When delivering judgment, the judge did not say whether he was taking the applicant's plea of guilty into account or that he had reduced the indicative sentences by the applicable sentencing discount in Pt 3 Div 1A *CSPA*: at [16], [35]-[45].

On some occasions, the Court has inferred that the discount had been applied. Uncertainty as to whether a discount is provided for a plea of guilty will generally warrant the Court's intervention and that the sentencing discretion be exercised afresh: at [39]-[41]; cases discussed.

The judge's statement that the applicant pleaded guilty does not equate to the provision of a sentencing discount. The arithmetic in relation to 15 of the 26 indicative sentences raised further doubts of the discount being applied. There is a significant doubt that the applicant received the benefit of entering his plea of guilty in the Local Court: at [39]-[40], [53].

s 22A CSPA 1999 – administration of justice not facilitated in fact by judge-alone or mode of trial

Dukagjini v R [2023] NSWCCA 210

The applicant submitted on appeal that as he was tried by judge-alone, he was entitled to a discount for the facilitation of the administration of justice pursuant to s 22A *CSPA*.

The CCA dismissed the appeal. Section 22A *CSPA* is discretionary in nature and to proceed by way of judge-alone trial will not *require* sentencing judges to reduce the sentence: at [4], [14], [18], [20], [25]-[26]; *Christov v R* [2009] NSWCCA 168.

Judge-alone trial does not necessarily result in efficiencies or savings. The issue depends not on *why* the applicant opted for judge-alone trial but *whether* his conduct of the trial in whatever form it proceeded facilitated the administration of justice. Section 22A emphasises "the degree to which the administration of justice has been facilitated *by the defence*": at [13]-[15].

5. PARTICULAR OFFENCES

Maintain unlawful sexual relationship with child – assessment of objective seriousness not reasonably open – application of principles in Burr v R [2020] NSWCCA 282 - s.66EA Crimes Act 1900

JG v R [2023] NSWCCA 33

The CCA held that in sentencing for maintain unlawful sexual relationship with a child under the current s 66EA *Crimes Act 1900*, the factors in *Burr v R* [2020] NSWCCA 282 for a s 66EA offence pre-1 Dec 2018 are still relevant, even though the earlier form of s 66EA required at least three occasions on separate days whereas the current s 66EA requires only two or more sexual acts at any time: at [67]; *GP (a pseudonym) v R* [2021] NSWCCA 180 at [64].

The factors in *Burr v R* include: the number and nature of sexual offences, ages of victim and age differential, period of time offences were committed and their context, position and abuse of trust, violence, coercion, threats, and/or admonitions as to non-disclosure: at [48].

The CCA allowed the applicant's appeal. The sentencing judge's assessment of objective seriousness was outside the proper exercise of discretion. The CCA observed that the judge was given limited assistance in relation to the assessment of objective seriousness and the admittedly small number of cases from this Court which assist on the question of objective seriousness: at [57], [69], [72]-[73].

Domestic violence - appropriate use of s 10A CSPA must be rare

R v Sharrouf [2023] NSWCCA 137

The appropriate use of s 10A *CSPA* (conviction with no penalty recorded) in a domestic violence offence must be rare: at [188].

The CCA allowed the Crown appeal against imposition of a s 10A for four assault offences by the respondent, who had also been sentenced to full-time imprisonment for sexual assault and attempted choking. The aggregate sentence was manifestly inadequate: at [227].

Legislative provisions emphasise the seriousness of domestic violence offences:

- ss 4A(1), (2) *CSPA* provide the court must impose full-time detention or a supervised order when sentencing for a domestic violence offence unless a different sentencing option is more appropriate.
- s 4B provides for protection and safety of victims in regard to intensive correction orders.
- s 4A(2) requires reasons for departing from full-time detention or supervised order.

The sentencing judge did not provide reasons for application of s 10A. Further, the respondent's subjective case did not justify the application of s 10A: at [190], [193].

Specially aggravated kidnapping in company occasioning actual bodily harm, s 86(3) Crimes Act 1900 - applicant did not foresee co-offender would inflict grievous bodily harm - degree of injury taken into account in assessing objective seriousness

Rahman v R [2023] NSWCCA 148

The CCA dismissed the applicant's sentence appeal for two counts of specially aggravated kidnapping in company occasioning actual bodily harm (s 86(3) *Crimes Act 1900*). The applicant had organised the offences to take place. Where the applicant did not foresee that the co-offender would bring a gun and inflict grievous bodily harm, the sentencing judge did not err taking into account the extent of the injury with regard to objective seriousness, but declining to take it into account as an explicit aggravating feature under s 21A(2)(g) *CSPA*: at [69], [80].

The injury was an objective feature of the offending of the offence. Actual bodily harm was an element of the offence (s 86(3)(b)) for which the applicant explicitly took responsibility by way of plea of guilty. Further, there was no "greater" offence (e.g. detention in company with infliction of *grievous* bodily harm) to engage principles of *The Queen v De Simoni* (1981) 147 CLR 383: at [77].

ICO not available for Commonwealth 'minimum non-parole' offences

Homewood v R [2023] NSWCCA 159

The applicant was sentenced to full-time imprisonment for advocating terrorism (s 80.2C *Criminal Code 1995* (Cth)), which is a "minimum non-parole offence" (s 19AG). The applicant submitted on appeal the sentencing judge erred in declining to impose an ICO.

The CCA dismissed this ground. An ICO is not an available sentencing option for Commonwealth 'minimum non-parole" offences.

A court in not permitted "to pass a sentence, or make an order, that involves detention or imprisonment" in respect of a minimum non-parole offence: ss 20AB(1), (6) *Crimes Act 1914* (Cth).

This means that a court in sentencing for a minimum non-parole offence cannot make an order of a type such as an ICO if, in order to do so, it first determines that a sentence of detention or imprisonment is the appropriate sentence: at [69]; s 20AB(1AA).

An ICO is a sentence or order that "involves" imprisonment for the purposes of s 20AB(6): at [6].

Terrorism – fail to consider s 19ALB Crimes Act 1914 (Cth) which prevents parole orders for 'terrorist act' unless exceptional circumstances exist - principles regarding relevance of executive decisions

Hatahet v R [2023] NSWCCA 305

> Section 19ALB *Crimes Act 1914* (Cth) requires that, absent special circumstances, the Attorney-General must not make a parole order for a person convicted of an offence involving terrorist acts.

The applicant was sentenced for offending involving a 'terrorist act' (engage hostile activity in a foreign country, s 6(1)(b) *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)). Section 19ALB was not raised at the sentencing proceedings. On appeal, evidence showed that the Attorney-General had refused to make a parole order with respect to the applicant, and that the established practice of the Attorney was not to make such parole orders: at [47].

The applicant appealed on the ground that the sentence was manifestly excessive.

The CCA allowed the applicant's appeal. Although application of s 19ALB was not raised with the sentencing judge, and no account was taken of s 19ALB for that reason, that failure was nevertheless an error in principle.

The CCA discussed principles regarding relevance of executive decisions (at [49]-[78]):

- While it is a well-established principle that a sentencing court is precluded from taking into account the likelihood of early release on licence or parole, this principle is protective and prevents a sentence being extended to allow an appropriate period of supervision in the community: at [50]; authorities cited.
- It is a further well-established principle that an offender should not be refused the benefit of parole where likely to be deported upon release: at [74]-[75]; authorities cited.
- However, it is also a well-established principle that a court will have regard to the likely circumstances attending incarceration, and evidence that an offender is likely to face more onerous conditions than other offenders: at [52]; authorities cited.

Fixing a non-parole period for a person who has no realistic possibility of release is likely to adversely affect the offender and mental condition. The Court should not be "blinkered" as to the practical consequences of imposing a non-parole period which has little if any utility. The expectation (now a reality) that parole would be refused, and the fact that the applicant has served most of his sentence in the High Risk Management Correctional Centre (taken into account by the sentencing judge), means that he has suffered a considerably more onerous period of imprisonment and, given ineligibility for release on parole, will continue to suffer more onerous conditions of imprisonment: at [83]-[85].

The applicant's sentence was manifestly excessive. The overall term of imprisonment was reduced to reflect that the applicant was unlikely to obtain parole.

Sexual intercourse without consent - knowledge of non-consent - objective seriousness - s 61HA(3) (since amended) Crimes Act 1900

R v R E [2023] NSWCCA 184

The respondent was convicted by jury of sexual intercourse without consent.

Section 61HA(3) *Crimes Act* (subsequently s61HE(3), now s 61HK(1)) provided that a person knows another person does not consent if they:

- have knowledge the other person does not consent (s 61HA(3)(a)), or
- are reckless as to consent (s 61HA(3)(b)), or
- have no reasonable grounds for believing the other person consents (s 61HA(3)(c)).

The Crown appealed, submitting the judge erred in assessment of objective seriousness, having found the respondent's state of mind was in the 'least serious' category of knowledge in s 61HA(3)(c).

The CCA dismissed the appeal. The judge did not err in assessment of objective seriousness. If a judge was not satisfied beyond reasonable doubt of more culpable forms of knowledge of non-consent in ss 61HA(3)(a)-(b), then a finding provided for in s 61HA(3)(c) was the necessary default. No additional evidence bearing upon knowledge of non-consent was adduced at sentence and the judge's task was to find the facts from evidence at trial, with regard to the jury verdict: at [26]; *Saffin v R* [2020] NSWCCA 246 distinguished.

There may be gradation of degrees of culpability depending upon circumstances of knowledge of non-consent. However, there is caution in treating a state of mind as a separate feature adding to gravity of offending. Whilst relevant, it is inextricably entwined with the circumstances of the offending more generally (*R v Ibrahim* [2021] NSWCCA 296 at [50]). The Crown's close attention to the matter is out of proportion to its significance in assessing objective gravity: at [21], [27].

Sexual intercourse without consent - state of mind (knowledge) elevated personal blameworthiness - no error in finding moral culpability relevant to objective seriousness

Stein v R [2023] NSWCCA 324

The applicant was convicted of sexual intercourse without consent. The sentencing judge found actual knowledge as to non-consent. The applicant gave a history of autism, depression, borderline intellectual disability and childhood exposure to domestic violence.

The CCA dismissed the applicant's appeal. The judge did not have regard to the applicant's moral culpability to wrongly elevate objective seriousness. The judge concluded that moral blameworthiness was not reduced by impairment because it was not causally connected to the applicant's crimes. His state of mind (knowledge) elevated personal blameworthiness and made his offences more serious than if his state of mind had been recklessness: at [58].

The general principle that moral culpability and the objective gravity of an offence are separate features is not without its exceptions (*DS v R; DM v R* (2022) 109 NSWLR 82). A feature that could be both a subjective feature and of relevance to gravity of an offence is an offender's state of mind. When assessing gravity of sexual offending the offender's state of mind is a feature that will ordinarily be relevant to both seriousness of an offence, and moral culpability: at [56].

Sexual intercourse without consent - knowledge about absence of consent – self-induced intoxication – s 21A(5AA) CSPA 1999

Pender v R [2023] NSWCCA 291

The applicant was convicted of sexual intercourse without consent.

> Section 61HE(3) *Crimes Act 1900* (now s 61HK(1)) provided that a person knows the other person did not consent if they have knowledge, are reckless as to consent, or have no reasonable grounds for believing the other person consents.
>
> Section 61HE(4) provided that in making any finding under s 61HE(3) the "trier of fact" must have regard to all the circumstances but not self-induced intoxication.

The sentencing judge found the applicant had actual knowledge of non-consent and applied s 21A(5AA) which provides that self-induced intoxication is not to be taken into account as a mitigating factor. The judge rejected a submission that the applicant was merely reckless due to his intoxication.

On appeal, the applicant submitted the judge erred in finding knowledge, and in applying s 21A(5AA), because s 61HE(4) had no application as the sentencing judge is not the "trier of fact."

The CCA dismissed the appeal. The sentencing judge did not err in approach.

Fisher v R [2021] NSWCCA 91 held that self-induced intoxication cannot be used to inform an assessment of the offender's "state of mind, awareness or perception at the time of the

offending" (Fullerton J) or his "knowledge of whether the complainant consented" (Adamson J). It would be inappropriate to depart from that established position, especially in light of the refusal of the High Court of the application for special leave. The construction given to s 21A(5AA) in *Fisher v R* by Fullerton and Adamson JJ stands as the construction of this Court, notwithstanding a contrary construction preferred by Brereton JA: at [50]-[51].

The applicant also submitted that s 21A(5AA) had no application as his intoxication was not self-induced being the result of an addiction not involving free choice (relying on *Bourke v The Queen* [2010] NSWCCA 22; 199 A Crim R 38). The CCA said it is not accepted, on the evidence, that the applicant's intoxication was not self-induced. This submission was not put to the sentencing judge and would call for considerable examination not undertaken at sentence proceedings. No diagnosis was made that the applicant suffered an "addiction": at [60]-[61].

Comparative table containing sentences for drugs other than GBL apt to actively mislead

Bott v R [2023] NSWCCA 255

It was an error to sentence the applicant for attempt to possess commercial quantity of gamma-butyrolactone (GBL) (*Criminal Code 1995* (Cth), ss 307.8(1)) on the basis of comparative cases concerning other drugs generally regarded as being of greater value than GBL, such as methamphetamine, heroin and cocaine. The comparative table, in the circumstances, was apt to actively mislead the sentencing judge. It is unfair to the applicant to impose a sentence based on an assumption that commercial quantity of GBL can be equated in value with a commercial quantity of such drugs. The sentence was manifestly excessive: at [1]-[8], [101]-[102].

SNPP for s 24(2) Drug Misuse and Trafficking Act 1985 not engaged with respect to a conspiracy to commit that offence – s 26 DMTA

Vu v R [2023] NSWCCA 315

The CCA held that an offence under s 26 *DMTA* of 'Conspiracy to manufacture commercial quantity of methylamphetamine' does not have the 10 year SNPP attached to the substantive offence in s 24(2).

Whether an offender convicted of an offence involving accessorial liability (aiding and abetting), an attempt, or a conspiracy to commit a substantive offence to which a SNPP applies is itself subject to the SNPP, is a matter of statutory interpretation. The issue is to be resolved only by reference to the operation of s 26: at [15]-[16]. The following supports the conclusion that the SNPP for s 24(2) is not engaged with respect to s 26 (at [17]-[20]):

- The very existence of s 26 demonstrates that s 24(2) and s 26 create separate offences.
- Div 1A of Pt 4 *CSPA* specifies SNPP's with respect to particular "offences". The table identifies an offence under s 24(2) in item 17 with a SNPP of 15 years, and none for s 26.
- The natural meaning of the word "punishment" in s 26 is the maximum punishment fixed under s 33, which deals separately with offending under s 24(2) and s 26. The fact that the same maximum penalty is imposed with respect to a range of offences says nothing about the standard non-parole periods in relation to those offences.
- Any residual ambiguity in the operation of these provisions in the *DMTA* should be resolved in favour of the individual subject to a loss of liberty.

Common law offence with no maximum penalty – use of "statutory analogues" for guidance

Macdonald v R (Sentence) [2023] NSWCCA 253

The offender was sentenced for conspiring to commit the common law offence of wilful misconduct in public office. As the common law offence carries no maximum penalty, the applicant invited the judge to have regard to the "appropriate statutory analogue", namely, the offence of "abuse of public office" in s 142.2 *Criminal Code 1995* (Cth) which carried a maximum penalty of five years' imprisonment.

The CCA held that the judge did not err in giving little if any weight to the proposed "statutory analogue". That approach was justified for reasons relating to objective seriousness of the offence: at [27].

Where the offence charged is a common law conspiracy to commit a statutory offence, significant assistance will usually be found in the penalty provided for the statutory offence. However, it is difficult to understand what assistance a court can obtain in divining the unexpressed intention of the State

legislature from a statutory offence created by the Commonwealth Parliament. A related concern is the wide variety within the possible analogues in other jurisdictions. There may be common law offences where an appropriate statutory analogue can be found. But the exercise is governed by the general principle that the Court should seek to maintain coherence in sentencing generally. Even that principle must operate at a high level of generality and be subject to significant qualification. It is not easy to establish a clear pattern amongst maximum penalties for differing offences: at [23]-[26].

Contempt – common law offence - sentencing principles

Prothonotary of the Supreme Court of NSW v Patrick (a pseudonym) [2023] NSWSC 1077**;** ***Council of NSW Bar Association v Rollinson (No 2)*** [2023] NSWSC 1390

These cases summarise sentencing principles and penalties regarding the common law offence of contempt.

The maximum penalty for contempt is at large. The *CSPA 1999* does not apply although statutory considerations in ss 3A, 5(1) and s 21A generally reflect common law principles, which remain applicable: *Patrick* at [17]; *Dowling v Prothonotary of the Supreme Court of NSW* (2018) 99 NSWLR 229. Forms of punishment that may be imposed are a fine, committal to a correctional facility, or suspended punishment in Part 55 rule 13 *Supreme Court Rules* 1970: *Rollinson (No 2)* at [70]-[74].

Matters taken into account in assessing punishment include: seriousness; awareness of consequences; actual consequences upon the trial or inquiry; whether committed in the context of serious crime; reason for the contempt; any benefit received by indicating an intention to give evidence; apology or contrition; character and antecedents; general and personal deterrence; and need for denunciation: *Patrick* at [21] citing *Wood v Staunton (No 5)* (1996) 86 A Crim R 183; *Rollinson (No 2)* at [61].

6. APPEALS

Five-judge bench - precedent - departure from previous decisions - principles of restraint - Gett v Tabet (2009) 109 NSWLR 1

AC v R [2023] NSWCCA 133

A five-judge bench considered the principles concerning departure from previous decisions of the Court as outlined in *Gett v Tabet* (2009) 109 NSWLR 1.

The present appeal involved an identical issue to *GL v R* [2022] NSWCCA 202, where the majority judges (Garling and Hamill JJ) held that, based on statutory construction of s 25AA(2), the correct SNPP for s 61M(2) offences committed before 1 January 2008 is 5 years, not the current 8-year SNPP.

The Crown submitted that *GL* was wrongly decided and should not be followed.

The Court held, by majority, that it ought to follow *GL*. An intermediate appellate court should not depart from its own previous decision(s) unless satisfied that the previous decision was "plainly wrong" or "clearly wrong", and that there are compelling discretionary reasons: at [24]; *Gett v Tabet*; *Totaan v R* (2022) 108 NSWLR 17.

GL was not wrongly decided, whether "plainly" so or otherwise: at [53]. Where questions of statutory construction are finely balanced, it may be difficult to conclude that a particular prior interpretation of a statutory provision is "plainly wrong": at [30].

As the issue was not fully argued in the present appeal, the Court does not express a view about whether the operation of the *Gett* principles is confined to, or requires strict identification of, the *ratio decidendi* of a previous decision. However, it may be said that confining operation of the *Gett* principles to an unduly narrow conception of what is strict *ratio* is undesirable: at [43]-[46].

For the purposes of the *Gett* principles, the *ratio decidendi* of a previous decision should generally be taken to include a conclusion of the earlier court in resolving an issue where:

- the relevant issue was fully argued; and
- the issue was treated by the court as a necessary step in reaching its conclusion to uphold a ground of appeal; even if
- the appeal is ultimately dismissed by reason of the exercise of a consequential power, in the nature of a residual discretion, to dismiss an appeal notwithstanding the presence of error: at [50].

The majority judges' statements in *GL* formed part of the *ratio decidendi*. To have reached their conclusion in the context of resentencing, it was first necessary to have reached the conclusion as to the effect of s 25AA(2). Otherwise, there would have been no occasion to exercise the sentencing discretion afresh, no other ground of appeal having succeeded: at [51].

Power to vary sentences attaching to undisturbed convictions - Criminal Appeal Act 1912, s 7(1)

Slattery v R (No 2) [2023] NSWCCA 171

> Section 7(1) *Criminal Appeal Act 1912* provides that where a conviction appeal is partially successful, the court may affirm the sentence passed, or pass such other sentence as the court thinks proper and as warranted by law.

The appellant was convicted of child sexual offences at a special hearing. The CCA quashed a finding of guilt on one count (Count 13).

A s 7(1) enquiry has two stages:

- First, to determine whether to affirm the sentence imposed, or whether to re-sentence. This discretionary decision will involve consideration of the degree of connection between the quashed count and those which remain; the way in which the sentencing judge gave effect to totality; and adequacy of remaining sentences.
- Second, if the Court determines to resentence, it is by re-exercising the sentencing discretion afresh: at [16]; *Ryan v R* (1982) 149 CLR 1; *Kentwell v R* (2014) 252 CLR 601.

The CCA affirmed the sentences for the remaining offences. It was not appropriate to exercise the power conferred by s 7(1) to resentence, having regard to the way the sentencing judge approached the sentencing exercise, length of remaining limiting terms, and number and nature of offences. Quashing Count 13 did not alter the overall appropriate sentence, given that the limiting term for Count 13 was to be served wholly concurrently with other limiting terms: at [36], [41].

CCA unable to amend clerical error of another court for federal offence - Crimes Act 1914 (Cth), s 19AHA

Nguyen v R [2023] NSWCCA 240

> Section 19AHA(1) *Crimes Act 1914* (Cth) allows a court to amend an order which reflects an error of a technical nature made by the court, has a defect of form or contains an ambiguity (s 19AHA(1)).
>
> A note to the sub-section says:
>
> Note: For paragraph (a), the following are examples of errors of a technical nature: a clerical mistake, an accidental slip or omission, a material miscalculation of figures or a material mistake in the description of a person, thing or matter.
>
> Section 19AHA(3) provides that the court may amend the sentencing order to rectify the error, defect or ambiguity.

The applicant was sentenced for a federal offence in the District Court. The sentencing judge corrected, pursuant to s 19AHA(3), an error in relation to pre-sentence custody. However, due to error by the court registry, the judge made a second error in providing for a recognisance release order for 3 years when he had imposed an order for 1 year 3 months.

The CCA held that any application to correct the second error must be made to the District Court under s 19AHA(3). The CCA does not have power under s 19HA to correct an error made by another court. The word "court" in subs (3) must be given the same meaning as in subs (1), that is, the court which made the error: at [68]-[70].

The power to vary orders in r 5.4 of the *Supreme Court (Criminal Appeal Rules) 2021* (NSW) preserves the inherent jurisdiction of the Court to correct accidental errors made by this Court, not by the court below. The error was not an error amenable to appeal under s 6 of the *Criminal Appeal Act 1912* (NSW): at [69].

Powers of appellate court to remit for resentencing – Criminal Appeal Act 1912, ss 5D, 12

R v Jacobs Group (Australia) Pty Ltd [2023] NSWCCA 280

Following a successful Crown sentence appeal in the High Court, the High Court remitted the matter to the CCA for "redetermination of the appellant's appeal under s 5D *Criminal Appeal Act*".

> Section 5D(1) provides that, on a Crown sentence appeal, the CCA may in its discretion vary and impose a sentence which is proper.
>
> Section 12(2) allows the CCA to "remit a matter or issue to a court of trial for determination".

The CCA held it was appropriate the matter be remitted for resentence under s 12(2), as submitted by the respondent: at [21].

There is no constraint on the CCA to remit a matter for resentencing by a trial court. Section 5D cannot be textually characterised as an "obligation", nor support a construction of that power having primacy over the power in s 12(2). Section 12(2) confers a broad, general discretion to remit and in doing so, to give directions subject to which a determination is to be made. The decision whether to remit is "very much case-dependent:" at [15], [17]; *Betts v The Queen* (2016) 258 CLR 420; *AW v The King* [2023] NSWCCA 92.

In deciding whether to remit, reference can be made to the requirements of justice in the particular case and ordinary principles of case management. In this case, relevant factors include that the respondent is on liberty meaning re-sentencing is less pressing than if he were in custody; re-sentencing by a trial court preserves the parties' right to appeal; and the respondent's intention to adduce further evidence which can be challenged by the Crown: at [18]-[21]; see also *Watson v R* [2020] NSWCCA 215 and *BQ v R* [2023] NSWCCA 34.

CONVICTION AND OTHER APPEALS

1. EVIDENCE

Admissions – s 138 Evidence Act - vulnerable person – ERISP admissions improperly obtained - steps for resolving objections under s 138

Mann v R [2023] NSWCCA 256

The CCA held the trial judge erred in holding the applicant's ERISP admissible pursuant to s 138 *Evidence Act*.

The applicant, convicted of multiple child sexual offences, was an Indigenous man with an intellectual impairment and a "vulnerable person" (*Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW)). For 18 of the 38 offences charged the only significant evidence against him was admissions made in his ERISP.

The trial judge had found that the interview and admissions were improperly obtained under s 138 but should be admitted because desirability of admitting the evidence outweighed the undesirability of admitting the evidence.

The CCA found that the evidence was improperly obtained and should have been excluded. The impropriety involved was substantial - pressuring a vulnerable person into taking part in the ERISP when he had received legal advice not to, and his support person had communicated to police that he would not be. That many of the offences charged could only be made out based upon these admissions did not justify admission: at [6]. Where the impropriety directed to a vulnerable person was deliberate and very serious, in circumstances where obtaining such evidence without impropriety or illegality was likely to be difficult, the desirability of admitting the evidence does not outweigh undesirability of admitting it in light of the manner it was obtained: at [126].

The judge identified three considerations in favour of admissibility: much of the interview is true and highly reliable; the ERISP was of great importance to the Crown case; and it "is notoriously difficult for investigating officials to get the full story from a young child in cases of suspected sexual assault." In light of the subsequent High Court decision in *Kadir v The Queen*, the third factor of treating the difficulty of obtaining evidence militates against admission. Here, action was not taken in circumstances of urgency in order to preserve evidence from loss or destruction, and the judge found the impropriety was deliberate: at [101]-[105]; *Kadir v The Queen* (2020) 267 CLR 109 at [20].

Steps for resolving s 138 objections

When objection is taken under s 138, the judicial officer will take the following steps (at [10]):

1. Find the relevant facts (if not agreed) as to how the evidence was obtained.
2. Reach a conclusion as to whether the evidence was obtained improperly or in contravention of an Australian law, or in consequence of such. Whether evidence was obtained as a result of a contravention of an Australian law involves a legal conclusion. Whether evidence was obtained as a result of impropriety involves a question of characterisation. If obtained by Police, that issue is determined by reference to "minimum standards of acceptable police conduct": *Kadir v The Queen* at [14]. Sections 138(2), 139 may be relevant to finding impropriety.
3. If it is concluded that the evidence was obtained improperly or in contravention of an Australian law then the evidence is not admissible *unless* the judicial officer concludes that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained. Once impropriety or illegality is established, the onus of proof is on the party seeking the evidence be admitted: note *Kadir* at [47]; *R v Riley* [2020] NSWCCA 283 at [36]. The conclusion involves the evaluative weighing up of non-exhaustive factors in s 138(3) relevant in the case, which may themselves involve evaluation, such as consideration of the probative value (par (a)), its importance (par (b)) and gravity of the impropriety or contravention (par (c)).

Admissions – s 90 Evidence Act – young person – unfairness - ERISP inadmissible on sentence

R v KS (No 2) [2023] NSWSC 1475 (Yehia J)

The Court ruled the ERISP of the 16-year-old accused inadmissible pursuant to s 90 *Evidence Act*, that having regard to the circumstances in which it was made, it would be unfair to use the evidence. The accused had pleaded guilty to murder on the basis of intent to inflict GBH. The Crown sought to rely on the police ERISP to show an intent to kill.

The interview was conducted at 2:42am after the offences were committed. The accused refused the police offer to call a legal hotline. The accused's uncle was present as a support person. The accused's unwillingness to answer questions was demonstrated by his responses, demeanour, and long pauses before answering or not answering at all: at [30].

Section 90 *Evidence Act*

A Court's consideration of s 90 will focus on voluntariness, reliability and an overall discretion taking account all the circumstances to determine whether admission or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards: *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 at [69].

There must be a balance between the investigator's objective of obtaining an account from a suspect, and the protection of the right to silence, particularly a child's, whose particular vulnerabilities should remain at the forefront: at [86]-[87].

Based on the following factors, the Court is satisfied that having regard to the circumstances in which the admissions were made, it would be unfair use the evidence (at 153):

1. Failure of custody manager to assist in exercising rights to legal advice

Reg 29 *Law Enforcement (Powers and Responsibilities) Regulation* 2016 does not place a positive obligation upon a custody manager to contact a lawyer where the child refuses one. However, obligations are not a "tick a box" list and not always fulfilled simply by informing a child of their right to speak to a lawyer. In some cases, given the child's specific vulnerabilities, s/he may not fully appreciate the seriousness of being held in police custody. Here, there was no urgency to interview the accused who was going to be charged and placed in juvenile detention regardless of any ERISP: at [138]-[142].

2. Role of Support Person

The support person had no real idea of his role and how he to assist the accused. A support person's role and obligations cannot be exhaustively defined, but mere presence is not sufficient. A support person must at least understand they are present to protect the child's rights, including not to answer questions, and stopping an interview where the child does not wish to continue. A support person should be at the interview table, next to the child demonstrating centrality of their role: at [143]-[148].

3. Continuing with Interview

Police questioning continued when, by words and demeanour, the young person indicated he did not wish to continue. Police representations ("tell us the truth", "we need to ask everyone their side of the story and figure out who's telling the lies …") were made when police, prior to interview, had already determined he would be charged with murder and bail refused: at [149]-[151].

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

R v Clarke [2023] NSWCCA 123

> Section 97A(2) *Evidence Act* creates a rebuttable presumption that tendency evidence about the defendant: (a) having a sexual interest in children, and (b) acting upon that sexual interest, will have significant probative value for the purposes of ss 97(1)(b) and 101(2).
>
> Section 97A(4) provides the presumption can be rebutted if there are sufficient grounds to determine the tendency evidence does not have significant probative value.
>
> Section 97A(5)(a)-(g) sets out factors *not* to be taken into account under s 97A(4), unless there are exceptional circumstances:
>
> > (a) the sexual interest or act to which the tendency evidence relates (the *"tendency sexual interest or act"*) is different from the sexual interest or act alleged (the *"alleged sexual interest or act"*),
> >
> > (b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred,
> >
> > (c) the personal characteristics of the subject of the tendency sexual interest or act (e.g., age, sex, gender) are different to those of the subject of the alleged sexual interest or act,
> >
> > (d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act,
> >
> > (e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act,
> >
> > (f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features,
> >
> > (g) the level of generality of the tendency to which the tendency evidence relates
>
> Section 101(2) provides that tendency evidence adduced by the prosecution cannot be used unless the probative value of the evidence outweighs the danger of unfair prejudice.

The Crown appealed the primary judge's pre-trial ruling that police interviews of the three child complainants LB, KB and BB were not admissible as tendency evidence. The judge ruled the interviews did not have significant probative value because "the tendency sexual act for LB is different to the tendency sexual act for BB and KB, and the circumstances in which those respective tendency sexual acts occurred are different such that there is no linkage between the two" (relying upon ss 97(5)(a), (b) and (f)). The presumption in s 97A(2) was thereby rebutted: at [33].

The CCA allowed the appeal and admitted the evidence. The judge erred in principle by failing to apply correctly s 97A (at [39]).

- The judge erred by relying upon ss 97A(5)(a), (b) and (f) without first determining whether there are "exceptional circumstances" that would warrant taking them into account, as required by s 97A(5). The question raised by s 97A(5) is whether there exist "exceptional circumstances" that would warrant taking all or any of those points of comparison into account in assessing "significant probative value" of the "tendency sexual acts". The purported "exceptional circumstances" nominated by the judge are merely three of the very points of comparison whose utilisation is in question, namely, s97A(5)(a), (b) and (f): at [35].
- Those matters will not suffice as "exceptional circumstances" to disengage s 97A(5). The court would have to find one or more of those features, or some other feature in s 97A(5), present in an exceptional degree, or some other exceptional circumstance different altogether from anything in s 97A(5)(a)-(f): at [36].
- The legislature has provided no guidance as to the criteria by which "exceptional circumstances" might be discerned. In order to be "exceptional", the circumstances must be more than just sufficient to enliven some of the points of comparison in s 97A(5)(a)-(f): at [36].

- None of the circumstances in this case justify the characterisation of "exceptional" to permit consideration of factors in s 97A(5)(a)-(f): at [40].

Section 97A effects significant departure from previous law. Sub-sections 97A(5)(a)-(f), which the courts are now forbidden from taking into account in assessment of whether putative tendency evidence has significant probative value, comprise substantially the criteria previously regarded as the basis in logic and common sense for comparing the acts said to prove the tendency with the acts charged: at [37].

ss 97, 97A, 101 Evidence Act 1995 – tendency evidence - primary tendency asserted in notice did not comprehend certain alleged sexual acts of accused

***Decision Restricted* [2023] NSWCCA 163 (Interlocutory order)**

The respondent (aged 18-20) stood trial for child sexual offences. The Crown sought to rely on cross-admissible evidence of three complainants as tendency evidence. The tendency notice asserted a first tendency to act upon sexual interest of girls aged 14-16, and a second tendency as acting on that interest through sexual touching and digital penetration on girls aged 14-16 who indicated these acts were "unwelcome." While most counts on the indictment alleged sexual touching or digital penetration, several counts did not. In particular, count 17 alleged penile/vaginal penetration of complainant three.

The trial judge ordered the counts involving complainant three be severed from the indictment.

The judge rejected the tendency evidence finding the s 97A(2) presumption rebutted, finding "exceptional circumstances" permitted consideration of factors in s 97A(5), namely that the tendency evidence was sought to be used "in the context of normal social interactions between teenagers" which resulted in some admitted sexual conduct, the only issue being the extent of that sexual conduct and whether some of it was consensual: at [50].

The judge further found s 101(2) excluded the evidence as there was a "real, not speculative danger" the jury would give disproportionate weight to the tendency evidence.

The CCA dismissed the Crown's interlocutory appeal against the judge's ruling on the basis of s 101(2).

Section 101(2)

Even assuming that the evidence pertaining to complainant three had significant probative value as tendency evidence, the evaluative judgment to be found in s 101(2) called for exclusion of it from the trial of the allegations of the first and second complainants: at [86].

Evidence supporting count 17 could go to the Crown's first tendency but not the second as it is not an allegation of sexual touching or digital penetration. It is inconceivable the jury could conscientiously use the evidence as directed regarding the first tendency but completely disregard it for the second: at [77]-[80], [86]-[87]. The danger of misuse of evidence is the essence of the prejudice referred to in s 101(2): at [10]; *Papakosmas v The Queen* (1999) 196 CLR 297 at [91].

Exceptional circumstances

Beech-Jones CJ at CL (Hamill J agreeing) made observations on s 97A(5).

Exceptional circumstances may be established where the particular feature(s) in s 97A(5)(a)−(g) may be so strong in terms of their bearing upon an assessment of probative value that they warrant the description "exceptional". For example, while a sexual interest that constitutes a tendency does not have to demonstrate distinctive or unusual features (s 97(5)(f)) and need not be described with specificity (s 97(5)(g)), a tendency of, say, a 23-year-old male to be sexually attracted to females aged 18−20 may be so lacking in any distinctive or unusual features and be so generally expressed that s 97A(4) is nevertheless satisfied: at [14], [97].

Witness not competent to give evidence - failure to follow statutory requirements in s 13(5)(c) Evidence Act 1995

SC v R [2023] NSWCCA 111

The CCA allowed the applicant's appeal against child sexual assault convictions and ordered a retrial. The trial judge failed to comply with s 13(5)(c) *Evidence Act*, in determining a complainant was not competent to give sworn evidence pursuant to s 13.

Section 13(5)(c) requires that prior to a person giving unsworn evidence, the Court is obliged to tell the person:

> "(c) that he or she may be asked questions that suggest certain statements are true or untrue and should feel under no pressure to agree with statements that he or she believes are untrue."

The trial judge considered s 13(5)(c) and determined that "*I don't propose to tell [GC] anything about that in the circumstances.*" Failure to strictly follow s 13(5) meant that the trial was not conducted according to law. The judge had no discretion to omit informing the complainant of the substance of the three sub-sections of s 13(5): at [6]-[11]; *SH v Regina* [2012] NSWCCA 79; *MK v Regina* [2014] NSWCCA 274.

Expert evidence – responses of child victims of sexual assault – evidence given within bounds of expertise - Aziz v R [2022] NSWCCA 76 and AJ v R (Decision Restricted) [2022] NSWCCA 136, applied - s 79 Evidence Act 1995

BQ v R [2023] NSWCCA 34

Note: The High Court has granted Special leave to appeal in this matter [2023] HCASL 214.

Sections 79(1) and 108C(1) *Evidence Act* allow evidence of opinions based on specialised knowledge from training, study or experience - including specialised knowledge of the impact of sexual abuse on behaviours of children - to be admitted as opinion evidence or credibility evidence.

The CCA dismissed the applicant's appeal against convictions for child sexual offences. Evidence by the Crown expert witness Associate Professor Shackel - whose PhD on use of expert testimony in child sexual assault cases focused on analysis of psychological and related research on how child victims respond to their victimisation - was within the bounds of her expertise and did not give rise to a miscarriage of justice: *Aziz v R* [2022] NSWCCA 76; *AJ v R* [2022] NSWCCA 136, followed.

The applicant had submitted the Professor impermissibly gave evidence on behaviour of "perpetrators"; the relationship between a victim and a perpetrator; intra-familial relationships; when abuse commonly takes place; and risk factors for sexual abuse.

However, the CCA found the Professor's evidence was concerned entirely with the relationship between child and perpetrator, effect on the child's behaviour, and response and behaviour of children during and after abuse by reason of the family relationship. Reference to abuse in the context of "everyday activities" was an explanation of why the child might react (or not react) in a particular way: at [237]-[240].

The Professor gave two answers that assaults in homes may occur with other people in the vicinity. These might be thought to be outside her expertise. However, they followed on her answer that abuse often takes place within the home in the context of everyday activities. Her knowledge in those two answers is very likely obtained by study of cases the basis of the research, and closely related to discussion of reactions and behaviour of children. Even if inadmissible, the answers did not give rise to a miscarriage of justice: at [237]-[240].

Expert evidence - expert opinion as to ideology reflected by right wing extremists - opinions not based on specialised knowledge – evidence inadmissible - s 79 Evidence Act 1995

R v Fleming [2023] NSWSC 560 (Wilson J, Procedural ruling)

The accused faced trial for engaging in a terrorist act, under s 101.1(1) *Criminal Code 1995* (Cth).

The Court ruled that evidence by Crown witness Professor S, an expert in "right wing extremism", was not 'expert' evidence and not admissible under s 79 *Evidence Act*.

Professor S holds a PhD in Politics and since 2017 has been researching far-right and violent extremism, strategies to de-radicalise individuals associated with extremism, and has various publications. The Crown submitted the Professor's evidence was highly relevant to interpreting for the jury writings by the accused, within the context of views expressed by persons who promulgate or support particular political views or ideology.

The Court was not persuaded that the study of right-wing extremism is, at this early stage of its development, and in the context of this trial, supported by "specialised knowledge", such that the professor's evidence is capable of informing the jury as to a fact in issue: at [62].

Expert evidence - whether Crown's expert evidence outside area of expertise - s 79 Evidence Act 1995 - cross-examination of defence expert by Crown prosecutor as to credibility without leave - s 103 Evidence Act 1995

Al-Salmani v R [2023] NSWCCA 83

The CCA dismissed the applicant's appeal against convictions for three counts of aggravated dangerous driving causing death.

Expert evidence regarding shock

The CCA held that evidence on shock by the Crown expert, a pharmacologist, was not outside her expertise (s 79 *Evidence Act*).

The Crown expert gave evidence that the applicant was impaired by drug use. Under cross-examination, she said it was unlikely that the applicant was affected by shock.

The applicant's expert gave evidence that presentation was more consistent with shock, not drug use.

Even if the opinions were beyond expertise of both experts, that they both gave evidence on this topic greatly diminished likelihood of a miscarriage of justice. Admission of the Crown expert evidence on "shock" elicited by the applicant's trial counsel was a forensic choice to pursue an alternative hypothesis. A question asked of the expert implies acceptance that the expert is capable of answering it within the expert's field of expertise: at [61]-[62]; [66].

In contrast to oral evidence, objection to an expert's *written report* will occur before the report is tendered to immunise a jury against receipt of objectionable expert evidence: at [64].

Cross-examination by Crown as to credibility without leave

The CCA found the Crown Prosecutor erred in asking the defence expert whether he had been "fired" from previous employment, without the leave of the Court: at [40]; ss 102, 103 *Evidence Act*; *Montgomery v The Queen* [2013] NSWCCA 73. A prosecutor is required to observe *Evidence Act* requirements calculated to ensuring that a trial does not miscarry: at [36]-[37].

However, in the context of the entirety of trial, including objection to the question, its disallowance and the judge's direction that the jury disregard it, the objectionable question did not result in an unfair trial or miscarriage of justice: at [42]-[46]; *Montgomery v The Queen* at [181].

Expert evidence not admissible regarding the question of doli incapax

R v IP [2023] NSWCCA 314 (Crown interlocutory appeal)

The respondent was on trial for murder. He was aged 13 at the time of the alleged offending. The Crown had to rebut the presumption of *doli incapax* (that the respondent was unable to appreciate the difference between right and wrong: *RP v The Queen* (2016) 259 CLR 641).

The trial judge:

- admitted into evidence, over Crown objection, expert psychiatric and psychological reports regarding the respondent's Post Traumatic Stress Disorder and Attention Deficit Hyperactivity Disorder affecting his decision making and impulse control, especially during heightened stress, suggesting that at the time of the alleged offending he was *doli incapax*.
- rejected the Crown's application to limit use of the evidence under s 136 *Evidence Act* so it could not be used for deciding the *doli incapax* issue (but was still permissible in, for example, an inquiry into a potential mental health defence or formation of the requisite intent).

The CCA allowed the Crown appeal, admitted the evidence but limited its use to trial issues excluding *doli incapax*.

The question of the state of the respondent's knowledge of the wrongness of his actions is not an inquiry about his emotional state, ability to control impulses or whether he was so affected by strong emotion that it rendered him incapable of resisting the urge to perform the relevant act. Nor are the possible effects of PTSD or ADHD relevant to assessment of his knowledge of wrongness: at [22].

There is an important distinction between, first, the existence of a particular state of knowledge in a child and, second, the ability to act in a way that mirrored the existence of that knowledge. The first inquiry (the *doli incapax* inquiry) is directed to whether a child between 10-14 lacks capacity for *mens rea* because of their state of moral and intellectual development: at [23]. The inquiry may include having regard any evidence of the child's level of intelligence, educational attainment,

moral guidance and instruction, or environment from which a sense of morality and rightness and wrongfulness may be derived. What is required is that the child has reached a developmental stage where s/he is able to and does comprehend the serious moral wrongfulness of the act, and to discern right from wrong: at [24]-[25].

Evidence of mental illness or other disorder is not relevant to *doli incapax* unless the disorder of itself prevents the child from reaching a state of moral and intellectual development where the serious moral wrongfulness of the conduct can be understood. It could be relevant to *doli incapax* only if the child's mental illness had adversely impacted upon intellectual and moral development: at [26].

In this case, the expert evidence is not admissible to go to the question of *doli incapax*: at [27].

Section 38 Evidence Act - Crown closing address contrary to evidence of Crown witnesses relied on by accused - whether prosecutor should have sought leave to cross-examine witnesses pursuant to s 38

ZL v R [2023] NSWCCA 279

> Section 38(1)(a) *Evidence Act* permits a party, with the court's leave, to cross-examine its own witness about evidence they have given that is unfavourable to the party.

The applicant appealed his child sexual assault convictions. At trial, he relied on evidence of two Crown witnesses, his mother and stepfather, that the spare room in which an offence occurred was not available - making the offence impossible. On appeal, the applicant submitted the Prosecutor's closing address impugned the two witnesses' evidence by telling the jury they were not obliged to accept their evidence. As the prosecutor had not sought leave under s 38 *Evidence Act* to cross-examine them, their evidence was unchallenged, and the verdicts were unreasonable.

The CCA dismissed the appeal. It was open to the jury to prefer the complainant's evidence over the two witnesses. Having regard to the obvious conflict between the evidence, there was no need for the prosecutor to do more: at [145], [167].

The principles on impugning a prosecution witness where leave to cross-examine under s 38 has not been sought are:

- witnesses ought generally be given an opportunity of responding to an attack on their credit: *MWJ v The Queen* (2005) 80 ALJR 329 at [39];
- prosecutors ought generally not impugn the credit of a Crown witness in final address where the witness was not given an opportunity to respond: *Livermore v R* (2006) 67 NSWLR 659.

However, it does not follow that prosecutors are obliged to make s 38 applications which are, in the circumstances, neither necessary nor reasonable, before they are entitled to submit that evidence ought not be accepted: at [111]-[112].

The CCA stated that:

- Whether a prosecutor can make a submission impugning evidence of a prosecution witness where no application under s 38 is made depends on the basis upon which the credibility (in the sense which includes reliability) is sought to be impugned, and circumstances including other evidence: at [136]; authorities discussed.
- Where the attack on a witness is significant and involves a positive proposition of wrongdoing, it will usually be necessary for the prosecutor to seek leave to cross-examine pursuant to s 38 to lay the foundation for the submission. If no leave is sought, the conviction may be set aside on the ground of unfairness to the appellant or because it is unreasonable: at [137].
- However, where evidence of a witness is challenged by the Crown because it is obviously contrary to the Crown case and the witness is clearly partisan (because of a relationship with the accused) and the challenge is merely that their evidence is incorrect or ought not be accepted, the prosecutor will not necessarily be obliged to seek leave under s 38 as a pre-condition to the propriety of making a submission that the evidence ought not be accepted: at [138].

Identification direction – "recognition evidence" – complainant's evidence that assailant's physical feature "matched" the applicant - s 116 Evidence Act 1995

Marco v R [2023] NSWCCA 307

The applicant was convicted of sexual intercourse without consent. He was a friend of the complainant's boyfriend visiting their home. The complainant's evidence was that, while lying in bed, a male whose head and arms "matched" the applicant entered her dark room and committed the offences.

The trial judge gave a jury direction on identification evidence. The applicant submitted the judge erred in not giving a "recognition direction": that mistakes in identification are not confined to people who do not know each other or who are only passingly familiar with each other: at [54].

The CCA dismissed the appeal. The definition of "identification evidence" in the *Evidence Act* extends to recognition evidence (*Trudgett v R* (2008) 70 NSWLR 696; *Gardiner v R* (2006) 162 A Crim R 233). The trial judge did not err in characterising the "recognition" evidence as 'identification evidence'. This was not a case where the complainant saw her assailant and gave evidence that she recognised him; it was a case where the complainant felt the assailant's hair and arms and formed the opinion that the applicant was the assailant. The judge's identification evidence direction was more than adequate to satisfy s 116 *Evidence Act*: at [61]-[62].

Even if characterised as recognition evidence, failure to give the recognition direction did not give rise to a real risk of miscarriage of justice. Defence counsel at trial did not seek such a direction. The complainant's evidence was not only on physical resemblance but also of the applicant's sexual advances, that he (other than her boyfriend, his father and brother) was the only other male present, and his reaction when she confronted him after the assault: at [63].

Appeal against special verdict – trial judge made findings in absence of expert evidence – s 144 Evidence Act 1995

McDiarmid v R [2023] NSWCCA 322

> Section 144 *Evidence Act 1995* states that proof is not required about knowledge that is not reasonably open to question, and is common knowledge, or capable of verification by reference to a document not reasonably open to question.

The CCA allowed the applicant's appeal against a special verdict entered by a judge-alone trial for break and enter and sexual offences.

The trial judge erred in making findings of fact, in the absence of any expert evidence, about the operation of the applicant's brain and that the applicant had a cognitive impairment and did not know his actions were wrong (ss 28, 30 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*). The judge based his findings on his own assessment of the applicant's evidence of historical brain injuries, the complainant's evidence and police camera footage of the applicant. It was not an error for the judge to take judicial notice that frontal lobe damage can impede executive functioning in a general sense. These were the judge's opinions he was entitled to express. They are not, however, the opinions of a qualified expert. It could not be said that the judge's opinions are not reasonably open to question or capable of verification by reference to a document the authority of which cannot reasonably be questioned (s 144).

At trial, both parties opposed any special verdict. Even if the parties were aware that the judge intended to take into account "the effect of brain injury on his behaviour", that did not authorise the judge to proceed to determine matters based upon his own opinions without evidence: at [41]-[45]; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

2. DIRECTIONS

Directions – murder – intoxication and specific intent offences – jury required to 'consider' (not 'find') applicant intoxicated to extent to affect capacity to form intent - s 428C(1) Crimes Act 1900

Cliff v R [2023] NSWCCA 15

The CCA dismissed the applicant's appeal against conviction for murder. The principal issue at trial concerned the impact of intoxication upon ability to form the intent of inflicting grievous bodily harm. The applicant submitted the trial judge erred by directing the jury that the applicant's "level of intoxication (if you *find* he was intoxicated) may be relevant": at [34].

The CCA held that having regard to the entirety and overall effect of the directions no miscarriage of justice was established: at [5]. However, there is room for criticism. It would have been better if expressed differently, i.e., the jury was required to *consider* the evidence on this point. It was not necessary for the jury to *find*, i.e, positively conclude, that the applicant was intoxicated and to such an extent as to affect his capacity to form an intent to cause grievous bodily harm. It was enough for an acquittal that the evidence, including as to intoxication, raised a reasonable doubt as to intent: at [55]-[58].

Recklessly inflict GBH, s 35(2) Crimes Act 1900 – inconsistent misdirections as to mental element - miscarriage of justice

AW v R [2023] NSWCCA 92

The CCA allowed the applicant's conviction appeal for recklessly inflicting grievous bodily harm, s 35(2) *Crimes Act 1900*. There was a miscarriage of justice based on misdirections as to mental element of the offence.

There was three inconsistent jury directions. First, recklessness was referred to in the context of the elements of the charge of assault - "the accused realised that the complainant might be subject to immediate and unlawful violence, *however slight* as a result of what he was about to do, but yet took the risk that that might happen" - which involved foresight of a degree of harm well less than actual bodily harm. Second, foresight of the possibility of "grievous bodily harm". Third, recklessness as foreseeing the possibility of "causing harm" without identifying nature and degree of the harm nor the "conduct" as to which the applicant would need to have had foresight of that possibility.

The directions were productive of uncertainty. The second direction was favourable to the accused. However, the first and third directions, which the jury had in writing, resulted in a miscarriage of justice: at [55]; *Hofer v The Queen* (2021) 95 ALJR 937; s 6(1) *Criminal Appeal Act 1912*.

The case is not one in which it is appropriate to apply the proviso. The question of whether there has been a substantial miscarriage of justice depends on the particular misdirection and the context in which it occurred (*Kalbasi v Western Australia* (2018) 264 CLR 62). The CCA found it could not be satisfied that the jury understood what the mental element was that the Crown needed to satisfy to the criminal standard based on the inconsistent misdirections, two of which fell well short in terms of the degree of harm the possibility of which the applicant was required to foresee: at [59], [61]-[62]; *Lane v The Queen* (2018) 265 CLR 196.

Directions - tendency - accused relied on tendency of alleged victim - directions apt to reverse onus of proof

Waldron v R [2023] NSWCCA 128

The CCA allowed the applicant's appeal against conviction for wounding her ex-partner with intent to cause GBH on the ground that the trial judge's directions on tendency evidence were erroneous. The Crown conceded error.

At trial, the applicant adduced evidence of the tendency of the complainant to threaten ex-partners.

The trial judge erred in directing the jury that it should not draw the inference that the complainant had a tendency to act in a particular way unless it was the only rational inference in the circumstances; and that the jury could take into account a tendency of the complainant to act in a particular way in considering whether it is more likely than not that he acted in the way alleged by the applicant.

Tendency evidence is a species of circumstantial evidence and there is no requirement that it be proved to any particular standard, or (as these directions suggest) beyond reasonable doubt: at [44]; *The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56.

The direction had three flaws.

First, the jury should not have been directed that it should be "very careful about drawing the inference asked of you by the defence." The accused, except in unusual cases, bears no onus: at [39].

Second, "whether it is more likely than not" – cast onus on the applicant, reversing the onus of proof: at [40].

Third, the direction foreshadowed a circumstantial evidence direction. In the circumstantial evidence direction, no distinction was made between drawing an inference of guilt against an accused – where

all other reasonable inferences must be excluded – and an inference favourable to the applicant as part of her circumstantial case based on the tendency evidence: at [43].

The conviction was quashed and new trial ordered.

Sexual intercourse without consent - mandatory directions under ss 292-292E Criminal Procedure Act 1986 (NSW) - Transitional provisions - "the hearing of the proceedings began" refers to time of first arraignment not commencement of the trial - advertent and inadvertent recklessness - no miscarriage of justice

Lee v R [2023] NSWCCA 203

The applicant was convicted of sexual intercourse without consent (s 61I *Crimes Act*) involving digital penetration of the complainant's vagina whilst she was sleeping.

The CCA held that the trial judge erroneously gave directions required to be given in sexual assault matters under ss 292A-E *Criminal Procedure Act* (consent directions), however, no miscarriage of justice was established and the appeal was dismissed: at [101].

Transitional provision - ss 292A-E *Criminal Procedure Act 1986*

The transitional provision states ss 292A-E do not apply if "*the hearing of the proceedings began before the commencement of the amendment*" (Sch 2, Pt 42 *CPA*). The phrase refers to proceedings on indictment from the time an accused is first arraigned in the court which goes on to hear the substantive trial of the accused, rather than when the trial commenced: *GG v R* (2010) 79 NSWLR 194; *Bektasovski v R* [2022] NSWCCA 246.

The mandatory direction provisions commenced on 1 June 2022. The applicant was first arraigned on 18 June 2021 and the trial began on 6 July 2022. Therefore, the provisions did not apply.

Directions as to consent

Section 61HE (since repealed and replaced by s 61K) sets out the mental elements sufficient to constitute a sexual offence (at [148]-[153]):

1. Knowledge - s 61HE(3)(a) (**first category**);
2. Recklessness by foresight of possibility, or "advertent recklessness" - s 61HE(3)(b) (**second category**);
3. Recklessness by not even turning one's mind to the question of whether there was consent, or "non-advertent recklessness" - s 61HE(3)(b) (**third category**); and
4. Unreasonable belief in consent, s 61HE(3)(c) (**fourth category**).

The trial judge directed the jury that the Crown will have proved the accused knew the complainant did not consent if: the accused was reckless as to whether the complainant consented because *"he did not even think about whether she consented but went ahead not caring or considering it was irrelevant whether she consented."*

The CCA held that trial judge's directions were not erroneous. The first mental element described, "he did not even think about whether she consented," was synonymous with the third category of non-advertent recklessness and legally correct. The second, "went ahead not caring, or considering it was irrelevant whether she consented," combines aspects of the second mental element (foresight of possibility of lack of consent) with the third (complete non-advertence to the presence or absence of consent). The latter part of the direction was extraneous, repetitive and a melding of the second category and third category, but did not constitute a miscarriage of justice. It is not easy to see how, in any practical sense, the verdicts are built on a wrong foundation: at [174]-[183].

3. JURY

Whether trial judge erred in failing discharge the whole jury where individual juror discharged for misconduct - Jury Act 1977, ss 53C(1)(a), 19(1)(a), 22(a)(i)

Haines v R; Brown v R [2023] NSWCCA 108

> Section 53C(1)(a) *Jury Act 1977* states that if the court discharges a juror, the court must discharge the jury if to continue with the remaining jurors would give rise to the risk of a substantial miscarriage of justice.
>
> Section 19(1)(a) states that, except as provided by s 22, the jury in criminal proceedings is to consist of twelve jurors.

> Section 22(a)(i) provides that, where a juror in criminal proceedings is discharged, the jury shall be considered as remaining properly constituted if its number is not reduced below ten.

At B and H's joint trial, after empanelment of twelve jurors, the trial judge allowed a joint application by all parties to discharge one juror on the basis of misconduct.

B's sole appeal ground was that the judge erred in then dismissing B's application for discharge of the whole jury pursuant to s 53C(1)(a) and allowing the trial to proceed with eleven.

The CCA dismissed the appeal. The principles regarding s 53C were recently summarised in *Watson* [2022] NSWCCA 208.

- Section 53C(1)(a) requires a trial judge to discharge the whole jury, following the discharge of one juror, where there is a risk of a substantial miscarriage of justice. Once the evaluative judgment is formed that there is no risk of a substantial miscarriage of justice, there is no discretion: at [40]-[43]; *Watson v R*; *Haile v R* [2022] NSWCCA 71.
- Section 19 provides a *prima facie* right to trial by a jury of twelve, but is limited by s 22. The trial judge did not fail to take into account this *prima facie* right nor misapprehend any principle. However, the trial judge was obliged to act in accordance with s 53C once the relevant evaluative judgment was formed: at [44]-[46].

There is no inconsistency in the judge's finding of misconduct by the discharged juror and the determination that no risk of a substantial miscarriage of justice arose in allowing the jury of eleven. *Watson* at [56] refers to the importance of identifying which jurors had purportedly engaged in misconduct and occasions of misconduct to establish a risk of a miscarriage of justice. Here, "delinquency" by only the discharged juror did not influence the other jurors: at [47]-[48].

Section 53B Jury Act 1977 – court may discharge juror – s 53B pertains to individual juror

Sun v R [2023] NSWCCA 147

> Sub-section 53B(d) *Jury Act 1977* states that the court may discharge a juror if it appears that, "for any other reason affecting the juror's ability to perform the functions of a juror, the juror should not continue to act as a juror."
>
> Sub-sections 53B(a), (b) and (c) allow, respectively, for discharge of a juror where the juror becomes ill, infirm, or incapacitated; is unable to give impartial consideration; or refuses to take part in deliberations.

The CCA held that, as a matter of statutory construction, s 53B refers to a *single juror*. Therefore, the trial judge erred in removing three jurors relying on s 53B(d) for the reason that the court was unable to accommodate fifteen jurors due to physical distancing during the Covid-19 pandemic: at [94], [100].

The "reason" which gives rise to the power in s 53B(d) is one that affects specifically the impugned juror and their ability to perform a juror's function. Sub-ss (a), (b) and (c) are specific to a particular juror or jurors, as opposed to circumstances where every juror's ability to perform the functions of a juror is equally compromised: at [100], [110].

However, the appeal was dismissed on the ground there was no substantial miscarriage of justice.

Error to include foreperson in ballot to select verdict jury – s 55G Jury Act 1977

Fantakis v R [2023] NSWCCA 3

Section 55G *Jury Act 1977* provides:

> (1) If the jury in criminal proceedings consists of more than 12 persons (the ***expanded jury***) immediately before the jury is required to retire to consider its verdict, the jury for the purposes of considering and returning the verdict (a ***verdict jury***) is to be constituted by only 12 members of the expanded jury.
>
> (2) A verdict jury is to be constituted by –
>
> (a) if the expanded jury has chosen one of its members to speak on behalf of the jury as a whole (a ***foreperson***) – the foreperson and 11 other members of the expanded jury selected by ballot, or
>
> (b) if there is no foreperson — 12 members of the expanded jury selected by ballot.

The applicant was convicted of murder. The applicant submitted the trial judge erred by including the foreperson of an expanded jury in the ballot to select the verdict jury, contrary to s 55G(2)(a). The foreperson was not selected for the verdict jury and this triggered "an unnecessary shake up to the jury dynamic" as it forced the jury to elect a new foreperson: at [354].

The CCA held the judge erred, but there was no miscarriage of justice in this case: at [385]. It was sufficiently clear that the jury had chosen a foreperson as at the time of the ballot. Section 55G is in mandatory terms. The clear legislative intention is that if an expanded jury has chosen one of its members to speak on behalf of the jury as a whole (as a foreperson) then that person is not to be included in the ballot required to determine the constitution of the verdict jury: at [376]-[377].

4. PROCEDURE

Permanent stay granted - conduct of police deprived applicant of practical ability to seek to argue statutory defence

La Rocca v R [2023] NSWCCA 45

The CCA ordered a permanent stay of proceedings where the applicant had been denied the opportunity of raising a statutory defence to a charge of attempt to possess a commercial quantity of an unlawfully imported border-controlled drug (ss 11.1(1) and 307.5(1) *Criminal Code Act 1995* (Cth)).

The applicant received two boxes of candles imported from Singapore, containing the drugs. The police had intercepted the boxes. An officer affixed to one box a Singapore Airlines label, thus identifying their status as imported goods.

The CCA held that the applicant had been denied the opportunity of raising a statutory defence in s 307.5(4), that "s/he did not know that the border-controlled drug was unlawfully imported".

It was no part of the Crown case that he had prior knowledge of the point of origin of the goods and that they had been imported from overseas. Whilst relevant for the primary judge that the consequences of the police officer's conduct were neither deliberate nor intended, the seriousness of those consequences and circumvention of will of the legislature diminished any significance as to intention or state of mind of the officer. The prejudice to the applicant was incurable in the context of a serious offence carrying a maximum sentence of life imprisonment: at [57], [61]-[62].

Deliberate alteration of the appearance of evidence directly relevant and material to the ability to establish a statutory defence "goes to the very root of the administration of justice" (*Strickland v Cth DPP* (2018) 266 CLR 325 and would bring the administration of justice into disrepute: at [57], [63]-[64].

The CCA summarised the stay principles at [34].

Invalid indictment - Cth offence - indictment signed by NSW Crown Prosecutor not authorised

Ihemeje v R [2023] NSWCCA 72

The CCA quashed the applicant's convictions for Commonwealth drug offences and ordered a new trial where the NSW Crown Prosecutor who signed the indictment was not authorised to do so. The NSW Prosecutor was not listed in the schedule of NSW DPP employees to whom the Commonwealth DPP delegates power to institute prosecutions on indictment for Commonwealth offences (s 31 *Director of Public Prosecutions Act 1983* (Cth)): at [32]. The CCA referred to other cases where indictments were signed by unauthorised persons (see at [29]-[31]).

Withdrawal of guilty pleas before conviction and sentence - White v R [2022] NSWCCA 241

Garcia-Godos v R; MH v R [2023] NSWCCA 145

The CCA dismissed the applicants' appeals against refusal of their applications to withdraw their pleas of guilty entered *before* conviction where the primary judges found there had been no "miscarriage of justice."

The applicants on appeal relied on *White v R* [2022] NSWCCA 241 which was handed down after their applications were refused. *White* held that the test for whether a guilty plea can be withdrawn *before* conviction is a consideration of the "interests of justice," and for *after* conviction the test is a "miscarriage of justice."

The CCA held that although the primary judges erred by applying the "miscarriage of justice" test, the result would not have been any different had the "interests of justice" test been applied: at [122]; [170].

Although there is some force in criticisms by the Crown levelled at the reasoning in *White*, it is not plainly wrong: at [5], [18]-[21], [72]; *Totaan v R* (2022) 108 NSWLR 17; *Gett v Tabet* (2009) 109 NSWLR 1.

Withdrawal of guilty pleas after conviction and sentence - where plea entered by reason of intimidation, improper inducement or fraud

Honeysett v DPP [2023] NSWCCA 215

The appellant had pleaded guilty to offences in 1987. In 1994, the Royal Commission into the NSW Police Force revealed police had colluded and fabricated evidence in the appellant's case. The Attorney referred the matter to the CCA (s 77(1)(b) *Crimes (Appeal and Review) Act* 2001).

The appellant's appeal ground was that there was a miscarriage of justice in that the "guilty plea entered by the appellant was not made with free choice".

The CCA set aside the convictions and entered verdicts of acquittal. The police actions were a form of 'fraud' and the circumstances of the appellant's guilty pleas involved a miscarriage of justice. Where a convicted person appeals a conviction entered after entry of a plea of guilty and did not apply to reverse their plea before the sentencing judge, then, consistent with s 6(1) *Criminal Appeal Act*, the test to be applied is whether the appellant has established a miscarriage of justice: at [37]; *White v R* [2022] NSWCCA 241.

Such applications are approached with "caution bordering on circumspection" given the "high public interest in the finality of legal proceedings" and "the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission … of the necessary legal ingredients of the offence": at [37]; *R v Liberti* (1991) 55 A Crim R 120 at 122.

However, there are exceptions to this principle, including where the plea is entered by reason of intimidation, improper inducement or fraud: at [38]–[41]; *Meissner v The Queen* (1995) 184 CLR 132 at 141-142, 157.

Accused remanded in custody - Local Court implied power to make order restricting accused's ability to retain a brief of evidence - 'Restricted Retention Order'

Commissioner of Police v Walker [2023] NSWSC 539

The defendant was remanded in custody charged with murder. A magistrate refused, as beyond jurisdiction, an order sought by the Commissioner of Police restraining the defendant from retaining copies of parts of the brief of evidence (a 'restricted retention order' (RRO)). The Commissioner sought the RRO due to safety concerns for prosecution witnesses.

The Court held the magistrate erred in refusing the order. There is no unqualified or absolute "right" under the *Criminal Procedure Act 1986* for an accused to have the whole brief with them at all times. While a brief must be served, this is subject to "any other law or obligation" relating to the provision of material to an accused by a prosecutor (ss 61, 61(2) *CPA*): at [65]-[67]. A power to make an RRO should be implied because it is necessary in certain circumstances. Whether to make an RRO is a matter for a magistrate balancing various competing public policy considerations including the rights of an accused: at [80]; *HT v The Queen* (2019) 269 CLR 403.

The matter was remitted to the Local Court.

5. PARTICULAR OFFENCES

Five judge bench - persistent sexual abuse of a child - Crimes Act 1900, s 66EA

MK v R; RB v R [2023] NSWCCA 180

s 66EA *Crimes Act* provides for the offence of persistent abuse of a child.

> An adult who maintains an 'unlawful sexual relationship' with a child is guilty of an offence: s 66EA(1).
>
> An 'unlawful sexual relationship' is a relationship in which an adult engages in two or more unlawful sexual acts with or towards a child over any period: s 66EA(2).

A five-judge bench considered whether an offence under s 66EA is established by:

> a. proof of the commission of two or more unlawful sexual acts (the "*first construction*"); or
>
> b. proof of the existence of a *relationship* "in which" two or more unlawful sexual acts were committed (the "***second construction***"); or
>
> c. proof of the existence of a *sexual relationship* over and above the commission of two or more unlawful sexual acts (the "*third construction*").

The Court held that the second construction is correct, as per Basten AJA (dissenting) in *RW v R (Restricted Decision)* [2023] NSWCCA 2: at [95], [101]. The applicants had sought to rely on the third construction as per *R v RB* [2022] NSWCCA 142 and *RW v R* per Fagan and Harrison JJ.

The Court dismissed the conviction appeals. The trial judges' directions accorded with the second construction: at [107]-[109]. To the extent that *RB* and *RW* differ and adopt the third construction, they are "plainly wrong" and should not be followed: at [6].

- Section 66EA(2) plainly states that what converts "a relationship" into an "unlawful sexual relationship" is two or more unlawful sexual acts in the course of that relationship ("in which").
- Typically, that may involve an established relationship such as parent-child, teacher-student or coach-player corrupted by two or more unlawful sexual acts within that relationship.
- In some cases, the "relationship" might be something that arises from the facts and circumstances of the commission of the unlawful sexual acts (and what connects them) so that the provision excludes from the scope of the offence a person who commits unlawful sexual acts with a child with whom he or she has no relationship: at [95].
- The word "maintains" in s 66EA(1) does not add anything to the actus reus beyond satisfaction of s 66EA(2). Thus, where existence of the relationship is not disputed, the relevant acts that constitute the offence are the commission of the unlawful sexual acts as referred to in s 66EA(2) in the context of that relationship. Where existence of such a relationship is disputed, then the relevant actus reus are the unlawful sexual acts referred to in s 66EA(2) and such acts of the accused that are relied upon to demonstrate the "relationship in which" those acts were committed. The relevant mental element is knowledge of the commission of those unlawful sexual acts and the contextual circumstances in which they were committed: at [92].

Accessory after fact to manslaughter by excessive self-defence – verdict unreasonable

Quinn v R [2023] NSWCCA 229

The CCA entered a verdict of acquittal for the applicant's conviction of being an accessory after the fact to manslaughter by excessive self-defence. The applicant and co-offender pursued the deceased after he had intruded into their home. The co-offender struck and killed the deceased with a sword. At trial, the applicant and co-offender raised self-defence. The applicant told police the deceased threatened her with a gun and threatened the co-offender. Witnesses gave evidence they did not see a gun. The co-offender could not say whether the deceased had a gun.

The CCA (Bell CJ, Sweeney J agreeing; Wilson J dissenting on this ground) held the verdict was unreasonable: at [141].

New South Wales, unlike other Australian jurisdictions, does not statutorily define an accessory after the fact or provide a specific offence, leaving it to the common law:

> "a person (D) will be guilty as an accessory after the fact, in relation to an offence committed by another person (P) where: P committed that offence; D intentionally provided some positive assistance for the purpose of helping P to escape apprehension, trial or punishment; and *at the time of providing such assistance, D was aware of the essential facts and circumstances that made up P's offence*." (emphasis added): at [103]-[104].

The critical (complex) question is whether the Crown excluded the reasonable possibility that the applicant believed that the co-offender saw her being threatened with a gun such that she believed that the co-offender's conduct was a reasonable response to the circumstances as she must have believed he perceived them, namely that it was necessary to defend her whilst she was being threatened with a gun. This possibility could not have been excluded if the applicant had seen the gun pointed at her. A reasonable inference, consistent with innocence, was that she believed that the co-offender probably saw this too and responded by striking the deceased with the sword. As such, it would be reasonably open to conclude that the applicant's understanding of the co-offender's actions was that they were taken as a measure of reasonable self-defence (in the extended sense, including in defence of the applicant): at [107]-[108].

Homicide – causation – where acts or omissions accelerate death - finding that causation established is not precluded by fact deceased would have died in any event from pre-existing wound or disease

Baker v R [2023] NSWCCA 262

The applicant was convicted of manslaughter. She cared for her former partner who suffered serious health conditions from cancer. The trial judge found that her neglect caused the deceased to develop ulcers and cachexia (extreme weight loss) which were significant causes of death. Two medical experts gave opinion that ulcers and cachexia contributed to death. A third expert gave opinion that the direct cause of death was a third stroke and that cachexia and ulcers were "separate ongoing parallel problems." A post-mortem report concluded there was evidence of several infarctions (or death of brain tissues) which had led to a third stroke in the days before death.

The CCA dismissed the applicant's conviction appeal.

To establish causation, the tribunal of fact must be satisfied that the act (or relevant omission) of the accused was a "substantial or significant cause of death" or "sufficiently substantial" cause of death: at [54]-[57]; *Swan v The Queen* (2020) 269 CLR 663; *Royall v The Queen* (1991) 172 CLR 378; *R v Evans (No 2)* [1976] VR 523; *Krakouer v Western Australia* (2006) 161 A Crim R 347, applied.

Of particular relevance to this appeal is that causation can be established where the act (or relevant omission) of the accused accelerates death. In a case where such acts or omissions are said to have accelerated death, a finding that causation has been established is not precluded by the fact that the deceased would have died in any event from a pre-existing wound or disease: at [54]-[58]; authorities discussed.

The first medical expert was unshaken that cachexia was a contributing factor to the cause of the stroke. The second expert did not suggest that the proposition that the deceased died from the stroke with no relevant contribution from cachexia or ulcers, including by hastening death, was any more than a bare possibility. The third expert's opinion contained nothing inconsistent with the proposition that cachexia and ulcers hastened death: at [67]–[69], [78]–[80], [97].

The overall effect of the evidence leads to the overwhelming conclusion the deceased's cachexia and ulcers made a significant contribution to the hastening of death. Causation was proven beyond reasonable doubt. There was not a significant possibility that an innocent person was convicted: at [96]−[99].

Stated case from District Court – publish indecent article - nature of mental element - s 578C(2) Crimes Act 1900

Nguyen v Director of Public Prosecutions (NSW) [2023] NSWCCA 42

The District Court stated to the CCA:

> *Question: "… for publishing an indecent article contrary to s. 578C(2) [Crimes Act 1900], is the prosecution required to prove that the person knew or believed that the article was indecent?"*
>
> *Answered: "No".*

The applicant submitted that the question of indecency required a mixed subjective/objective approach.

The CCA stated that indecency is an element in criminal offences that is wholly objective, based upon contemporary standards of ordinary members of the community. It does *not* require a mental element, whether intention, knowledge, recklessness: at [44]; authorities cited.

Otherwise, eccentric or thoughtless people could publish indecent articles without sanction, if it could not be proven beyond reasonable doubt they were aware that the article was contrary to standards of ordinary people. This does not accord with the objective intention of Parliament in creating the offence: at [45].

The maximum penalty of this summary offence is 12 months' imprisonment or 100 penalty units. *He Kaw Teh* (1985) 157 CLR 523 and *Environment Protection Authority v N* (1992) 26 NSWLR 352 are of little use as markedly heavier penalties applied: at [46].

The position of a person truly ignorant about the indecency of what they have published can be ameliorated on sentence, including by not proceeding to conviction: at [54].

Knowingly participate in a criminal group - shared objective - Crimes Act ss 93S(1), 93T(1)

Mohana v R [2023] NSWCCA 61

The applicant was convicted of participating in a "criminal group" (s 93T(1) *Crimes Act*) comprised of the applicant, M1 and M2. M2 sold drugs to the applicant, which the applicant and M1 then on-sold to others.

The applicant submitted that because the members had divergent objectives, the Crown failed to prove a "shared objective" required as proof of the existence of a "criminal group": at [102]-[103]; *Czako v R* [2015] NSWCCA 202.

The CCA dismissed the appeal. The definition of "criminal group" in s 93S(1)(a) requires conduct that constitutes a single serious indictable offence. The supply by M2 to the applicant was the 'serious indictable offence' from which each of the three participants shared the objective of obtaining material benefits. That M2's objective was to obtain material benefits from selling drugs to the applicant, while the applicant and M1's objective was to obtain material benefits from on-selling, did not preclude finding of a shared objective: at [107]-[108].

Crimes (Domestic and Personal Violence) Act 2007, ss 72, 72A - application to vary or revoke an AVO applies only to unexpired AVOs

Wass v DPP (NSW); Wass v Constable Wilcock [2023] NSWCA 71

The Court of Appeal held that an application to vary or revoke an apprehended violence order (AVO) under ss 72A and 73 *Crimes (Domestic and Personal Violence) Act* applies only to unexpired AVO's.

> Sections 72A and 73 provide that "An application may be made to a court *at any time*" and "The court may, if satisfied that in all the circumstances it is proper to do so, vary or revoke a final apprehended violence order or interim order".

The plaintiff had been subject to a 12-month AVO. He was not able to obtain a permit under the *Firearms Act 1996* while he was, or at any time within the last 10 years, subject to an AVO, other than an order that has been revoked. After his AVO expired, his applications for it to be revoked under ss 72A and 73 were dismissed in the Local Court and District Court on appeal.

The Court of Appeal dismissed the plaintiff's summons for judicial review. The power to "vary or revoke" an order is to be construed as confined to a power to vary or revoke an unexpired order, which accords with natural meanings of "vary" and "revoke", is consistent with use of "revoked" in other provisions in the Act and accords with legislative history and purpose: at [26]-[44], [59].

Female genital mutilation, s 45(1) Crimes Act 1900 - cause grievous bodily harm with intent, s 33(1)(b) - body modification procedures on consenting adult females - s 45(1) applies only to female children - The Queen v A2 (2019) 269 CLR 507, applied - consent not an available defence to cause grievous bodily harm

Russell v R [2023] NSWCCA 272

The applicant, a body modifier, performed a partial excision of AA's labia minora and an "abdominoplasty" or "tummy tuck" on BB. Both victims were consenting adult women who suffered adverse health outcomes.

The CCA quashed the applicant's conviction by judge-alone of female genital mutilation (s 45(1)(a) *Crimes Act 1900*) and upheld the conviction for cause grievous bodily harm with intent (s 33(1)(b)).

Female genital mutilation, s 45(1)

The CCA quashed the s 45(1) conviction and entered an acquittal. The trial judge erred in finding that s 45(1)(a) applies to body modifications performed on adult women who consented: at [38].

A High Court majority in *The Queen v A2* (2019) 269 CLR 507 at [56] identified the statutory purpose of s 45(1) as "to prohibit completely female genital mutilation practices injurious to *female children*" (emphasis added): at [13]. While the question of the scope of the application of s 45(1) and the meaning of "of another person" and "on another person" in s 45(1)(a) and (b) formed no part of the *ratio decidendi* in *A2,* what was said in unqualified language as to the purpose of s 45 amounts to "seriously considered dicta": at [30]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [134].

But for the decision in *A2*, and seven powerful textual indications (see at [27]), the CCA would have been inclined to reject that s 45(1) should be confined to the proscribed acts of mutilation performed on female children as a result of ritualistic practices: at [29].

Cause grievous bodily harm, s 33(1)(b)

The judge did not err in finding that consent was not an available defence to s 33(1)(b). A person cannot consent to the infliction of grievous bodily harm: at [91]-[99]; *R v M(B)* [2018] EWCA 260; *R v Brown* [1994] 1 AC 212; *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715; *Secretary Health & Community Services v JWB* (1992) 175 CLR 218; *R v Stein* (2007) 18 VR 376.

The risks attending such a significant surgical procedure outside a regulated medical environment are obvious and trump appeals to personal autonomy: at [94].

Embezzlement by "clerk or servant" – ss 155 and 157 Crimes Act 1900 - where complainant had contractual relationship with a company controlled by applicant

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

The applicant was convicted of 34 counts of embezzlement as a clerk or servant contrary to s 157 *Crimes Act*. He was sole director and shareholder of a Management company responsible for management of the professional activities of the complainant, a singer and recording artist. The Crown case was that the applicant misappropriated income received into the Management company trust account which, after commission and GST, the applicant was obliged to remit to the complainant.

The applicant submitted that the evidence could not establish that he was a "clerk or servant" within the meaning of ss 155 and 157, and the jury ought to have been directed to acquit.

The CCA held the trial judge did not err in finding that the definition of "clerk or servant" in s 155 was, on the Crown evidence, capable of applying to the applicant. Section 155 is, while headed "Definition of clerk or servant", not a definition but a deeming provision. Persons within the description in s 155 are deemed to be a "clerk or servant". "Clerk or servant" thus includes relationships which would not otherwise be clerk or servant relationships and gives an expanded meaning to the "clerk or servant". In particular, it includes persons employed as "collectors of money." A clerk or servant for the purposes of s 157, as defined in s 155, does not require proof of a master and servant relationship. It does not require the Crown to establish that the applicant was bound to the complainant by a contract of service: at [125]-[129].

The appeal was allowed on another ground.

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 reading of the presence of cocaine 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].

6. APPEALS

Five-judge bench – judge's refusal of application for disqualification based on bias an "interlocutory order or judgment" - s 5F(3) Criminal Appeal Act 1912

Maules Creek Coal Pty Ltd v Environment Protection Authority [2023] NSWCCA 275

A five-judge bench departed from previous authority to hold that a judge's decision to grant or refuse an application for disqualification based on bias is an "interlocutory order or judgment" capable of being subject of an application under s 5F(3)(a *Criminal Appeal Act 1912* (NSW).

R v Rogerson (1990) 45 A Crim R 253 (which held that a decision on a disqualification application is not an interlocutory judgment or order) and *Barton v Walker* [1979] 2 NSWLR 740 are no longer good law and should not be followed. The previous line of Court of Criminal Appeal authority has been overtaken by subsequent High Court and Court of Appeal authority: see at [72].

The Court granted leave but dismissed the appeal.

Pre-recorded evidence of child witnesses - judge's refusal of leave to recall child witnesses not an "interlocutory judgment or order"- s 5F(3) Criminal Appeal Act 1912 - Sch 2, Cl 87(3)(b) Criminal Procedure Act 1986

PJ v R [2023] NSWCCA 105

The CCA held that where evidence of child witnesses was pre-recorded, the trial judge's ruling not to permit the recall of the children at trial pursuant to Sch 2 cl.87(3)(b) *Criminal Procedure Act 1986* was not an "interlocutory judgment or order" within s 5F(3) *Criminal Appeal Act 1912.*

The CCA dismissed the applicant's application to appeal the trial judge's ruling.

(i) Ruling not to permit the recall of the children not an "interlocutory judgment or order"

The ruling under cl.87 is closer to one limiting scope of cross-examination or rejecting a line of questioning, and analogous to refusal to require the prosecution to recall a witness or allow it to reopen its case. Such rulings made during a trial would not engage s 5F (authorities and other cases discussed). The fact that such a ruling is made before the trial commences does not alter character and effect of the ruling: at [30]-[31].

(ii) No error refusing leave for children to give further evidence.

The trial judge did not err in refusing leave for the children to give further evidence. Clause 87 confers a discretionary power, not obligation, to grant leave if the court is satisfied of one of the matters identified in cl.87(3): at [42]-[44].

An important consideration in exercising the power must reflect the dominant purpose of protecting child witnesses from trauma of giving evidence. In an application under cl. 87, legal representatives must be aware of the statutory policy not to provide further hearings. Matters known to the applicant at the time of the hearing should be addressed if sought to be relied on at trial and be put to the child witness (cl. 87(3)(a)): at [47]-[48].

Jurisdiction of CCA to entertain second application for leave to appeal where first application refused - extension of time refused - s 10(1)(b) Criminal Appeal Act 1912

Gould v R [2023] NSWCCA 103

Where the applicant filed in the CCA a second application for leave to appeal against conviction, and it was common ground the new grounds could have been brought in his first rejected application, the CCA:

- held the CCA had jurisdiction to entertain the second application where a first application was refused;
- refused to extend time within which to file the second application: at [105], [137], [149]; s 10(1)(b) *Criminal Appeal Act 1912.*

Jurisdictional issue

Previous refusal of leave to appeal on the merits does not create a jurisdictional bar preventing the Court entertaining a further application for leave to appeal: at [52]–[53]; following *Lowe v The Queen* (2015) 249 A Crim R 362; [2015] NSWCCA 46; *Postiglione v The Queen* (1997) 189 CLR 295; cf. *Grierson v The King* (1938) 60 CLR 431, considered.

Refusal of extension of time in respect of second application

The threshold question was whether the interests of justice require an extension of time in the circumstances, where a leave application has been determined on the merits: at [95]; [148]; [164].

The Court does not consider that it is "just under the circumstances" or that the interests of justice require that an extension of time be granted for the second application for leave to appeal: at [105], [137], [149]. Reasons why the applicant should *not* be granted an extension of time include: (at [105]ff):

- The applicant has had, in substance, a full hearing challenging conviction. Cogent reasons should underwrite any discretion to extend time for a second application. The proposed grounds of appeal are simply allegations of further errors. Where an applicant has had full opportunity to raise such arguments, prima facie the interests of justice will not warrant a further opportunity. The interests of justice will have been served by the first opportunity.
- The application is a "second go" by a new legal team and is not a material change of circumstances.
- Arguments at the first appeal hearing were heard and determined; that other arguments were not raised did not amount to a denial of procedural fairness.
- The exercise of the discretion is informed by the principle of finality.

Where fitness to be tried not raised at the trial and first raised on appeal – test in R v RTI (2003) 58 NSWLR 438 continues to apply

Roberts v R [2023] NSWCCA 187

The CCA held that where fitness to be tried was not raised at the trial and was first raised on appeal, then the test in *R v RTI* (2003) 58 NSWLR 438 continues to apply.

The test in *R v RTI* provides that if there is material "which raises a question about the propriety of the conviction because an appellant may have been unfit to stand trial, the court should quash the conviction unless it is satisfied that, had the question been raised before or during the trial which led to the conviction, the court acting reasonably must have found that the accused was fit to stand trial".

R v RTI concerned provisions under the repealed *Mental Health (Forensic Provisions) Act 1990* where unfitness to be tried was determined by jury. From 1 January 2006, that decision was made by 'judge alone' and remains the case under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, s 44. Identity of the decision-maker as to the question of fitness is not determinative of the appropriate test to be applied by this Court when considering a ground of miscarriage of justice: at [163].

The CCA allowed the appeal. Applying *R v RTI*, the evidence raises a real and substantial question about the propriety of the conviction because the applicant may have been unfit to stand trial: at [203].

Criminal Appeal Act 1912, s 6(1) - ***two-step test in Patel v The Queen (2012) 247 CLR 531 applies - appeal against refusal to discharge jury - admission of prejudicial material***

Ilievski v R; Nolan v R (No 2) [2023] NSWCCA 248; ***Conway v R*** [2023] NSWCCA 265

These two cases concerned an appeal ground that the trial judge erred in refusing to discharge the jury on the basis of prejudicial material before the jury resulting in a miscarriage of justice.

The cases held that:

- The appeal is against the conviction, not the refusal to discharge the jury. The starting point is s 6(1) *Criminal Appeal Act*: ***Ilievski v R; Nolan v R (No 2)*** at [52], [81]; *Patel v The Queen* (2012) 247 CLR 531; *Hamide v R* (2019) 101 NSWLR 455.

- Under s 6(1) *Criminal Appeal Act 1912*, the two-step test in *Patel v The Queen* applies: the applicant must establish a miscarriage of justice (third limb in s 6(1)) then the Crown must establish no substantial miscarriage of justice (proviso to s 6(1)). The importance of the two-step procedure is that, whilst the convicted person must satisfy the court that there has been a miscarriage, once that occurs the onus of persuasion moves to the Director to establish that there was, in the actual circumstances, no "substantial" miscarriage: ***Conway v R*** at [29], [32]-[34]; ***Ilievski v R; Nolan v R (No 2)*** at [76].
- In light of High Court authority post-dating *Crofts v The Queen* (1996) CLR 247, the approach in *Crofts*, which appears to conflate the two limbs in s 6(1) (the third limb ("miscarriage of justice") with the proviso ("substantial miscarriage of justice") cannot be applied: ***Ilievski v R; Nolan v R (No 2)*** at [77]-[81]; [86]-[88]; ***Conway v R*** at [29], [32]-[34].
- Where there is a finding there was a miscarriage of justice, it is necessary to consider the proviso. It cannot be concluded that there has not been a substantial miscarriage of justice unless it is concluded the evidence, properly admitted at trial, proves the guilt of the applicants beyond reasonable doubt: ***Ilievski v R; Nolan v R (No 2)*** at [108]; *Weiss v The Queen* (2005) 224 CLR 300.

In ***Ilievski v R; Nolan v R (No 2)*** the CCA allowed the applicants' appeal against convictions for aggravated robbery finding a substantial miscarriage of justice. Their sole appeal ground was that, after a witness gave inadmissible unexpected evidence that N was known to police and a bank robber, the trial judge's refusal to discharge the jury resulted in a miscarriage of justice.

Dhanji J at [89] in ***Ilievski v R; Nolan v R (No 2)*** sets out nine considerations relevant to a complaint of admission of unfairly prejudicial material to be resolved by consideration of whether the applicant has established a miscarriage of justice, and if so, whether the Court can be satisfied that there has been no substantial miscarriage of justice.

In ***Conway v R*** the applicant was convicted of murder. A witness gave evidence the applicant had a reputation for violence and used drugs. The CCA found the evidence to be of minimal significance and dismissed the appeal, holding there was no miscarriage of justice.

Basis for challenging factual findings by trial judge on conviction appeal - alleged error in reasoning does not raise issue under "first limb" but is capable of raising separate issue under "third limb" s 6(1) Criminal Appeal Act 1912

EE v R [2023] NSWCCA 188

The applicant was convicted by judge alone of assault and sexual intercourse without consent.

The judge found the complainant made a complaint to the applicant's parents about the sexual offence shortly after it occurred, but that the parents did not recall any complaint as evidence of it "was limited, containing no real detail". The judge found the parents' evidence did not undermine the complainant's evidence, which was honest and reliable.

The CCA rejected the applicant's submission that the judge erred in resolving the conflict between the evidence of the complainant and parents (*the conflicting evidence issue*) and dismissed the appeal. Nor was the verdict unreasonable: at [47], [51].

Conflicting evidence issue and s 6(1) *Criminal Appeal Act 1912*

The "first limb" of s 6(1) *Criminal Appeal Act* states the CCA shall allow an appeal against conviction if the verdict "should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence."

The function addressing the first limb of s 6(1) is "not to determine whether there was error in the factual findings on which the trial judge relied" in finding guilt. Instead, the Court "is to determine for itself whether the *evidence* was sufficient in nature and quality to eliminate any reasonable doubt that the accused is guilty of that offence" (*Dansie v The Queen* (2022) 96 ALJR 728 at [7]). To the extent that *Filippou v The Queen* (2015) 256 CLR 47 at [48] suggests that "errors… in the reasoning process" of a trial judge could engage the first limb of s 6(1), appears to have been superseded by *Dansie*: at [30]-[34].

While alleged error in the judge's reasoning in accepting the complainant's evidence does not raise an issue under the first limb, it is capable of raising a separate issue under the "third limb" of s 6(1); i.e. on some "other ground… there was a miscarriage of justice": at [34], [39]−[41]; *Dansie* at [16]; *M v The Queen* (1994) 181 CLR 487 at 494-495. Any doubt that might have been raised by

the alleged contradiction between the evidence is a doubt that the judge was capable of resolving by way of having an advantage in "seeing and hearing" the evidence. There is not a significant possibility that an innocent person has been convicted (*M* at 494): at [50].

Legal principles - whether jury verdict unreasonable or cannot be supported by evidence

Russell v R [2023] NSWCCA 196

Button J summarised the legal principles for assessing whether the verdict is unreasonable, or cannot be supported, having regard to the evidence (at [82]-[90]), based on the judgment in ***Hanna v R*** [2023] NSWCCA 182 at [18] to [26] (per Leeming JA; Yehia and Weinstein JJ agreeing):

1. The verdict of a jury has "a special authority and legitimacy": *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53 at [48], *Hanna v R* at [18].
2. This Court must "determine for itself whether the evidence was sufficient in nature and quality to eliminate any reasonable doubt that the accused is guilty of that offence": *Dansie v The Queen* (2022) 96 ALJR 728 at [7], *Hanna v R* at [19].
3. Even if the appellate court experiences a doubt, that is not the end of the matter, because there would be no deference to "the role of the jury and the advantages it enjoyed in seeing the trial": *Hanna v R* at [20]. Having said that, "it is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred": *M v The Queen* (1994) 181 CLR 487; *Hanna v R* at [20].
4. The "ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty": *M v The Queen* at 495, *Hanna v R* at [21].
5. The advantage enjoyed by the tribunal of fact will vary depending upon the form of the evidence and nature of issues at trial: *Dansie* at [17], *Hanna v R* at [23]. At one end of the spectrum, a verdict founded upon a trial that consists entirely of undisputed circumstantial facts, with little or no oral evidence, may be more liable to interference on this ground by a court than a trial that called for assessment of credibility of many witnesses about sharply disputed facts, including the accused. In the former, the tribunal of fact has little advantage over the appellate court.
6. Separately, what needs to be established is "that a miscarriage of justice has occurred authorising and requiring its intervention": *MFA v The Queen* at [96], *Hanna v R* at [24].

7. OTHER CASES

Drug Court terminated applicant's program - constructive failure to exercise jurisdiction in s 10 and s 10(1)(b) Drug Court Act 1988

Cooper v DPP (NSW) [2023] NSWCA 65

The applicant commenced the Drug Court program. A month later he was charged with further offences and refused bail. The Drug Court terminated his program after an application focusing on the probability of a sentence of fulltime imprisonment in respect of the new charges.

The Court of Appeal (Brereton and Kirk JJA, White JA dissenting) held that the Drug Court constructively failed to exercise the jurisdiction reposed by s 10(1) and s 10(1)(b) *Drug Court Act 1988*. The Court set aside the order terminating the program and directed the Drug Court to determine the application according to law.

Section 10(1) gives the Drug Court a discretionary power to terminate a program. There are two statutory preconditions that must be met, the second of which contains two alternatives:

1. the Court is satisfied, on balance of probabilities, participant failed to comply with their program (this precondition is set out in the chapeau of s 10(1)); and
2. pursuant to s 10(1)(b), the Court is satisfied, on balance of probabilities, the participant:
   (1) is unlikely to make any further progress in the program, *or*
   (2) that further participation in the program poses an unacceptable risk to the community that the person may re-offend.

The Drug Court was satisfied that, by being detained on remand, the applicant failed to comply with his program, so as to engage the first precondition under s 10(1).

However, the Drug Court placed erroneous focus on the appropriateness of dealing with the fresh charges through the diversionary procedures of the Drug Court and failed to address the criterion in s

10(1)(b). The Drug Court misconceived the nature of the Drug Court's jurisdiction and constructively failed to exercise that jurisdiction. The decision was afflicted by jurisdictional error: at [57]-[63]; [67]-[84]; authorities cited.

Child Protection (Offenders Registration) Act 2000 - juvenile offender - possess child abuse material, s 91H(2) Crimes Act 1900 - whether offender a "registrable person" - whether possession of child abuse material is an offence "committed against" a person

Commissioner of Police, NSW Police Force v TM [2023] NSWCA 75

The Court of Appeal allowed the Police Commissioner's appeal against the primary judge's declaration that the respondent was not a 'registrable person" (*TM v Commissioner of NSW Police* [2022] NSWSC 337).

The 17-year-old respondent (a child) committed three possess child abuse material offences under s 91H(2) *Crimes Act*, involving different children within a 24-hour period.

An exception to being a "registrable person" under s 3A *CPOR* Act is s 3A(2)(c)(ii), where a child committed "a single offence" of possessing child pornography under s 91H(2): at [82].

A "single offence" includes more than one offence of the same kind arising from the same incident: s 3A(5).

Offences "arise from the same incident" only if committed (i) within a single 24-hour period and (ii) against the same person: s 3(3).

The primary judge declared the respondent was not a 'registrable person." The judge ruled that reading s 3(3) into s 3A(2)(c)(ii) would not produce a coherent result for possession offences under s 91H(2) as such offences may involve conduct not 'committed against *any person'* - for example, where cartoon characters or fictional children are used.

Allowing the appeal, the Court of Appeal considered the proper construction of s 3(3) and its interaction with ss 3A(2)(c)(ii) and 3A(5). The Court held the exception in s 3A(2)(c)(ii) did not apply to the respondent.

Application of s 3(3) to s 3A(2)(c)(ii)

There is no incoherence in application of s 3(3) to s 3A(2)(c)(ii). Although it might produce some incongruous and even unfair results, the legislature's clear intention was, by s 3(3), to except from the operation of s 3A(1) juvenile offenders who commit multiple offences arising from the same incident, committed within a single period of 24 hours and (if committed against a person) against the same person: [94]-[95], [104]: *Cooper Brookes (Wollongong) Pty Ltd v Fed Commissioner of Taxation* (1981) 147 CLR 297.

However, the legislature cannot have intended that an offender who commits an offence of possess child abuse material '*not committed against any person'*, is worse off than one whose offences are committed against an actual person. Therefore, where offences are committed within a 24-hour period but *not against any person*, the first limb of s 3(3) is sufficient to trigger the exception to s 3A(1). Resort to the second limb of s 3(3) is unnecessary, and s 3(3) should be read as: "For the purposes of this Act, offences arise from the same incident only if they are committed within a single period of 24 hours and (if they are committed against a person) are committed against the same person": at [105]-[106].

Application of s 3(3) to present case

The respondent did not fall within the s 3A(2)(c)(ii) exception and was therefore a 'registrable person'. His offences were not committed "against the same person". His offences did not arise from the same incident (s 3(3)) – although committed within a 24-hour period, they involved different children and were not committed against the same person: at [110].

Whether arrest reasonably necessary - Law Enforcement (Powers and Responsibilities) Act 2002, s 99(1)(b)(viii), (ix)

AD v State of NSW [2023] NSWCA 115

Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides:

> 99 Power of police officers to arrest without warrant
>
> (1) A police officer may, without a warrant, arrest a person if—

(a) the police officer suspects on reasonable grounds that the person… has committed an offence, and

(b) the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons—

……

(viii) to protect the safety or welfare of any person (including the person arrested),

(ix) because of the nature and seriousness of the offence.

The female applicant intervened in a brawl between her ex-husband and her new partner. She was charged with reckless inflict GBH and assault which were later withdrawn. A trial judge dismissed her proceedings against the State of NSW for false imprisonment. The judge accepted that the arresting officer "was of the view that both [the husband] and children needed protection from further incidents of a similar nature".

The Court of Appeal dismissed her challenge to lawfulness of arrest based on s 99(1)(b)(viii) and (ix).

To form a different opinion to the arresting officer is not sufficient for the applicant to succeed. The difficulties are (at [18]-[19]):

First, s 99(1)(b) is in regards to the state of satisfaction of the police officer, not review court. There are limited grounds on which such a state of satisfaction may be reviewed.

Second, by par.(viii), for the arrest to be reasonably necessary to protect safety or welfare of any person, it is the arrest itself which must be intended to provide such protection. Arresting with the intention that bail conditions (and conditions of a provisional AVO) be imposed as a consequence of the arrest, did not take the conduct outside par (viii).

Third, par.(ix) requires evaluative judgment. The officer placed weight on seriousness of the offences. This suggests purposive constraints of ss 99(1)(b)(i)-(viii) may be evaded by reliance on a state of satisfaction as to seriousness of the offence: at [19]-[24].

The basis on which a state of satisfaction may be challenged must turn on proof that the decision-maker committed legally reviewable error in forming the requisite state of satisfaction. While wholehearted endorsement of the officer's views need not be accepted, the applicant has not established either that the officer did not hold the state of satisfaction as to reasonable necessity of the course taken, or that such a state of satisfaction was manifestly unreasonable, arbitrary or capricious: at [25]-[28]; *State of NSW v Randell* [2017] NSWCCA 88.

8. BAIL

Section 77(1) Bail Act 2013 - police officer may take actions to enforce bail requirements

Bugmy v Director of Public Prosecutions (NSW) [2023] NSWSC 862

Section 77(1) *Bail Act* 2013 lists actions a police officer may take, when they believe on reasonable grounds that a person is in breach of bail.

Section 77(3)(a)-(d) lists matters to be considered by an officer in deciding whether to take action, but does not limit the matters that can be considered.

The Court held that s 77(3) does not impose any mandatory requirement on police that limits the power under s 77(1): at [33].

The plaintiff was convicted of resist officer in execution of duty (s 58 *Crimes Act*). The offence occurred when he was arrested for breach of bail under s 77(1)(e). The plaintiff challenged the lawfulness of the arrest by submitting that the police officer, in deciding to take action under s 77(1), failed to first consider matters in s 77(3).

The Court held that the power in s 77(1) is qualified only by two stated pre-conditions in the sub-section itself: (1) that s 77A does not apply; (2) action in s 77(1)(a) – (f) may only be taken where "a police officer … believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition". If these pre-conditions are met, the officer may take any action listed in s 77(1) being a discretionary matter for the officer: at [50]-[51].

Crown detention application to CCA following grant of bail by Supreme Court - relevant principles for determining whether cause has been shown – Bail Act 2013, ss 16A, 50(1), 67(1)(e)

***Decision Restricted* [2023] NSWCCA 287**

The CCA allowed the Crown appeal seeking to revoke bail granted by the Supreme Court pursuant to ss 50(1), 67(1)(e) *Bail Act* 2013. The respondent was charged with domestic violence offences and intentionally choke with recklessness, which were "show cause" offences being serious indictable offences committed on parole (s 16B).

The application must be heard as a new hearing and determined afresh on its merits. Evidence may be adduced in addition to any evidence called at the last hearing (s 75). The Court may have regard to the judgment of the Supreme Court judge (*Trinh v R* [2016] NSWCCA 110 at [28]; *DPP (NSW) v Mawad* [2015] NSWCCA 227 at [8]; *Viavattene v R* [2018] NSWCCA 197 at [3]). However, in the present matter, the judge's judgment was given in circumstances where matters of real significance were not brought to his Honour's attention: at [1], [5]-[6]; [84]-[85].

The CCA set out relevant principles for the determination of whether cause has been shown (s 16A): see at [14]-[21].

The CCA found the respondent has failed to show cause why his detention is not justified. When assessed in the light of the material now before this Court, there are inherent weaknesses in all of the s 18 factors relied upon by the respondent to show cause (e.g. delay in the trial being reached, no evidence of a mental health condition), meaning his release poses a very significant risk as to ex-partners: at [66], [69].

A. HIGH COURT

Intensive correction order - failure to comply with s 66(2) amounted to jurisdictional error

Stanley v Director of Public Prosecutions (NSW) [2023] HCA 3; 296 ALJR 107; 407 ALR 222

Appeal from NSW. Appeal allowed.

The appellant was sentenced in the Local Court to aggregate sentence of 3 years imprisonment, NPP 2 years for firearms offences. On sentence appeal in the District Court, the appellant asked that her sentence be served by way of ICO. The District Court dismissed the appeal, making no express reference or findings as to an assessment under s 66(2). By majority, the Court of Appeal held that non-compliance with s 66(2) was not a jurisdictional error of law and dismissed the application for review (*Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1).

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

Held: By majority (Gordon, Edelman, Steward and Gleeson JJ; Kiefel CJ, Gageler and Jagot JJ dissenting), appeal allowed. Set aside order of District Court dismissing the appellant's appeal, and order the District Court to determine the appeal according to law.

- Three steps are to be undertaken by a sentencing court prior to the final order by which a sentence of imprisonment is imposed under the *CSPA*, or confirmed or varied on a sentencing appeal: first, a determination that the threshold in s 5(1) is met; second, determination of the appropriate term of the sentence of imprisonment; and third, where the issue arises, consideration of whether or not to make an ICO: at [59].
- s 66 imposes specific mandatory considerations upon the decision maker to make, or refuse to make, an ICO: at [72]ff.
- While aspects of community safety underpin some of the general purposes of sentencing, such as specific and general deterrence and protection of the community from the offender, those aspects will have been considered in deciding whether to impose a sentence of imprisonment (ie, before considering an ICO). Community safety is required to be considered *again* and in a different manner under s 66 when considering whether to make an ICO. At this third step, community safety in s 66(1) is given its principal content by s 66(2), namely, the safety of the community from harms that might result if the offender reoffends, whether while serving the term of imprisonment that has been imposed or after serving that term of imprisonment: at [77].

- The jurisdiction to make an ICO calls for a subsequent and separate decision to be made *after* a sentence of imprisonment is imposed: at [82].
- The failure to consider the paramount consideration in s 66(1) by reference to the assessment of community safety in s 66(2) demonstrates a misconception of the function being performed when deciding whether to make an ICO by failing to ask the right question within jurisdiction: at [88].
- The District Court failed to undertake the assessment required by s 66(2) and thereby fell into jurisdictional error. As there is a duty to consider whether to grant an ICO in cases where the power is engaged, this duty remains unperformed: [116]-[117].
- Failure to undertake the assessment in s 66(2) did not invalidate the sentence of imprisonment: at [98].

Combination of extended joint criminal enterprise at common law and constructive murder

2. **Mitchell v The King [2023] HCA 5; 97 ALJR 172; 407 ALR 587**

Appeal from SA. Appeals allowed.

The High Court allowed appeals of the four accused, holding that:

- The common law doctrine of extended joint criminal enterprise does not apply to constructive murder pursuant to s 12A *Criminal Law Consolidation Act 1935* (SA). The doctrine of extended joint criminal enterprise and constructive murder under s 12A could not be relied upon in combination to create a new pathway to Murder under s 11.
- Combining the doctrine with the statutory provision of constructive murder (s 12A) was impermissible as it amounted to creating a new doctrine of "constructive, constructive murder", where no such doctrine has ever existed.

Note: Section 12A is drafted in somewhat similar terms to s 18 *Crimes Act 1900* (NSW).

In ***R v Nehme and Ors*** [2023] NSWSC 202 Button J at [1] said in that it is very difficult to resist a reading of the effect of *Mitchell* is that the combination of extended joint criminal enterprise at common law and constructive murder has been abolished … throughout Australia, for all purposes.

Wright J in ***R v DJD; Murdoch*** [2023] NSWSC 222; 111 NSWLR 193 at [71] said, regarding *Mitchell*, that if a similar approach is taken to construction of s 18(1)(a) *Crimes Act* (NSW) it leads to the conclusion that an accused's liability for constructive murder could be established by application of the doctrine of joint criminal enterprise, but not the doctrine of extended joint criminal enterprise; and that this reasoning is consistent with the approach of Button J in *R v Nehme*.

Break and enter dwelling-house - appellant joint tenant - "break and enter" must involve trespass - person with lawful authority to enter premises not liable for "break"

3. **BA v The King [2023] HCA 14; 97 ALJR 358**

Appeal from NSW. Appeal allowed.

The accused was charged with aggravated break and enter with intimidation (s 112(2) *Crimes Act 1900*) for breaking into his ex-partner's apartment. He was a tenant under a residential tenancy agreement but no longer an occupant of the apartment. The CCA, allowing the Crown's appeal against the trial judge's verdict of acquittal, held the trial judge erred in holding that the prosecution was required to establish that the respondent did not have a pre-existing right to enter, as a pre-condition to proof of 'breaking'. Rather, the prosecution was obliged to establish that entry occurred without consent of the complainant. A re-trial was ordered (*R v BA* [2021] NSWCCA 191).

Held: By majority (Gordon, Edelman, Steward and Gleeson JJ; Kiefel CJ, Gageler and Jagot JJ dissenting), appeal allowed.

- The appellant did not commit a break and enter. Section 112(1)(a) requires a trespass, that is, entry to premises of another without lawful authority. The appellant did not commit a trespass. He had a right of exclusive possession which would not have been lost even if he ceased to occupy the premises prior to the expiry or termination of the residential tenancy agreement. He had lawful authority for entry, including by force of the kind that would constitute a "break" in the absence of such authority. Having that authority, he did not require the complainant's consent to enter the premises. His liberty to enter the premises was also not conditional upon his having a purpose to use the premises as a residence, nor was it removed when he entered the apartment by force, in contravention of s 51(1)(d) of the *Residential Tenancies Act 2010* (NSW): at [42].

***Children - presumption for incapacity - doli incapax - RP v The Queen* (2016) 259 CLR 641**

4. **BDO v The Queen [2023] HCA 16; 97 ALJR 377**

Appeal from Qld. Appeal allowed, in part.

This case has relevance to NSW due to the High Court's discussion of *RP v The Queen* (2016) 259 CLR 641.

The appellant, a child, was convicted of eleven counts of sexual assault. Section 29 *Criminal Code* (Qld) provides:

> Immature age
>
> (1) A person under the age of 10 years is not criminally responsible for any act or omission.
>
> (2) A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.

The appeal raised the question of whether what is required by s 29(2) to rebut the presumption of incapacity can be equated with what is required by the common law as stated in *RP v The Queen*. At common law the presumption may be rebutted by evidence that the child "knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence" (*RP v The Queen* at [9]) - what is spoken of is the child's *actual knowledge*: at [6].

Held: Appeal allowed, in part. There was insufficient evidence by the prosecution to rebut the presumption of incapacity beyond reasonable doubt for five counts, for which verdicts of acquittal were entered: at [52].

The trial judge did not err in directing the jury that to rebut the presumption for incapacity it had to be proved that at the time he did the act, the appellant "had the capacity to know he ought not do it."

- Section 29(2) does not use the term "knowledge". There is a difference between what is meant by a person's capacity to know and their knowledge. The former has regard to ability to understand moral wrongness, the latter to what in fact they know or understand: at [15].

- It may be that *RP v The Queen* as to matters of proof is relevant to a child's capacity to know or understand that the act is morally wrong. Wrongness is expressed by reference to the standard of reasonable adults, from which it takes its moral dimension. It is not what is adjudged to be wrong by the law or by a child's standard of naughtiness. The capacity of a child to know that conduct is morally wrong will usually depend on an inference to be drawn from evidence as to the child's intellectual and moral development: at [23].

- Section 29(2) does not require the prosecution prove actual knowledge of moral wrongness of the act, but rather the capacity to know or understand that to be the case. In practical terms in some cases the distinction will not be of importance, but the distinction remains in Queensland: at [24].

Inquiries into convictions - federal offences - Crimes (Appeal and Review) Act 2001 (NSW) can be picked up by Judiciary Act 1903 (Cth), s 68 so as to apply to a conviction for a federal offence

5. **Attorney-General (Cth) v Huynh [2023] HCA 13; 97 ALJR 298**

Appeal from NSW. Appeal allowed.

The applicant was convicted of Commonwealth drug importation offences. His application for a review into his conviction to the NSW Supreme Court under s 78 *Crimes (Appeal and Review) Act 2001* (*CARA*) was refused. The NSW Court of Appeal dismissed his application for judicial review of the Supreme Court decision, holding that ss 78 and 79 *CARA* did not apply to federal offenders of their own force or by force of s 68(1) *Judiciary Act 1903* (Cth) (*Huynh v Attorney-General (NSW)* [2021] NSWCA 297).

Held: By majority, appeal allowed. Remit the matter to the Court of Appeal.

- *CARA* can be picked up by the *Judiciary Act 1903* (Cth), s 68 so as to apply to a conviction for a federal offence. Sections 78(1) and 79(1) of *CARA* do not apply of their own force to a conviction by a NSW court for a Commonwealth offence. But ss 78(1) and 79(1)(b) do apply to such a conviction/Commonwealth laws by force of s 68(1) *Judiciary Act*, as they are laws respecting the procedure for the hearing of appeals in the "like jurisdiction" to that conferred under s 86 *CARA*, invested in the NSW Court of Criminal Appeal upon its receipt of a reference under s 79(1)(b) *CARA*: at [77].

Expert evidence at common law – expert opinion – s 79 Evidence Act 1995

6. Lang v The Queen [2023] HCA 29; 97 ALJR 758

Appeal from Qld. Appeal dismissed.

The appellant was convicted of murder. The Crown case was that the appellant stabbed the deceased. The Crown had to exclude the possibility that the victim died by suicide.

In the High Court, the appellant submitted that the Queensland Court of Appeal erred in finding that evidence of Dr O - that it was more likely that the deceased's wounds had been caused by another person than self-inflicted - was admissible because it was not based on Dr O's expert knowledge as a forensic pathologist.

Held: By majority (Jagot J; Kiefel CJ and Gageler J agreeing; Gordon and Edelman JJ dissenting), appeal dismissed.

- The impugned evidence of Dr O, that likelihood of the wounds being inflicted by another person rather than self-inflicted, was admissible. To be admissible at common law, an expert opinion must be based on specialised knowledge or experience that is beyond the common knowledge and experience attributable to the tribunal of fact. It is enough that the opinion be demonstrated to be based substantially on that specialised knowledge: at [10]-[12]; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; *Velevski v The Queen* (2002) 76 ALJR 402; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

- No expert evidence is based exclusively on the expert's training, study, or experience. All fields of specialised knowledge assume "observations and knowledge of everyday affairs and events, and departures from them", it being the "added ingredient of specialised knowledge to the expert's body of general knowledge that equips the expert to give [their] opinion" (*Velevski* at [58]). *Cross on Evidence* identifies seven criteria for admissibility of expert opinion evidence at common law. These criteria are not all mutually exclusive. The requirement in *Makita* that the expert's evidence must "fully" expose the expert's reasoning process does not involve an absolute standard, even in a case where admissibility is governed by the terms of s 79 *Evidence Act 1995*. Depending on the field of expertise and the expert opinion given, some matters may be properly assumed or inferred as forming part of the foundation of the expert's opinion: at [431]-[435].

- Dr O drew substantially on specialised knowledge to engage in process of reasoning through comparison of features of the stab wound with features of stab wounds made by people who had wanted to kill themselves and by people killed by others: at [24]-[26]. Dr O's opinion was plainly based on his expertise as a forensic pathologist: at [1], [248], [465]-[470]; *HG v R* (1999) 197 CLR 414.

Jury misconduct – juror conducted internet research – no miscarriage of justice

7. HCF v The Queen [2023] HCA 35; 97 ALJR 978

Appeal from QLD. Appeal dismissed.

After jury verdicts of guilty were entered at the applicant's trial for sexual offences, a juror delivered a note to the court that juror X had conducted internet research regarding sentencing practices for one of the offences charged and had informed the other jurors of the outcome of their research. The jury had been instructed by the trial judge not to conduct research about the accused, any witnesses or people involved or the legal principles. The trial judge directed the Sheriff to conduct an investigation.

In the High Court, the appellant submitted there was a miscarriage of justice due to juror X's undertaking not to conduct internet research and failure by other jurors to report the conduct to the judge.

Held: By majority (Gageler CJ, Gleeson and Jagot JJ; Edelman and Steward JJ dissenting), appeal dismissed.

- In cases of jury (or juror) misconduct, what is required to establish a miscarriage of justice is that a fair-minded and informed member of the public might reasonably apprehend that the jury (or juror) might not have discharged or might not discharge its function of rendering a verdict according to law, on the evidence, and in accordance with directions of the judge: at [13]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
- Juror X and other jury members did contravene the trial judge's directions. The conduct of juror X and the jury is properly described as misconduct and irregular: at [59].
- However, for the conduct to satisfy the reasonable apprehension test, more would be required than that the conduct contravened directions of the judge. Cases where juror misconduct has resulted in setting aside of the verdict have included consideration of the potential effect of the misconduct on the jury's

discharge of its function, with the most important considerations being the nature of the inquiries made and/or information obtained (cases cited): at [48].

- Juror X's conduct might have been in wilful disobedience of directions. Equally plausible, however, is that juror X did not appreciate that internet research – not about the appellant, any witness, or the particular case or the charges, but about the definitions of and sentences for rape as compared to unlawful carnal knowledge – was contrary to directions. As to the state of mind of other jury members, it is relevant that nothing in the Sheriff's report suggests that when juror X told them about his internet research, any of them took the view that the conduct needed to be reported in order not themselves to have been in contravention of directions: at [51]-[52]. Failure of a jury or juror to fully appreciate and therefore apply a procedural direction about what is to occur in the course of a hearing does not, without more, provide a foundation for a positive feeling of actual apprehension on the part of a fair-minded member of the public of failure to fully appreciate and therefore apply a substantive direction about how a verdict is to be rendered: at [62].
- The misconduct of juror X in undertaking the internet research about the definitions of and sentences for rape and unlawful carnal knowledge and of jurors in not reporting these matters to the judge, could not be found on the balance of probabilities to their having acted in wilful disobedience of the judge's directions. The "objective nature and extent" of this misconduct, which is all that exists in this case, provides no basis to conclude that a fair-minded and informed member of the public might reasonably apprehend that this jury might not have discharged its function according to law, on the evidence, and in accordance with directions: at [69]-[70]; *Smith v Western Australia (No 2)* (2016) 263 A Crim R 449.

"a party" in s 135(a) Evidence Act 1995 includes a co-accused in a joint criminal trial

8. **McNamara v The King [2023] HCA 36**

Appeal from NSW. Appeal dismissed.

The appellant and co-accused (Rogerson) were convicted of murder and drug supply. To establish a defence of duress, the appellant sought to lead evidence at trial that the co-accused admitted participation in several homicides and other violence. The trial judge excluded the evidence as unfairly prejudicial to the co-accused under s 135(a) *Evidence Act* which permits a court to refuse to admit evidence if probative value substantially outweighed by danger of unfair prejudice to "a party".

In the High Court, the appellant submitted "a party" in s 135(a) does not include a co-accused in a joint criminal trial.

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

- "a party" in s 135(a) includes a co-accused in a joint criminal trial. Strong principle and policy reasons support existence of a judicial discretion to exclude admissible evidence of a co-accused where probative value is outweighed by its prejudicial effect on another co-accused: at [51].
- Applying terminology of the *Evidence Act* to the one joint trial which must be had on the one joint indictment, the joint trial is "a proceeding" to which the Crown ("the prosecutor") is "a party" and to which each co-accused ("a defendant") is also "a party". Each co-accused is "a party" to the one proceeding constituted by the joint trial on the one joint indictment: at [62], [64].
- Similarly, the danger of unfair prejudice to "a party" under ss 135(a), s 136(a), and 137, is unfair prejudice to any co-accused. The 'hearsay rule', 'tendency rule' and 'credibility rule' and relevant provisions also show the statutory scheme in its application to a joint trial on a joint indictment which follow from understanding each co-accused to be "a party" to the one "proceeding": at [70]-[75].

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

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

Appeal from NSW. Appeal dismissed.

The appellant was sentenced for s 66EA, persistent sexual abuse of child. The maximum penalty at time of the offending was 25 years imprisonment. From 1 December 2018, a new s 66EA provision commenced, carrying an increased maximum penalty of life imprisonment.

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.

The appellant appealed the decision of the NSW CCA where a majority held it was correct for the appellant to be sentenced on the basis that the new maximum penalty of life imprisonment applied. Section 19 did not apply as the current s 66EA created a new and distinct offence (*Xerri v R* [2021] NSWCCA 268).

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: at [15], [65]. There are significant differences between the current and previous s 66EA: see at [15]-[22]; [55]-[57].
- The current s 66EA creates a new retrospective offence carrying a maximum penalty of life imprisonment (s 66EA(7)): at [21], [26], [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. The current s 66EA contains its own provision on sentencing in s 66EA(8): at [32]-[33]. Nothing in s 25AA can alter that the current s 66EA is a new offence. Whilst s 25AA(4) expressly preserved the continuing application of s 19, that reservation did not touch upon the ambit of the application of s 19. Section 25AA(4) therefore cannot influence the correct characterisation of current s 66EA as being a new offence: at [66].

B. SUPREME COURT

EAGP - fail to ascertain whether accused pleaded guilty before committal – s 95 Criminal Procedure Act 1986

Tuxford v DPP [2023] NSWSC 1300 (Weinstein J)

The Court allowed the applicant's appeal from the magistrate's order committing him for trial. The Magistrate erred by failing to ascertain whether or not the plaintiff pleaded guilty to the offence charged.

Section 95(4) *Criminal Procedure Act 1986* provides that before committing an accused person under s 95, a Magistrate *must* ascertain whether or not the accused person pleads guilty to the offences which are proceeded with. This is mandatory, and for good practical reason. Failure to undertake the inquiry required under s 95(4) potentially deprives the plaintiff of a 25% discount for an early plea of guilty, as the discount available is mandatorily reduced by s 25D(2)(b) *CSPA* once the matter is committed to the District Court for trial: at [13]-[17]; *Coles v DPP* [2022] NSWSC 960; *Hijazi v DPP* [2022] NSWSC 1218.

EAGP case conference obligations – s 76 Criminal Procedure Act 1986

Elwood v Director of Public Prosecutions [2023] NSWSC 772 (Davies J)

> Section 76(3)(a)-(b) *CPA* ('Failure to complete case conference obligations') provide that a magistrate may commit an accused for trial or sentence, or adjourn committal proceedings, for unreasonable failure by the accused to participate in a case conference or complete a case conference certificate.

The Court held the magistrate erred where, after delays, he refused the plaintiff further adjournment, entered pleas of not guilty and committed the plaintiff for trial (s 76(3)(a)) despite a joint application by both parties for further case conferencing and negotiations. The magistrate prejudged the matter and focussed too much on delay without hearing why the parties were seeking adjournment or giving an explanation for why the plaintiff was guilty of unreasonable failure, nor finding how the plaintiff was to complete the case conference certificate where it had not been completed by the prosecutor.

The magistrate was bound to consider the different pathways available under s 76; and the effect of committal on the accused, that is, deprival of 25% discount for early plea by reason of s 25D *CSPA* (*Coles v DPP* [2022] NSWSC 960): at [62]-[63].

The proceedings were remitted before a different magistrate.

EAGP – commencement and transitional provisions

R v Tiriaki [2023] NSWSC 1480 (Rothman J)

The EAGP provisions in Pt 3 Div 1A *CSPA*, which prescribe discounts for a plea of guilty in offences dealt with on indictment, apply to proceedings commenced on or after 30 April 2018 (Sch 2, Pt 30 *CSPA*).

In this matter, the accused was conviction of murder in 2013. In 2023, his conviction was overturned on appeal and a new trial ordered. The accused was re-arraigned and pleaded guilty. The Crown submitted Pt 3 Div 1A applied because the previous proceedings had concluded and the present proceedings were new proceedings that could not have commenced before 2023 (cl.88, Sch 2, Pt 30).

The sentencing court, Rothman J, held that Pt 3, Div 1A did not apply to the present proceedings and reverted to earlier principle whereby a sentencer had a broad discretion to discount a sentence for the utilitarian value of a plea of guilty. Once quashed on appeal, a conviction has no effect, and has had no effect from its delivery and/or

recording. Therefore, the proceedings commenced on arraignment in August 2013 before the promulgation of Pt 3 Div 1A: at [21]-[36].

Accused detainee to appear by audio-visual link (AVL) for sentencing proceedings - Indigenous cultural values and principles - s 5BB Evidence (Audio and Audio Visual Links) Act 1998

R v Knight (No 1) [2023] NSWSC 195 (Yehia J)

The applicant's murder sentence proceedings had been listed with an order that the applicant appear in-person. Both the deceased and applicant come from the Bourke Indigenous community.

The Court granted the applicant's application to revoke the direction to appear in-person, and to appear by AVL pursuant to s 5BB *Evidence (Audio and Audio Visual Links) Act 1998*. The Crown had opposed the application.

Section 5BB(1) provides that an accused detainee charged with an offence must, unless the court otherwise directs, appear before the court by audio visual link.

Section 5BB(4) provides that the court may make such a direction only if satisfied that it is in the interests of the administration of justice for the accused detainee to appear physically before the court.

The Court held that the statutory presumption that the applicant appear by AVL is not displaced: at [31]. It is not in the "interests of the administration of justice" that the applicant attends in-person, where the sentencing proceedings will be held in the usual way, rather than pursuant to a restorative justice model, and in the local area allowing family and community to attend. It is difficult to see how attendance in-person would better fulfil purposes of sentencing (s 3A *CSPA*), i.e., accountability, denunciation, and to recognise harm to deceased and community: at [23]-[25].

In an appropriate case, it may be wholly appropriate that Indigenous cultural values and principles would dictate a direction is made for an offender to appear in-person at sentencing: at [27].

The *Bugmy Bar Book* is increasingly relied upon as capable of assisting judicial officers, dealing with impact of intergenerational trauma and the stolen generations: at [20].

Committal proceedings - extension of time to file charge certificate beyond six month statutory time limit

Zahed v Director of Public Prosecutions (NSW) [2023] NSWSC 368 (Hamill J)

The Magistrate erred in finding the DPP did not have the power to request material from the NSW Crime Commission pursuant to s 15A *Director of Public Prosecutions Act 1986*, and thereby extending time for the DPP to file a charge certificate beyond six months pursuant to s 67(3)(b) *Criminal Procedure Act 1986*.

The Court allowed the plaintiff's appeal, however, and extended the time for the DPP to file the charge certificate.

Section 15A(7) *DPP Act* clearly provides that "a law enforcement or investigating officer must provide to the Director any information, document or other thing of that kind if the Director requests it to be provided." The six-month time limit for filing of a charge certificate (s 67(2)(b) *CPA*) is not taken lightly. However, the circumstances in this case are unusual. Two related matters in favour of finding it is in the interests of justice to extend the date for charge certification are (i) nature of charges (murder and aggravated kidnapping) and (ii) large size of police brief. Neither matter, by itself, would justify extending the period for charge certification beyond six months. However, it is in the interests of justice that crimes of such seriousness are prosecuted with all information considered by the prosecution: at [51]-[53].

Appeal from Local Court to Supreme Court - s 53(3)(a) Crimes (Appeal and Review) Act 2001 - not available to Commissioner of Police

Commissioner of Police, NSW Police Force v Alahmad [2023] NSWSC 762 (Garling J)

Section 53(3)(a) *Crimes (Appeal and Review) Act 2001* provides that "any person" against whom an order has been made by a magistrate in committal proceedings may appeal to the Supreme Court, but only on a ground involving a question of law alone and by leave of the Court.

The Court dismissed the summons by the Commissioner of Police pursuant to s 53(3)(a) against the Local Court's refusal to set aside a subpoena. The Commissioner is not entitled to bring proceedings seeking leave to appeal under s 53(3)(a). "Any person" refers to a defendant and does not encompass a third party (*Commissioner of Police v Chidgey* [2007] NSWSC 417). Pt 5 makes specific provision for appeals to the Supreme Court in criminal proceedings from the Local Court by defendants or by prosecutors: at [40]-[44].

C. LEGISLATION

1. Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023

Commenced 29 January 2024. Second Reading Speech.

This Act amends the *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 years of age at that time, or
- was less than 18 years 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, to ensure that a young person does not become ineligible to give evidence via pre-recorded evidence or with the assistance of a witness intermediary simply because they turned 18 between committal and pre-recorded evidence hearing.

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 – outlines 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
- the 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.

- The role of the witness intermediary is 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. However, a court is not prevented from

appointing a person where the person has assisted the witness in a professional capacity if 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.

2. Crimes Legislation Amendment (Coercive Control) Act 2022

Commencement as indicated.

Crimes Act 1900

- *Not yet commenced* - The proposed offence of coercive control in s 54D(1) is yet to commence. The coercive control offence will make it an offence for an adult to engage in repeated or continuous abusive behaviour against a current or former intimate partner.
- s 54I (commenced 22 December 2022) provides for the establishment of a Coercive Control Implementation and Evaluation Taskforce by the Minister.

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, falls 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 or violent; sexually abusive, coercive or violent; economically or 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.

3. Voluntary Assisted Dying Act 2022

Commenced 28 November 2023.

The Act regulates access to voluntary assisted dying for people with a terminal illness in NSW.

New *Crimes Act* offences: ss 41B–41E

- s 41B: Unauthorised administration of prescribed substance. Maximum penalty: Life imprisonment (strictly indictable).
- s 41D: Inducing, by dishonesty or pressure or duress, self-administration of prescribed substance. Maximum penalty: Life imprisonment (strictly indictable).
- s 41C: Inducing, by dishonesty or pressure or duress, another person to request or access voluntary assisted dying. Maximum penalty: 7 years imprisonment (Table 1 offence).
- s 41E: Advertising Schedule 4 or 8 poison as voluntary assisted dying substance. Maximum penalty: 330pu and/or 3 years imprisonment (Table 2 offence).

Offences under *VAD* Act:

- s 123 of the *VAD* Act applies *Crimes Act 1900* Pt 5A (False or misleading information offences) to the provision of information or giving of a statement under the *VAD* Act. Therefore, if a person (a) knows that information or a statement is false or misleading, or (b) omits anything which makes the information or statement misleading, the offences in Pt 5A *Crimes Act 1900* apply.
- ss 124(2)(a), (b): Authorised supplier fails to cancel materially false or non-compliant prescription. Maximum penalty: 12 months imprisonment.
- ss 125(1), (2): Contact person fails to give unused or remaining substance to authorised disposer. Maximum penalty: 12 months imprisonment.
- s 126(1): Person directly or indirectly records, uses or discloses information obtained because of a function the person has or had under the Act. Maximum penalty: 12 months imprisonment.

- s 127(1): Person publishes information about a Part 6 Supreme Court review proceeding that discloses personal information about a relevant party. Maximum penalty: 12 months imprisonment.

4. 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.

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

Commenced 8 January 2024.

Amends the *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.

6. Criminal Legislation Amendment (Knife Crimes) Act 2023

Commenced 23 October 2023.

Crimes Act 1900

These offences were transferred from the *Summary Offences Act 1988* with increased maximum penalties.

Amends *Crimes Act 1900* to create offences:

- s 93IB Custody of knife in a public place or a school. Maximum penalty—40 penalty units or imprisonment for 4 years, or both. It is a defence if the accused person proves the person had a "reasonable excuse": ss 93IB(2), (3).
- 93IC Using or carrying knives in public places or schools. Maximum penalty—100 penalty units or imprisonment for 4 years, or both.

7. Crimes Legislation Amendment (Assaults on Retail Workers) Act 2023

Commenced 13 July 2023.

Crimes Act 1900

Amends *Crimes Act 1900* to create new offences in relation to assaults on, and other actions in relation to, retail workers.

- s 60G(1) – assault, throw missile at, stalk, harass or intimidate retail worker in course of duty without causing actual bodily harm. Maximum penalty: 4 years imprisonment; Table 2 offence.
- s 60G(2) – assault retail worker causing actual bodily harm. Maximum penalty: 6 years imprisonment; Table 1 offence.
- s 60G(3) - wound or cause grievous bodily harm to retail worker, being reckless as to causing actual bodily harm. Maximum penalty: 11 years imprisonment.