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NEW SOUTH WALES COURT OF CRIMINAL APPEAL

SENTENCE APPEAL CASES

1. AGGRAVATING FACTORS

Offence committed in the home of the victim - s.21A(2)(eb) Crimes (Sentencing Procedure) Act – state of authorities unclear

In ***Aktar*** [2015] NSWCCA 123 Wilson J revisited the tension between the authorities surrounding the application of s 21A(2)(eb). On the one hand, a line of cases state that s21A(2)(eb) applies only where the offender is an intruder unlawfully within the premises: at [54]-[55]; *Ingham* [2011] NSWCCA 88; *NLR* [2011] NSWCCA 246; *BIP* [2011] NSWCCA 224; *DS* [2012] NSWCCA 159; *EK* (NSW CCA) (2010) 208 A Crim R 157. On the other hand, there have been suggestions that this interpretation is too narrow and s 21A(2)(eb) should include application to offences committed in the home by an offender lawfully present: at [55]-[63]; referring to *Melbom* [2013] NSWCCA 210 per RA Hulme J; *Montero* (NSW CCA) (2013) 234 A Crim R 532; *Second Reading Speech, Crimes (Sentencing Amendment) Bill 2007*, Leg Council, 17/10/2007 Hansard p 2667.

In this case the applicant indecently assaulted his cousin in her home during a visit. Dismissing the appeal, Wilson J found the sentencing judge did not err in finding the offence aggravated under s 21A(2)(eb). Wilson J concluded that whilst the applicant was initially a guest in the victim's home, and lawfully inside, his status changed from the moment the victim told him to leave: at [67]. However, Wilson J said that in the absence of submissions from both parties concerning the interpretation of s 21A(2)(eb) this was not an appropriate occasion on which to make further comment on 21A(2)(eb): at [64].

Hoeben CJ at CL and RA Hulme J agreed with Wilson J's orders. However, Hoeben CJ at CL reserved his position on s 21A(2)(eb) until an occasion when the matter has been fully argued by both sides, and not in any way wishing to "deprecate" Wilson J's remarks: at [1]. RA Hulme J, noting his comments in *Melbom*, also said that as the point was not fully argued he did not wish to say any more on the subject: at [2].

In ***Sumpton (No. 4)*** [2015] NSWSC 684, Hamill J, in sentencing for the murder of the victim in her own home, said that given the state of the authorities remains unclear, his Honour did not propose to treat the matter as an aggravating feature under s 21A(2)(eb). However, the fact the victim was killed in her home remained relevant to a proper assessment of the objective criminality of the offender's conduct. The distinction between this approach and essentially ticking a box that s21A(2)(eb) is engaged is a fine, and possibly elusive, one: at [27]-[31].

'Substantial injury or emotional harm' s.21A(2)(g) Crimes (Sentencing Procedure) Act

Section 21A lists aggravating factors to be taken into account on sentence. The suffix to s21A(2) prevents a court from having regard to aggravating factors where they are an element of the offence.

Eg 1: Shoot with intent to cause GBH s33A(1) Crimes Act – consideration of physical harm not excluded – anxiety, fear, or other emotional harm intrinsic to offence is excluded

In ***Tuala*** [2015] NSWCCA 8 the CCA considered whether the aggravating factor of substantial harm under s.21A(2)(g) can be taken into account on an offence of shoot with intent to cause GBH under s33A(1) *Crimes Act*. The CCA said that as it is not an element of s 33A(1) that grievous (or any other) harm was in fact caused, it is not excluded from consideration under s 21A(2). However, it might be expected that shooting at a victim with intent to cause grievous bodily harm would cause some degree of anxiety, fear, or other emotional harm. Such harm is intrinsic to the offence and, to the extent that it is, is excluded from consideration: at [45].

Eg 2: 'Wounding with intent to cause GBH s33(1) Crimes Act - Emotional harm, not physical harm, can be taken into account

On the other hand, in ***Muggleton*** [2015] NSWCCA 62, on an offence of wounding with intent to cause GBH (s 33(1) *Crimes Act*), the judge took into account as an aggravating factor that the victim had suffered substantial emotional harm under s 21A(2)(g). The CCA said it is of the nature of an offence under s 33(1) *Crimes Act* that the physical injury is substantial given the offence involves wounding or grievous bodily harm. Accordingly, it would offend the principle in *De Simoni* (1981) 147 CLR 383 to take into account the nature of the physical harm in sentencing. However, the emotional harm suffered by the victim of an offence under s 33(1) may not necessarily be substantial. Therefore emotional harm may be taken into account as an aggravating factor if shown to be over and above that which would normally be expected to be experienced by a victim who had suffered wounding: at [39].

Intoxication by "ice" as an aggravating factor

In ***King*** [2015] NSWCCA 99, the CCA held that the sentencing judge was entitled to take into account, as an aggravating feature, the appellant's intoxication by "ice" (methylamphetamine) at the time of the offence in circumstances where there was expert evidence of the connection between aggression and methylamphetamine and where the appellant knew that he could become aggressive and violent when using "ice" and alcohol but chose to do so: at [66]-[70].

2. MITIGATING FACTORS

Aboriginal background – social exclusion

In ***Kentwell (No 2)*** [2015] NSWCCA 96 the applicant was sentenced for rape and violence offences. The applicant was born to Aboriginal parents and at 12 months adopted by a non-Aboriginal family. He grew up ignorant of his Aboriginal cultural heritage, drank alcohol because he felt out of place at school, suffered from a drinking problem from 15 and was asked to leave his adoptive parents' home at 17 due to his drinking and fighting. He suffered from various mental health issues.

In re-sentencing, Rothman J (Bathurst CJ and McCallum J agreeing) made reference to ***Lewis*** [2014] NSWSC 1127 in which studies showed that social exclusion can cause high levels of aggression, self-defeating behaviours, reduced pro-social contributions to society, poor performance in intellectual spheres and impaired self-regulation. Thus a person, such as the appellant, who has suffered extreme social exclusion on account of his race, even from the family who had adopted him, is likely to engage in self-defeating behaviours. Such circumstances are akin to a systemic background of deprivation and are a background of a kind that may compromise the person's capacity to mature and to learn from experience: *Bugmy* (2013) 249 CLR 571 at [41]-[43]. This background of social exclusion will explain an "offender's recourse to violence…such that the offender's moral culpability for the inability to control that impulse may be substantially reduced": *Bugmy* at [44]. The studies in *Lewis* make clear such extreme social exclusion will likely result in anti-social behaviour and criminal offending. However, in each case, there must be evidence to suggest the application of these principles and the effect of the exclusion. The evidence in relation to the appellant of that factor is substantial: at [90]-[94].

Bathurst CJ accepted at [13] that the removal of the applicant from his natural parents and his consequent difficulty in adjusting to a "white fella's world" (as noted in the Pre-Sentence Report) is evidence of a deprived background and social disadvantage which may mitigate the sentence, consistent with the principles in *Kennedy* [2010] NSWCCA 260 at [53]; *Bugmy* (2013) 249 CLR 571 at [37]-[44]; *Neal* (1982) 149 CLR 305 at 326 per Brennan J.

Delay as a mitigating factor – judge found that delay caused applicant anxiety and concern – failure to take delay into account – error in finding delay was not to applicant's detriment

In ***Sabra*** [2015] NSWCCA 38 the sentencing judge found that an 18 month delay between a search warrant being executed and fraud charges being laid caused the applicant to become "anxious and concerned": at [21]. The CCA held the sentencing judge erred in failing to give due weight to delay and in finding the delay was not to the applicant's detriment.

It has been suggested that mere unnecessary delay, without any relevant changes occurring during the delay, is not usually a reason to mitigate sentence; so that where the defendant has taken major steps resulting in a substantial change in personal circumstances, it is the *combined* effect of delay and rehabilitation that will usually be taken into account in the defendant's favour: *Pickard* [2011] SASCFC 134; see discussion at [28]-[41].

However, this is not wholly consistent with decisions of this Court which has held delay can be relevant at a number of levels, and can operate to mitigate sentence <u>in the absence of evidence that it caused a particular change in an offender's circumstances</u>: *Blanco* (1999) 106 A Crim R 303; *King* (1998) 99 A Crim R 288; *Gay* [2002] NSWCCA 6; *Giourtalis* [2013] NSWCCA 216.

In *Giourtalis* Bathurst CJ, dealing with a complex fraud case, cited *Scook* [2008] WASCA 114 per Buss JA (at [57]-[65]) that delay will ordinarily be a mitigating factor where:

> "1. it has resulted in significant stress for the offender, or left him or her, to a significant degree, in uncertain suspense; or
>
> 2. during the period of delay, the offender has adopted a reasonable expectation that he or she would not be charged, or that a pending prosecution would not proceed, and the offender has ordered his or her affairs based on the faith of that expectation:" at [36]-[40].

Having found the delay caused anxiety and concern, the judge erred by not having regard to it on sentence and by finding the applicant failed to establish the delay was to his detriment. The anxiety and concern must have been detrimental to the applicant, at least to some degree: at [41]-[42].

Note: see also ***Omar*** [2015] NSWCCA 67 below, where total rehabilitation from drug addiction during a period of delay was of great significance.

s 21A(5) Good character - special rules for child sexual offences – victim was daughter of applicant's partner - judge erred in finding applicant's good character facilitated commission of offences

Section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* states:

"(5A) In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence."

In ***AH*** [2015] NSWCCA 51 the applicant pleaded guilty to child sexual assault offences involving the 9 year old daughter of his de facto partner. The judge, applying s 21A(5A), found the applicant's lack of prior convictions was not a mitigating factor because "his good character was a factor which was of assistance to him in the commission of these offences": at [20]-[21].

The CCA said this was an error. Here the applicant's good character played no part in obtaining access to the victim. He was not exercising a role in the community which might have afforded him access to children, such as teacher, sports coach or pastor: at [21]; see *O'Brien* [2013] NSWCCA 197. The applicant's relationship with the victim's mother and the trust which that engendered created an environment in which the offences could be committed. However, his good character could not be said to have assisted his commission of the offences: at [25].

Further, repeat offending in child sexual assault may diminish the mitigating impact of a finding of good character: *PGM* (2008) 187 A Crim R 152 at [44]. However, it is not relevant to the particular question raised by s 21A(5A) of whether an offender's good character facilitated his commission of an offence: at [23]-[24].

3. AGGREGATE SENTENCING

No power suspend an aggregate sentence – error to impose single s9 bond for five offences

In ***RM*** [2015] NSWCCA 4, a Crown appeal, the CCA found that the judge erred by suspending the execution of the aggregate sentence imposed for two offences. The ***Crimes (Sentencing Procedure) Act 1999***, s12(3) provides that, subject to s 99(1) [the revocation provisions], Part 4 of the Act does not apply to a sentence of imprisonment the subject of an order under s 12. Section 53A ('Aggregate sentences') which empowers the court to impose an aggregate sentence of imprisonment is found in Part 4. Thus, reasoned the court, there is no power to

make an order suspending the execution of the aggregate sentence: at [50]-[52]. The CCA at [53] cited ***Egan*** [2013] NSWCCA 196 at [82]-[83]:

Part 4 of the *Crimes (Sentencing Procedure) Act* does not apply when a sentence of imprisonment is suspended: s 12(3). Part 4 includes s 47, which provides for the commencement of sentences and a power to order that a sentence be served consecutively, or partly concurrently and partly consecutively, with some other sentence of imprisonment. It follows that there is no power to back- date or post-date a sentence of imprisonment that is suspended and, where there are multiple sentences to be imposed, there is no power to order any degree of accumulation.

It follows that where a court is sentencing for multiple offences, it is necessary to have regard to what the overall term of the sentence should be before considering whether an alternative to full-time imprisonment is appropriate: *Burnard v R* at [111].

The judge also erred in imposing a single bond for five offences. The Justice Link entry recorded the imposition of a separate bond for each of the individual offences. However, the record of the Court is that signed by the sentencing judge (the physical court file), and the sentence pronounced is that which bears his Honour's signature, that being a single s 9 bond for the 5 offences: at [61]-[67].

Note: Query the correctness, in ***RM,*** of the proposition that there is no power to make an order suspending the execution of the aggregate sentence. Section 12(3) states that Part 4 does not apply to a sentence the subject of an order under s12 (that is, a sentence which *has been suspended*). Arguably the question of whether suspended sentences can be aggregated is quite different from the question of whether an aggregate sentence can be suspended. There does not seem to be anything in the Act preventing a judge from deciding to impose an aggregate sentence, finding that it is less than two years, and then considering whether to suspend that sentence under s12. However, at this stage ***RM*** is a binding authority for the proposition that aggregate sentences cannot be suspended.

Aggregate sentencing - criminality of individual offences properly assessed - judge not required to set out in detail process of accumulation and totality - discount for guilty plea applied to indicative sentences and not to the aggregate sentence - no error

In ***Tweedie*** [2015] NSWCCA 71 the applicant pleaded guilty to 27 offences of dishonestly obtain property by deception (s192E ***Crimes Act***). The applicant used stolen credit cards to obtain goods at retail outlets. The judge imposed an aggregate sentence of 4 years, NPP 3 years. The CCA dismissed the applicant's appeal.

The applicant submitted that as there were a number of offences where criminality differed but for which the same sentence was indicated, the judge failed to determine an appropriate sentence for individual offences and made a "blanket assessment". However, the CCA said the judge had discriminated between the various offences based upon the value of the goods obtained but not to the extent to which the applicant contended he should have. If there had been two, or a few, offences, it may be that the value of goods in each transaction would be a significant indicator of the seriousness of the individual offences. However, these were not isolated acts but systematic, frequent and fraudulent activity. The value of the individual transactions is of lesser importance as the pattern of offending is more blatant, frequent and entrenched: at [28]-[29].

The applicant submitted the judge failed to specify the structure of the aggregate sentence and the extent of accumulation of indicative sentences. However, the CCA said a judge imposing an aggregate sentence is not required by the legislation to spell out in detail how the process of accumulation and the application of the principle of totality has been carried out: at [33]: *JM v R* [2014] NSWCCA 297 at [39]-[40].

The applicant further submitted it could be inferred from the aggregate sentence the judge failed to give a discount for his plea of guilty. However, the CCA said the discount for a plea of guilty is not applied to the aggregate sentence. Section 53A(2)(b) *Crimes (Sentencing Procedure) Act* requires various matters to be taken into account in arriving at indicative sentences, including the mitigating value of any plea of guilty pursuant to s 22. Of course, in arriving at an aggregate sentence through a notional process of accumulation of indicative sentences it is important to ensure that an offender is not deprived of mitigation for the utilitarian value of pleas of guilty: at [41]; *Liles v R (Cth)* [2014] NSWCCA 289 at [45]; *JM* at [92].

4. SPECIAL CIRCUMSTANCES

Where judge found special circumstances in factors other than accumulation – special circumstances not reflected in total effective sentence

In ***Sabongi*** [2015] NSWCCA 25 the judge made a finding of special circumstances. The judge identified rehabilitation, first time in custody and the applicant's young age as relevant matters; and also identified accumulation as a relevant matter. The applicant submitted the total sentence was in accordance with the "statutory ratio": at [79].

The CCA allowed the applicant's appeal. The Court has declined to intervene when the sole basis for finding special circumstances was by reason of accumulation: at [83]; ***AB*** [2014] NSWCCA 31. Conversely, the CCA has intervened where the finding of special circumstances was more broadly based than accumulation and where the sentencing Judge had not clearly indicated the total sentence will remain in accordance with the statutory norm: at [84]: see cases cited.

In this case, the Judge did not make clear an intention to impose a total sentence whereby the non-parole period would be 75% of the total sentence; and did not indicate that his purpose in finding special circumstances was merely to apply the statutory proportions to the overall effective sentence. This case falls between those cases where there is no acknowledgement by the Judge of the total effect of the sentence and, on the other hand, cases where the finding of special circumstances were based entirely on the accumulation or where the Judge states he or she is aware the adjustment will result in the normal "statutory ratio": at [86]-[87].

It is significant the finding of special circumstances was not based solely upon the accumulation, but also other matters. If the only matter identified had been the accumulation of sentences, then the imposition of a collection of sentences in which the total parole period was only slightly less than one-third of the total of the non-parole periods might be regarded as sufficient implementation of sentencing intention: see ***Cicekdag*** [2007] NSWCCA 218 at [46]-[49]. However, other factors were identified: at [90]. Matters such as the need for rehabilitation ought to have resulted in greater adjustment to the proportion between the non-parole period and total sentence. The sentencing discretion miscarried: at [91].

Special circumstances not reflected in individual sentences or total effective sentence

In ***MD*** [2015] NSWCCA 37 the applicant pleaded guilty to two counts of aggravated sexual intercourse with a child under 10 and was sentenced to imprisonment of 10 years 3 months, NPP 7 years 8 months. The judge found special circumstances under s 44(2) ***Crimes (Sentencing Procedure) Act*** to provide for the applicant's rehabilitation and, to a "minor" extent, to reflect the accumulation of the sentences for Counts 1 and 2: at [30]. The applicant submitted the sentence failed to reflect the finding of special circumstances.

The CCA allowed the appeal. Generally where the Court has intervened, it has usually been where the sentencing judge has not given effect to a finding of special circumstances through inadvertence or miscalculation. See the case examples collected in ***Fina'i*** [2006] NSWCCA 134: at [40].

The starting point with appeals asserting such error is to ascertain "what can be gleaned of the judge's intention": ***Maglis*** [2010] NSWCCA 247. The judge's statement that the release of the applicant after completing "about sixty-five percent of his total sentence" if his risk level has been ameliorated by treatment in custody, is inconsistent with the total NPP imposed, being 74.8% of the total sentence. It is also inconsistent with the individual NPPs on Counts 1 (75%) and Count 2 (73.5%) as a proportion of the total term of the individual sentences. An earlier statement that the applicant should be released after serving "slightly less than the statutory period" cannot be interpreted as advertence to the end result. There is nothing to indicate the judge was aware of, or intended, this result. The sentencing discretion miscarried: at [43]-[46].

5. INTENSIVE CORRECTION ORDERS

Breach of suspended sentence bond – failure to consider Intensive Correction Order under s 99(2) Crimes (Sentencing Procedure) Act

In ***Lambert*** [2015] NSWCCA 22 the applicant received 2 years imprisonment for drug offences, suspended pursuant to s 12 *Crimes (Sentencing Procedure) Act*, upon entering a good behaviour bond for 2 years. The applicant was called up for breach of the bond and the judge imposed a sentence of imprisonment.

Section 99(2) *Crimes (Sentencing Procedure) Act* states that when revoking a s 12 bond, a court may direct the sentence of imprisonment to which the bond relates to be served by Intensive Correction Order (ICO).

Allowing the appeal, the CCA held the proceedings miscarried as the judge did not consider s99(2). If it were apparent that the applicant could not be assessed as suitable for an ICO, this ground of appeal would fail. But there was promising progress of rehabilitation: at [44]. In the absence of any consideration of the options provided by s 99(2), the applicant was deprived of an opportunity to have been sentenced more favourably. Section 99(2) expressly provides that the option of an ICO remains open even after revocation of a s12 bond. It does not mandate such consideration in every case. But this was a case in which an ICO was a realistic potential sentencing outcome: at [46].

Drug supply - failure to consider availability of ICO as alternative to full-time custody - legal representatives did not bring court's attention to optional alternatives

In ***EF*** [2015] NSWCCA 36, an appeal from a sentence for drug supply, the applicant's evidence at his sentence hearing was that he had been selling drugs to support his habit. The applicant's legal representative did not submit otherwise than that a full-time custodial sentence had to be considered. The applicant was sentenced to a term of imprisonment.

The CCA allowed the appeal. In other than exceptional circumstances in the case of drug supply for an offender who has substantial involvement in trafficking, a custodial sentence will ordinarily be imposed: *Gu* [2006] NSWCCA 104; *Clark* (NSWCCA, 15 March 1990, unreported). However, the judge failed to consider the availability of an Intensive Correction Order (ICO) in accordance with s 5(1) *Crimes (Sentencing Procedure) Act* which requires that a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate: at [40]-[41]. The court said that nothing in the authorities such as *Gu* and *Clark* obviates the need for sentencers to consider the circumstances of each case, including the availability of alternatives to full-time custody: at [10]-[11]; *Cacciola* (1988) 104 A Crim R 178.

Ordinarily an offender is bound by the conduct of his case at first instance, but that is not an absolute rule: at [13]; [57] citing *Lambert* [2015] NSWCCA 22 at [39].

No submissions were made as to whether an ICO should be considered, even though the circumstances were such that it was a sentencing option: at [58]. The applicant's offending, his circumstances and his ongoing record of compliance with conditions of bail, all matters relevant to an assessment of suitability for an ICO, suggested that there were real prospects he would be found suitable, if assessed: at [60].

Note: See the commentary on this case in *Criminal Law News* (Vol 24, Issue 4), with which the author respectfully agrees:

> Statements in many cases of the Court of Criminal Appeal such as that in *R v Gu* [2006] NSWCCA 104; BC200601976 at [27] quoted in the judgment of Simpson J have held that unless there are exceptional circumstances a full-time custodial sentence ought be imposed where an offender has been substantially involved in drug trafficking. It seems to have been assumed by E's legal representative in the District Court and by the judge that there were no exceptional circumstances, and hence the acceptance by all that a full-time custodial sentence should be imposed. The judgment of the court in *EF* makes it unclear whether exceptional circumstances were found by the court to exist. On one view it might be that the court considered the existence of exceptional circumstances to be an unnecessary consideration and that a sentencing judge may consider the imposition of something other than a full-time custodial sentence regardless of whether such circumstances exist or not. If that is the approach that was taken it appears to be contrary to a long line of authority.

6. VICTIM IMPACT STATEMENTS

Extent to which Victim Impact Statement can be used to prove an aggravating factor under s 21A Crimes (Sentencing Procedure) Act which must be proved beyond reasonable doubt – caution where victim's credibility doubtful

In ***Tuala*** [2015] NSWCCA 8 the Crown appealed against a sentence imposed for shoot with intent to cause GBH (s33A(1) *Crimes Act*). The Crown submitted the judge failed to find substantial harm was caused to the victim so as to constitute an aggravating factor under s 21A(2)(g) *Crimes (Sentencing Procedure) Act* 1999.

Simpson J considered the extent to which an unsworn Victim Impact Statement (VIS), not tested by cross-examination, can be used to prove an aggravating factor such as s 21A(2)(g) which must be proved beyond reasonable doubt: at [57]. Where there is no objection to a VIS or a VIS confirms other material, there seems to be no hesitation in accepting a VIS to establish substantial harm. However, considerable caution must be exercised before the VIS can be used to establish an aggravating factor to the requisite standard where:

- the facts to which the victim impact statement attests are in question; or
- the credibility of the victim is in question; or
- the harm which the statement asserts goes well beyond that which might ordinarily be expected of that particular offence; or
- the content of the victim impact statement is the only evidence of harm: at [81]- [82].

Simpson J noted the CCA is yet to reach a consensus on the use to which a VIS is put and each case will depend on its own facts and circumstances: see authorities at [52]-[76].

In this case the VIS could not be used to prove beyond reasonable doubt that the injury, loss and damage caused by the offences was more substantial than could ordinarily be expected of such offences: [82], [84]. The victim's credibility was subject to considerable doubt: [80]-[81]. That does not mean that substantial injury, loss and damage were not proved, as substantial physical injury was proved by evidence in the trial: at [84].

Substantial emotional harm s 21A(2)(g) Crimes (Sentencing Procedure) Act - use of victim impact statement (VIS) – where 'VIS' is an expert's report

In ***Muggleton*** [2015] NSWCCA 62 the CCA dismissed the applicant's appeal against sentence for wounding with intent to cause GBH (s 33(1) *Crimes Act*). The judge did not err in taking into account as an aggravating factor that the victim had suffered 'substantial emotional harm' under s 21A(2)(g) *Crimes (Sentencing Procedure) Act* based on documents tendered by the Crown: a VIS by the victim, and reports by a trauma counsellor and a psychologist (collectively referred to as the Victim Impact Evidence).

Emotional harm may be taken into account as an aggravating factor on an offence of wounding with intent to cause GBH if shown to be over and above that which would normally be expected to be experienced by a victim who had suffered wounding: at [39]. The degree of emotional harm and whether it is 'substantial' within s 21A(2)(g) can be established by a VIS: ss 28(1), 30A *Crimes (Sentencing Procedure) Act*: at [40]. At sentence, the applicant made submissions as to the weight of the Victim Impact Evidence but did not seek to cross-examine the authors of the reports. While s 30A does not appear to envisage the author will be cross-examined, the position might be otherwise where the author is an expert, rather than a victim. The psychologist report

may not have been a VIS as such. It was, however, admissible as evidence from a qualified person on the impact of the incident on the victim. Accordingly, the psychologist could have been required for cross-examination but no request was made: at [44]. There was no impediment to cross-examining the trauma counsellor. That evidence as to emotional harm thus stands unchallenged: at [45]; see *Aguirre* [2010] NSWCCA 115 at [77].

The applicant also submitted the judge did not detail what would normally be expected to be suffered by a victim of an offence of wounding with intent to cause grievous bodily harm and, accordingly, in what way the victim suffered harm over and above that threshold: at [35]-[36]. The CCA said the judge was not required to specifically address the level of emotional harm that would normally be expected to be suffered by a victim of a s33(1) offence, in the circumstances of the present case, particularly in remarks delivered *ex tempore*. The victim's continuing emotional reaction must be regarded as exceptional. It was open to the judge to find the victim suffered "substantial ongoing emotional harm which has impacted enormously on him and his family". The judge was obliged, in light of that finding, to take it into account as an aggravating factor by reason of the mandatory wording in s 21A: at [46].

7. PROCEDURE AND EVIDENCE

s 43 Crimes (Sentencing Procedure) Act – re-opening proceedings to correct sentencing error – new evidence not permitted - Achurch (2014) ALR 566

In ***Bungie*** [2015] NSWCCA 9 the original sentences had been imposed "contrary to law" and sentence proceedings in the District Court had been reopened under s 43 ***Crimes (Sentencing Procedure) Act***. The CCA said the District Court judge was correct in refusing to allow the applicants to put additional material regarding rehabilitation made during their imprisonment. The power conferred by s 43 has been narrowly interpreted and is directed to correction of an error that results in the imposition of sentence that is "contrary to law". It is for that reason only that power is given to re-open proceedings. The section is not intended to afford an opportunity to offenders to re-litigate what they have already litigated, or to seek a different outcome, on different evidence: at [36]-[40]; ***Achurch*** (2014) ALR 566. Section 43 does not extend to a general re-opening of proceedings to enable a reconsideration (with or without additional evidence) of the decision originally made: at [41].

Statement made by applicant to expert - no sworn evidence of applicant - limited weight given to untested, self-serving statements made to experts

In ***Halac v R*** [2015] NSWCCA 121 the applicant was convicted of drug offences. It was submitted on appeal the sentencing judge erred in rejecting a statement by the applicant to an expert psychiatrist that he was only offered $15,000 for his part in making the delivery. The CCA rejected this submission. The Crown did not attempt to prove what the applicant was paid. Further, statements made by an offender by way of history to an expert, which statements are not supported by the offender giving sworn evidence and subjecting themselves to cross-examination, are of very little, if any, weight: see *Qutami* [2001] NSWCCA 353 at [58]. It was open to the judge to reject the statement: at [104]-[105]. The court commented (at [106]) that:

> "The practice of offenders relying on hearsay statements for findings of fact in their favour is not uncommon, notwithstanding this Court's remarks. It is not to be encouraged."

8. PARTICULAR OFFENCES

Drug supply - trafficking to a 'substantial degree' – decision not based solely on quantity of drugs but other indicia of supply

In ***Pak*** [2015] NSWCCA 45 the appellant was convicted of supply drugs. The quantities of drug were slightly more than indictable quantity and about twice the trafficable quantity. The judge said that if it were merely quantity, he would not be able to find beyond reasonable doubt the offender was involved in trafficking to a substantial degree. However, when drugs and other indicia of supply (scales, empty resealable bags, plastic bags containing foil) found at the scene were taken into account with the quantity, there was trafficking to a substantial degree: at [16]-[18].

The CCA dismissed the appeal. A determination of whether an offender is substantially involved in supply is ultimately a question of fact: at [27]. There were three different drugs and a number of indicia of supply. It cannot be said the finding was not open to the judge: at [29].

Note 1: Compare this with the case of ***Youssef*** [2014] NSWCCA 285 where the appellant had 29.86g of cocaine (over an ounce or nearly 10 times the trafficable quantity) concealed in 4 plastic bags in two places in his car. There were no indicia of supply and the NSWCCA found that it was not open to the sentencing judge to find that the appellant was substantially involved in trafficking.

Note 2: see also the case of ***EF*** at p7 above in relation to the *Clark* principles and the availability of an ICO.

Dealing with suspected proceeds of crime – s400.9 Criminal Code – general deterrence

In ***R v Yi-Hua Jiao*** [2015] NSWCCA 95, the CCA upheld a Crown appeal against a sentence of 6 months fixed term for a single offence against s400.9(1) of dealing with suspected proceeds of crime valued at over $100,000 – being $624,000 in cash. The sentence was imposed after trial on the appellant who was a 55 year old foreign national with no prior convictions. The CCA found that the principles of general deterrence called for a significantly longer sentence for an offence involving some planning, an amount of more than 6 times the threshold amount for the offence, and an offender who was more than a "bag person" or mere courier. On resentencing the appellant received a sentence of 16 months with conditional release after 12 months.

Note: The case of ***Shi*** [2014] NSWCCA 276 was cited with approval – see p22 of the 2014 Update paper.

9. MENTAL ILLNESS

Mental illness and drug addiction – total rehabilitation between commission of offences and arrest several years later – reduced need for both general and specific deterrence

Omar [2015] NSWCCA 67 was a Crown appeal against a sentence of 6 years 10 months, NPP 3 years 11 months for two counts of aggravated sexual assault and one count of armed robbery with wounding. The offences had taken place several years earlier. Evidence at sentence was that the respondent suffered mental illness at the time of the offences and had undergone total rehabilitation from drug use since the offending.

Dismissing the appeal, the CCA said the judge properly found the respondent's mental illness moderated the need for general deterrence. Further, the judge's finding that rehabilitation was

total and complete meant that *specific* deterrence was of less significance than might otherwise have been: at [75]-[79]; *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 at [177].

Crown appeal against inadequacy of limiting term - purpose of limiting term is not to punish: Mailes* (2004) 62 NSWLR 181 - *purpose of sentencing s 3A Crimes (Sentencing Procedure) Act 1999

AB [2015] NSWCCA 57 was a Crown appeal against a limiting term of 7 years' imprisonment imposed for manslaughter under s 23(1)(b) *Mental Health (Forensic Provisions) Act 1990*. As the nomination of a limiting term involves the court making the best estimate of the sentence it would have considered appropriate, following a normal trial of a person fit to be tried (s 23 *Forensic Provisions Act*), the provisions of s 3A *Crimes (Sentencing Procedure) Act 1999* are applicable: at [41]. The sentencing judge did not mention the sentencing purposes stated in s 3A: at [40], [42].

Section 3A identifies the purposes of sentencing as:

> "(a) to ensure that the offender is adequately punished for the offence,
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,
> (c) to protect the community from the offender,
> (d) to promote the rehabilitation of the offender,
> (e) to make the offender accountable for his or her actions,
> (f) to denounce the conduct of the offender,
> (g) to recognise the harm done to the victim of the crime and the community."

The Crown appeal was dismissed. The purpose of nominating a limiting term is not to punish: *Mailes* (2004) 62 NSWLR 181 at [32]. Accordingly, s 3A(a) can be put to one side. The purposes in ss 3A(b), (c), (d) and (e), also have, in the circumstances of this case, little bearing. The judge found (and this was unchallenged) that, by reason of mental disability, the respondent was an unsuitable vehicle for general deterrence. The respondent's progressive dementia, and the finding he would not commit another act of violence, means that protection of the community, and rehabilitation, have little (if any) relevance; and there is little to be gained by making an offender suffering from progressive dementia accountable for his actions: at [42]. The Crown placed particular relevance on the need to denounce the conduct (s 3A(f)). However, denunciation falls into the same category as general deterrence: an offender unsuitable, by reason of mental disability, to be a vehicle for general deterrence, is equally unsuitable to be the subject of denunciation. The irrelevance results from the diminished moral culpability, which itself results from the impaired mental capacity. Recognition of the harm done to the victim and community (s3A(g) had a place in the sentencing exercise and was not overlooked: at [45].

Section 3A does not call for a ritualistic incantation of those purposes and an express discarding of those that do not apply: at [43].

10. APPEALS

Weight to be attributed to particular sentencing considerations is a matter for the sentencing judge

In ***Tuala*** [2015] NSWCCA 8, a Crown sentence appeal, the Crown asserted inadequate weight was given to the sentencing considerations of maximum penalties, standard non-parole period

and injuries of the victim, and excessive weight given to the respondent's subjective circumstances.

Simpson J (Ward JA; Wilson J agreeing) said that *Bugmy* (2013) 249 CLR 571 makes plain that the weight to be attributed to particular sentencing considerations is a matter for the sentencing judge: at [24]. The authority of the CCA is not enlivened by a view that it would have given greater or less weight to a sentencing factor, but only if satisfied the sentencing judge's discretion miscarried because a sentence was below the range of sentences that could be justly imposed: at [44]; *Bugmy* at [24].

Applicant seeks to argue different case from that run below - Zreika [2012] NSWCCA 44

In ***Hudson*** [2015] NSWCCA 64 the applicant submitted the sentencing judge failed to take into account that between the date of arrest and the date he went into custody, the appellant had spent three periods in custody on unrelated matters: at [8]. The CCA dismissed the appeal. In the District Court the judge had been asked by the appellant's counsel to backdate his sentence to a nominated date. The appellant now argues greater regard should have been given to custody on unrelated matters and that there should have been a lesser sentence, a shorter non-parole period, or a greater backdating. An appeal to this Court is not an opportunity to argue a different case to that advanced in the court below: see ***Zreika*** [2012] NSWCCA 44. This is especially where the issue concerns the manner in which a discretion should be exercised. The submissions made in the District Court were responsible and prevailed. There is an air of unreality in what is now contended: at [9]-[10].

In ***Avery*** [2015] NSWCCA 50 the applicant received a discount for assistance to authorities. On appeal, the applicant submitted the considerations discussed in *Ellis* (1986) 6 NSWLR 603 should operate to increase the discount, and that the judge failed to make a finding about the applicant's intoxication: at [65]. The CCA dismissed the appeal. No submission regarding *Ellis* or intoxication was put to the sentencing judge. It is not open for a party to come to this Court and assert error on the part of a sentencing judge based upon a failure to take a particular course which the judge was never asked to take. Generally a party is bound by the manner in which the case is conducted at first instance: at [72], [85]; ***Zreika*** [2012] NSWCCA 44.

Note: See ***Lambert*** [2015] NSWCCA 22 and ***EF*** [2015] NSWCCA 36 above (at pp7-8 under the heading ICOs) as examples of "exceptions that prove the rule". Despite occasional exceptions, it appears that the CCA have been applying ***Zreika*** increasingly rigorously.

Earlier refusal of an application for leave to appeal does not create a jurisdictional bar for leave to appeal

In ***Lowe*** [2015] NSWCCA 46 the applicant and his cooffender S had been sentenced in 2009. In 2013 the applicant was refused leave to appeal his sentence by the CCA. S's sentence appeal was allowed in 2014. The applicant applied again to the CCA for leave to appeal based on parity. The question was whether the CCA had jurisdiction to hear this second application given its earlier refusal.

The CCA held there was jurisdiction and went on to allow the applicant's sentence appeal. The CCA and equivalents in other states have no jurisdiction to entertain a second appeal where there has been a dismissal of the appeal on the merits: at [89], [91]; *Grierson* (1937) 54

WN(NSW) 144. Authorities have consistently made a distinction between an order dismissing an appeal and an order refusing leave to appeal, consistent with *obiter* remarks in *Postiglione v The Queen* (1997) 189 CLR 295 at 305 that "there is no reason in principle to prevent a person bringing a second application for leave to appeal if an earlier application has been dismissed": at [122]-[123].

Simpson J referred also to ss 5, 6 *Criminal Appeal Act* as indication that refusal of leave to appeal does not create a jurisdictional bar to any further proceedings: at [7], [14], [23].

CONVICTION APPEALS AND OTHER CASES

1. EVIDENCE

Hearsay rule – s 65(2)(d) Evidence Act – maker unavailable – Court required to assess the circumstances in which representation made with a view to assessing reliability

In ***Sio*** [2015] NSWCCA 42 the applicant was convicted of robbery. An accomplice identified the appellant as the driver of the car used in the robbery and that the appellant had led him to commit the robbery. At trial, the accomplice refused to answer any questions. The trial judge ruled the accomplice's statements and records of interview were admissible under s 65(2)(d) on the basis that their maker was unavailable. Section 65(2)(d) states:

> s 65(2)(d) *"The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:...*
> *(d) was:*
> *(i) against the interests of the person who made it at the time it was made, and*
> *(ii) made in circumstances that make it likely that the representation is reliable."*

The CCA noted s 65(2)(d) was amended following *Suteski* (2002) 56 NSWLR 182. The CCA set out the following matters in respect of s 65(2)(d) at [24]-[30]:

(1) Paragraph (d) imposes an additional hurdle upon the prima facie admissibility of firsthand hearsay evidence of a representation against interest whose maker is unavailable. It is no longer sufficient to say the unavailable maker made a representation against interest (*Suteski* (2002) 56 NSWLR 182) it is necessary as well to satisfy (d)(ii), which requires an assessment of reliability.

(2) The new test in (d)(ii), "make it likely", is less onerous than the pre-existing wording in paragraph (c), "make it highly probable".

(3) Paragraphs (b), (c) and (d) require the Court to assess the *circumstances* in which the representation was made, with a view to assessing whether the *representation* is reliable. Those paragraphs are not directed to any particular asserted fact, but instead to the reliability of the representation considered as a whole: *Ambrosoli* (2002) 55 NSWLR 603 at [28] and [34]-[35].

(4) Two circumstances which enhance reliability are *contemporaneity* (or near contemporaneity) and *against interest*. That is plain from a comparison of the lesser tests of reliability imposed by paragraphs (b) and (d) in contrast with (c). Paragraphs (b) and (d) incorporate clear examples of circumstances taken by the Legislature to increase the likely

reliability of a representation, but they do not exhaust the circumstances to which regard may be had; there is a wide range of other matters which bear upon the "circumstances" to which attention is required by s 65(2)(b), (c) and (d).

(5) There will be cases where s 65(2) is satisfied, but the evidence is excluded under ss 135 and 137.

In reviewing a trial judge's ruling on the admissibility of hearsay evidence that the circumstances make it "likely" that the representation is reliable, the question for the CCA is binary: either the circumstances make it likely that the representation is reliable, or they do not. Appellate review is to be approached not in accordance with the principles in *House v The King* [1936] HCA 40; 55 CLR 499, but *Warren v Coombes* [1979] HCA 9; 142 CLR 53: at [30].

The question posed by statute is *not* whether the actual statements made are themselves accurate or likely reliable, but whether the *circumstances* in which they were made are such that they are likely to be reliable: at [33]. Reviewing the circumstances of the accomplice's evidence, the CCA dismissed the appeal: at [32]-[36].

Note: The reasoning in this case appears to be somewhat circular and problematic but is currently binding. The fact that a representation is 'against interest' is a prerequisite of admissibility s65(2)(d)(i). To use that factor to prove the qualifier or additional requirement over and above 'against interest' in s65(2)(d)(ii) appears to be illogical. Further, query whether the fact that a representation is 'against interest' is a circumstance in which that representation is made.

Opinion evidence – s 76(1) Evidence Act – identity of person on video footage

s 76(1) ***Evidence Act*** states: "Evidence of opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

In ***Haidari*** [2015] NSWCCA 126 the applicant was convicted of riot which took place at Villawood Detention Centre. Officer K, a client service officer, viewed film footage of the incident and identified the applicant. No objection was made at trial to Officer K's evidence. The applicant submitted the evidence was not admissible under s 76(1).

The CCA dismissed the appeal. The distinction between fact and opinion is one of degree, and wide latitude should be accorded to the trial judge given the blurred boundary between fact and opinion: at [49]-[51]; *R v Smith* (1999) 47 NSWLR 419 at [19]; *Smith v The Queen* (2001) 206 CLR 650 at [54]; *Marsh* [2005] NSWCCA 331 at [29], [31]; *Drollett* [2005] NSWCCA 356.

Unlike other cases, Officer K was present at the scene and testified he had seen the applicant. The film footage provided strong evidence adverse to the applicant, if the jury was satisfied Officer K had correctly identified him. Officer K's evidence was not opinion evidence. It was factual evidence which was not objected to, but was challenged by the applicant in cross-examination and closing address upon the basis this was a case of mistaken identity: at [76]-[77]. The applicant's reliance on *Drollett* can be distinguished where the evidence was challenged and the officer did not observe the actual incident but made observations as to what happened after conclusion of the incident: at [55]-[56], [74].

The CCA referred to other cases where issues of this type have arisen: at [54]:

1. in *Smith v The Queen*, the police officers who purported to identify the accused person were not witnesses to the events portrayed in the photographs;

2. in *R v Marsh*, the accused person's sister did not witness the alleged offence, but her evidence of identification of her brother was admitted after application of the law stated in *Smith v The Queen*;
3. in *R v Beattie* [2001] NSWCCA 502; 127 A Crim R 250, evidence of prison officers of photographic identification of the accused person, in circumstances where they had not observed the events in question, was held to have been wrongly admitted applying *Smith v The Queen*;
4. in *Nguyen v R* [2007] NSWCCA 363; 180 A Crim R 267 at 272-277 [9]-[40], this Court (referring to *Smith v The Queen*, *R v Beattie*, *R v Marsh* and *R v Drollett*) upheld decisions of a trial Judge allowing police officers (who were not present at the scene of the events) to identify accused persons from CCTV footage taken at the time of the events.

Sexual experience - proper construction of s 293 (4)(c) Criminal Procedure Act

In ***Taleb*** [2015] NSWCCA 105 the appellant, convicted of sexual assault offences, claimed the sexual activity was consensual. A vaginal swab detected DNA from an unidentified male, not the appellant. Evidence also showed the complainant engaged in text messaging of a sexual nature and may have taken part in consensual activity with another male not long after the offence.

Section 293(3) *Criminal Procedure Act* 1986 states evidence relating to the complainant's sexual experience is inadmissible. Section s 293(4)(c) allows an exception to s 293(3), providing s 293(3) does not apply if:

> *(i) the accused person is alleged to have had sexual intercourse (as defined in section 61H (1) of the Crimes Act 1900) …. with the complainant, and the accused person does not concede the sexual intercourse so alleged, and*
>
> *(ii) the evidence is relevant to whether the presence of… injury is attributable to the sexual intercourse alleged to have been had by the accused person... .*

The appellant submitted the judge erred in ruling that s 293(4)(c) did not apply as he did not concede the "sexual intercourse so alleged" (s 293(4)(c)(i)) because he claimed it was consensual. Also, that the judge erred in refusing to allow questioning about the DNA swab and text messaging.

The CCA dismissed the appeal. The "sexual intercourse so alleged" in s 293(4)(c)(i) refers only to the physical act of sexual intercourse and excludes the issue of consent. "Sexual intercourse" in s 293 has same meaning as in s 61H *Crimes Act*. Section 61H deals only with the physical acts which constitute sexual intercourse. Matters relating to consent are found in the individual sections which create the offences: at [93]-[97]; Second Reading Speech for s 409B *Crimes Act*; *Tubbou* [2001] NSWCCA 243; *Mosegaard* [2005] NSWCCA 361.

The appellant admitted sexual intercourse, therefore that element was made out. In that way, and because consent was a separate element, the sexual intercourse alleged was conceded: at [95]. If "sexual intercourse so alleged" means sexual intercourse without consent, it is difficult to see what work there is for s 293(4)(c)(i) to do, because every person accused of such an offence would satisfy the sub-paragraph. The appellant does not fall within s 293(4)(c). There was no miscarriage of justice: at [102]

The appellant further submitted the text messaging and DNA swab evidence fell within the exception in s 293(4)(a)(i), (ii): at [76]-[79]. The CCA said that to bring himself within this exception the appellant needed to demonstrate the relevant other sexual activity (i) took place "at or about the time of the commission" of the offence charged, and (ii) the evidence of such sexual activity formed part

of a "connected set of circumstances" in which the offence charged was committed. In addition, the tailpiece to the subsection needed to be satisfied. The CCA held the text messages and DNA evidence suggesting sexual activity soon after the alleged offence were precisely the sort of evidence that s 293(4)(a) was designed to exclude: at [108]. It cannot be said there is any connection between the events complained of and the matters sought to be introduced by the appellant to enable the exception in (a)(ii) to be satisfied: at [107]-[109]; *JWM* [2014] NSWCCA 248 referred to.

2. OTHER CASES

"Import" drugs – "dealing" - appellant did not receive delivery of drugs – judge erred in finding a price inquiry as to cost of releasing goods from storage amounted to 'dealing' –- inquiries together with assertions of ownership amounted to 'dealing'

In ***El-Haddad*** [2015] NSWCCA 10 the appellant was convicted of drug importation offences: ss300.2, 307.1(1) *Criminal Code* (Cth). The appellant did not receive delivery of the shipping container containing the heroin. However, he made a price inquiry regarding the release of the container from storage. The definition of "import" in s 300.2 states:

> *"**'import'**, in relation to a substance, means import the substance into Australia and includes:*
>
> *(a) bring the substance into Australia; and*
> *(b) deal with the substance in connection with its importation."*

The CCA held the trial judge erred in finding that a price inquiry could fulfil the definition of dealing. A price inquiry is not a physical dealing with a thing, nor does it readily fall within any accepted meaning of a legal dealing with the thing: at [111]-[112]. Paragraph (b) must be construed to mean something beyond bringing the substance into Australia. There must be a "dealing", and the dealing must be "in connection with" that broad process of importation: at [104]. The word "dealing" includes *physical* acts (such as removing the substance from a warehouse) and can also be a *legal* process (arranging for payment or sale by deed): at [109]-[110].

However, the CCA found the actions of the appellant amounted to a dealing of a substance "in connection with its importation." The appellant's inquiries amounted to an assertion of ownership of the contents of the container to the freight forwarder who enjoyed actual possession. There was also a letter from the appellant directing the freight forwarder to release the goods to a company undeniably connected with the appellant: at [116]-[119].

Directions – joint criminal enterprise

In ***Youkhana*** [2015] NSWCCA 41 the applicant was convicted of robbery in company (s 97(1) ***Crimes Act***). CCTV footage showed the applicant leading two co-offenders onto a train. One man sat opposite the victim, the other two sat behind. When the train stopped, the victim was punched in the eye from behind and the person sitting opposite grabbed the victim's iPad. The three men ran out of the train. The CCTV showed the applicant covering his face.

The applicant submitted the judge's direction about joint criminal enterprise was erroneous as it did not make clear the jury had to be satisfied not only that the applicant was a party to an arrangement to rob the victim, but also that he had participated in that enterprise by being present

and intentionally assisting or encouraging the others to commit the robbery, relying on *Tangye* (1997) 92 A Crim R 545 at 556-557: at [8].

The CCA dismissed the appeal. It is sufficient to constitute participation that a party to the agreement is present when the crime is committed in accordance with the agreement: at [13] citing *Huynh* [2013] HCA 6; 87 ALJR 434 at [38]; *Osland* (1998) 197 CLR 316 at [27], [73]; *Tangye*. The applicant's reliance upon the statement in *Tangye* is misplaced because the participation relied upon was the applicant's presence when the crime the subject of the arrangement was committed. In such a case it is not necessary separately to establish intentional assisting or encouraging because the person present has a continuing understanding with the others present that the crime should be committed: at [15]; *Tangye* at 556-557.

The judge's directions properly guided the jury as to the only issue at trial: whether, accepting that the Crown could not establish that the applicant was one of the two men who were directly involved in the robbery, the jury could be satisfied beyond reasonable doubt that he nevertheless was a party to an agreement to rob the victim: at [21]-[22].

Note: Compare this case with ***Markou*** [2012] NSWCCA 64 where the CCA found that it was necessary for there to be some proof of an agreement or understanding for someone to be "in company" with another. In ***Youkhana,*** the evidence of agreement appears to have been from conduct before and after the incident, including running away together and the appellant covering his face as he went past a CCTV camera.

Accessory after the fact – prosecution must establish knowledge of precise crime committed by principal

In ***Gall & Gall*** [2015] NSWCCA 69, at a joint trial, the principal was convicted of murder and the applicant was convicted of 'accessory after the fact to murder'. The trial judge had left both 'accessory after the fact to murder' and 'accessory after the fact to manslaughter' to the jury, however, did not specify the mental state required for each offence. Further, the judge did not direct the jury these were alternative offences: at [150]-[151].

The CCA upheld the applicant's submission that the judge failed to properly direct the jury that before the applicant could be found guilty of the subject offence, his knowledge must have been of the precise felony, being murder, committed by the principal. It was not sufficient for the judge to simply refer to "the unlawful homicide": at [155], [163]-[170]. The CCA affirmed that the weight of judicial opinion is that to be convicted of an accessory after the fact, it is necessary for the prosecution to establish knowledge of the precise crime committed by the principal. The paucity of authority was noted: at [163]-[170]; *The Queen v Richards* (1877) 2 QBD 311; *R v Tevendale* [1955] VLR 95; ALR 260; *Winning v The Queen* [2003] WASCA 245. RA Hulme J also noted the criticism that has been made of this requirement: at [252]-[256].

However, despite the judge's misdirection, the CCA applied the proviso and dismissed the conviction appeal: at [183].

Appellant asleep during parts of trial – no error in finding appellant fit to be tried

In ***Feili*** [2015] NSWCCA 43 the appellant had fallen asleep for parts of his trial. He submitted the trial judge erred in finding he was fit to be tried. The CCA dismissed the appeal. The key findings properly made by the judge were that: the appellant had not been asleep when matters of importance to his case were raised; even if that was the case, there was nothing to indicate his lawyers had not kept him apprised, nor that he had missed something *"crucial"*; ameliorative measures were available which constituted an appropriate response to managing the symptoms of sleeplessness for the duration of the trial; he was capable of understanding the proceedings so as to be able to make a proper defence - if he missed any aspect of the evidence, his lawyers were able to inform him: at [52].

The judge's approach to the issues posed at the fitness inquiry were practical, reasonable and commonsense. Practical aspects of the trial included the fact the appellant required an interpreter and the ability of his legal representatives to assist the appellant concerning evidence which may affect him: at [53]. It was for the judge to determine the issue of fitness on the balance of probabilities by application of relevant principles to the evidence adduced at the inquiry. The judge applied the relevant principles to the evidence and reached a conclusion that was open on the evidence: at [54].

Judge allegedly asleep during parts of trial – appeal dismissed

In ***Duncan*** [2015] NSWCCA 84 the appellant alleged the trial judge had fallen asleep for parts of his trial. The CCA considered whether there were substantial discontinuities in the judge's superintendence and control of the trial due to the alleged sleep episodes and, if so, whether that resulted in a miscarriage of justice: at [17], [198], [221]; *Cesan v The Queen* (2008) 236 CLR 358.

The appeal was dismissed. While the trial judge did close his eyes at various times, on the evidence this was not inconsistent with him listening to and following the evidence. This is indicated by the judge's demonstrated ability and actions in responding appropriately to the evidence led at such times as and when required. Whilst it is possible the judge may on occasions have had momentary sleep episodes, on the evidence if they occurred they were not sufficient to establish that the judge *"substantially failed to discharge"* his duty of supervision and control of the trial process: [75], [200]-[202], [220]; *Cesan* at [93].

Evidence relied upon by the appellant included a medical report in which it was noted the judge had been previously diagnosed with severe obstructive sleep apnoea. The CCA held the medical report was irrelevant and inadmissible: at [41]-[49], [139]-[140], [209]-[216].

Fresh evidence in appeal from Local Court to District Court – post-conviction admissions by accused made during Intensive Correction Order (ICO) assessment not admissible

In ***Landsman*** [2014] NSWCCA 328 during an ICO assessment, the applicant was counselled by the Corrective Services Officer to tell the truth. The Officer said, 'In your own words tell me what happened …'. The applicant replied that he hit each of the victims. The applicant was sentenced to an ICO and subsequently appealed against his convictions to the District Court. The Crown sought leave to adduce fresh evidence from the Officer as to the applicant's admissions.

Section 18(2) *Crimes (Appeal and Review) Act 2001* states that in such an appeal fresh evidence may be given, but only if the District Court is satisfied it is in the "interests of justice." A question of law was submitted to the CCA:

"On the hearing of an appeal against conviction under s. 18 Crimes (Appeal and Review) Act 2001, is it capable of being in the interests of justice to grant the prosecution leave to adduce as fresh evidence an admission made by [the applicant] to a Corrective Services Officer, after a finding of guilt in the Local Court, the admission being made in the course of the preparation of an 'ICO' assessment report for the purpose of sentencing [the applicant]?"

The CCA (Beazley P; Hidden and Fullerton JJ agreeing) answered that question "*No*."

The courts have resisted using post-conviction statements for other purposes (such as whether the proviso in s 6(1) *Criminal Appeal Act* applies and whether there should be a new trial or an acquittal): at [46]-[64]. Much will depend upon the circumstances in which a post-conviction statement is made: *Dunlop* [2007] 1 WLR 1657. If to allow the statement would compromise some basic aspect of the criminal justice system, the "*interests of justice*" would dictate that the not be admitted: *Miell* [2008] 1 WLR 627.

[T]he statement of the applicant was made to a person in authority during the course of an interview, conducted pursuant to an order of the court, made pursuant to statute, for the purposes of assessing the applicant's suitability for an intensive corrections order. The question asked by the Corrective Services Officer was not part of the information required by the Act and Regulation. Further, although the applicant was not compelled by law to answer the questions asked by the officer concerned nor was he otherwise required, as a matter of law, to provide information to that officer, there was undoubtedly significant pressure on him to do so, given the circumstances in which he provided the information. Importantly, the statement was made without any warning to the applicant that the information could be used in evidence against him on the question of his guilt, although it should be accepted that the applicant would, or at least ought to, have appreciated that the report of the interview would be provided to the court for the purposes of sentence: at [81].

It would not be capable of being in the interests of justice to allow the evidence, based on matters personal to the applicant and broader policy considerations. The admission was made in a court ordered process. It is likely the applicant felt obliged to respond and there may have been adverse consequences if he did not. Had it not been the requirement that the applicant be assessed, the evidence the Crown now seeks to use would not have been available. The admission was made in circumstances where the applicant was denied his common law right of silence. It is not in the interests of justice that the Crown now be allowed to use the admission: at [83]-[86].

Note: the test applied in this case is not necessarily the same as would be applied in, for example, a retrial where the Crown sought to rely upon such an admission and the accused objected. In such a case, the accused would have to rely upon s85 and/or s90 of the *Evidence Act 1995*. Nevertheless, similar considerations might apply to s90 in particular.

s 294AA Criminal Procedure Act - "Murray direction" prohibited when evidence based only on absence of corroboration of complainant

Ewen [2015] NSWCCA 117 concerned a judge alone trial for two counts of sexual intercourse without consent under s 61I *Crimes Act*. The offences occurred in a bathroom without any

witnesses present in that room, although witnesses observed the conduct of both the appellant and the victim before and after the offences. The appellant submitted the judge failed to give himself a "*Murray* direction" - that it was necessary to scrutinise the uncorroborated evidence of the complainant with great care before proceeding to a conviction (*Murray* (1987) 11 NSWLR 12).

A judge sitting without a jury is to take into account any warning required to be given to a jury: s 133(3) ***Criminal Procedure Act***. Section 294AA 'Warning to be given by Judge in relation to complainant's evidence' states:

> (1) A judge in any proceedings to which this Division applies must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.
> (2) Without limiting subsection (1), that subsection prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant.

The CCA dismissed the appeal. As it was only the absence of corroboration that was said to give rise to the requirement of a "*Murray* direction", such a direction was not required and is prohibited by s 294AA(2): at [146]. Section 294AA(2) expressly prohibits warning the jury of the danger of convicting on the uncorroborated evidence of "any complainant". The legislature intended to prohibit warnings that call into question (by reason only of absence of corroboration) the reliability not only of complainants as a class, but also of a complainant in any particular case: at [136]. A "*Murray* direction", based only on the absence of corroboration is tantamount to a direction that it would be dangerous to convict on the uncorroborated evidence of the complainant: at [140].

High Court cases under the repealed s 405C (the earlier equivalent to s 294AA) show that in every case where it was held the verdict of guilty (whether by jury or judge alone) was flawed due to failure to warn the complainant's evidence must be scrutinised with great care, there were circumstances other than the absence of corroboration of the complainant's evidence. There is no case, post s 405C, in which it has been held the failure to give a warning to the effect that the absence of corroboration *alone* calls for a direction in accordance with *Murray*: at [132]; *Longman* (1989) 168 CLR 79; *Fleming* (1998) 197 CLR 250; *Robinson* (1999) 197 CLR 162; *Tully* (2006) 230 CLR 234.

However, a direction may be appropriate to the circumstances such as where the evidence calls for a warning, or a specific direction, as to weaknesses or deficiencies in the evidence; there is delay in bringing proceedings; or there is an absence of corroboration where corroborative witnesses might have been available: at [143]-[144].

Note: This appears to be a substantial change from current practice and the Trial Bench Book is yet to be updated to reflect this.

SUPREME COURT / COURT OF APPEAL / CCA BAIL CASES

Bail Act 2013

In ***DPP (NSW) v Tikomaimaleya*** [2015] NSWCA 83 the respondent was convicted at trial of sexual intercourse with a person under 10 (s 66A(1) *Crimes Act*). The judge released him on bail. Section 66A(1) is a "show cause" offence under s 16B(1)(b)(i) *Bail Act* 2013. The DPP made a detention application pursuant to s 50 *Bail Act*. The Court of Appeal held the application be granted and bail be refused: at [11]-[13].

The Court of Appeal made the following points regarding the *'Show cause and unacceptable risk tests'* in the *Bail Act 2013:*

. Part 3 is headed "Making and variation of bail decisions". Division 1A (ss 16A and 16B) deals with a "show cause requirement" for certain types of offences. Division 2 (ss 17 to 20A) deals with an "unacceptable risk test" which applies to all offences. (Division 1A was inserted and various amendments to Division 2 were made by the *Bail Amendment Act 2014* (NSW) which commenced operation on 28 January 2015.)

. *s 16A 'Accused person to show cause for certain serious offences'* states:

(1) A bail authority [defined in s 4(1) to mean a police officer, an authorised justice or a court] making a bail decision for a show cause offence must refuse bail unless the accused person shows cause why his or her detention is not justified.

(2) If the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 (Unacceptable risk test-all offences).

(3) This section does not apply if the accused person was under the age of 18 years at the time of the offence."

. Sub-section (2) makes clear there is a two-step process involved in determining bail release and detention applications for show cause offences: at [16].

. If a person charged with a 'show cause offence' succeeds in showing cause why detention is not justified pursuant to s 16A(1), a bail authority must consider whether there is an "unacceptable risk" that the person will fail to appear; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses: s 19(2). If there is an unacceptable risk, bail must be refused: s 19(1). If there are no unacceptable risks, bail must be granted or dispensed with: s 20.

. Before making a bail decision regarding 'unacceptable risks' (s 19(2)), the bail authority must assess any "bail concerns" (s 17(1)). Bail concerns are defined in s 17(2) in similar fashion to the definition of "unacceptable risk" in s 19(1): that the accused if released from custody will fail to appear; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses.

. In the assessment of bail concerns, a bail authority is to consider the various matters listed in s 18, and only those matters.

. Two matters are emphasised from this overview of the provisions:

1. If the offence in question is a "show cause" offence, there is a two-step process: cause must first be shown as to why detention is not justified under Div 1A of Pt 3. If it is shown, the bail authority must then consider the "unacceptable risk" test in Div 2 of Pt 3.
2. There is an exhaustive list of matters in s 18 that must be considered in relation to the latter but the Act does not prescribe what must or might be considered in relation to the former.

. In many cases it may be that matters relevant to the 'unacceptable risk test' will also be relevant to the 'show cause test'. If there is nothing else that appears to the bail authority to be relevant to either test, the consideration of the show cause requirement will, if resolved in favour of the accused, necessarily resolve the unacceptable risk test in his or her favour as well.

. It is important that the two tests not be conflated (disapproving McCallum J in ***M v R*** **[2015] NSWSC 138** at [7]-[8] where her Honour stated that the "apparent simplicity of a two-stage approach is illusory").

. Determination of the unacceptable risk test is not determinative of the show cause test. The show cause test requires an accused to demonstrate why, on the balance of probabilities (s 32), detention is not justified. The justification or otherwise of detention is to be determined by consideration of all the evidence or information the bail authority considers credible or trustworthy in the circumstances (s 31(1)) and not just by a consideration of those matters exhaustively listed in s 18 required to be considered for the unacceptable risk assessment: at [25].

. The present case shows why it is important to bear in mind the two-stage approach. There is a matter relevant to the show cause test that is not available to be considered in relation to the unacceptable risk test. The jury's verdict of guilty is not a matter listed in s 18; yet it is plainly germane to the question whether cause can be shown that continuing detention is unjustified, since the presumption of innocence, which operated in the offender's favour before the verdict, has been rebutted by that verdict: at [26].

Note: See also the recent paper by Mark Ierace SC, Senior Public Defender, "*Recent Changes to Bail Law in NSW*", delivered at University of NSW on 11 March 2015 at: http://www.publicdefenders.justice.nsw.gov.au/pdo/public_defenders_mostrecentpapers.html

Bail Act 2013 – Application for bail to CCA pending appeal against conviction – section 22 – special and exceptional circumstances

In ***El-Hilli and Melville*** [2015] NSWCCA 146 the CCA considered an application for bail under s 22 of the *Bail Act 2013*. The applicants had been convicted and sentenced imprisonment for offences of dishonestly obtaining a financial advantage by deception. Each applicant had filed a notice of appeal against conviction and sentence. Hamill J (Simpson and Davies JJ agreeing) made the following points:

<u>The legislation and nature of the present application</u>

. The *Bail Act 2013* ("the Act") introduced a system under which a bail authority made an assessment of whether an applicant represented an "unacceptable risk" of committing offences or taking flight. If there was an unacceptable risk, the bail authority was required to consider whether bail conditions could sufficiently mitigate that risk: at [6].

. The *Bail Amendment Act 2014* ("the Amendment Act") made a number of significant changes. It introduced Division 1A (ss 16A-16B) whereby accused charged with certain serious offences are required to "show cause why his or her detention is not justified". The "show cause" provisions were considered in *DPP v Tikomaimaleya* [2015] NSWCA 83; *M* [2015] NSWSC 138 (McCallum J), *Ebrahimi* [2015] NSWSC 335 (Beech-Jones J), *Raad v* [2015] NSWSC 532 (McCallum J): at [7].

. Apart from those offences caught by the "show cause" provisions, the unacceptable risk test was maintained although the Amendment Act refined it.

    . Bail authority must now make an assessment of "bail concerns" under s 17 by reference to the exhaustive list of factors in s 18.

    . The authority must then determine under s 19 whether there is an unacceptable risk the person will (a) fail to appear, (b) commit a serious offence, (c) endanger the safety of victims, individuals or the community or (d) interfere with witnesses or evidence.

. If assessment of those factors satisfies bail authority there is an "unacceptable risk", bail must be refused (s 19). If there are no unacceptable risks, bail must be granted or dispensed with: s 20. Under s 20A the Court can impose bail conditions: at [8].

. The CCA can hear a bail application in certain defined circumstances: s 67. Section 22 provides a "General limitation on [a] court's power to release":

> *"(1) Despite anything to the contrary in this Act, a court is not to grant bail or dispense with bail for any of the following offences, unless it is established that special or exceptional circumstances exist that justify that bail decision:*
>
> *(a) an offence for which an appeal is pending in the Court of Criminal Appeal against:*
>
> *(i) a conviction on indictment, or*
>
> *(ii) a sentence imposed on conviction on indictment,*
>
> *(b) an offence for which an appeal from the Court of Criminal Appeal is pending in the High Court in relation to an appeal referred to in paragraph (a).*
>
> *(2) If the offence is a show cause offence, the requirement that the accused person establish that special or exceptional circumstances exist that justify a decision to grant bail or dispense with bail applies instead of the requirement that the accused person show cause why his or her detention is not justified.*
>
> *(3) Subject to subsection (1), Division 2 (Unacceptable risk test-all offences) applies to a bail decision made by a court under this section." : at [9].*

. Two things can be observed about s 22:

. First, in cases where there is a "show cause requirement" under Division 1A (ss 16A-16B), the requirement to establish special and exceptional circumstances applies rather than the show cause requirement. The requirement to establish special and exceptional circumstances is at least as onerous as the requirement to show cause.

. Second, subject to s 22(1), the unacceptable risk test in Division 2 (ss 17-20A) applies. The present case does not involve show cause offence. However, s 22 is engaged and the applicants must establish special and exceptional circumstances justifying bail: at [11].

. *DPP v Tikomainaleya* held that s 16A(2) concerning offences where there is a "show cause" requirement "make it clear that there is a two-step process involved in determining bail release and detention applications for show cause offences": at [24]-[25]. The same reasoning supports the following propositions:

. First, where s 22 is engaged, there are two stages. The applicant must demonstrate "special and exceptional circumstances" exist justifying bail. Then the Court must apply the "unacceptable risk test" and do so by application of the exhaustive list of matters in s 18.

. Second, the same factors and evidence may operate at both stages. Where an applicant establishes special and exceptional circumstances, it is likely the same material will also succeed in satisfying the unacceptable risk test. However, that cannot be stated as a universal proposition and the bail authority must apply each test in accordance with the terms of the Act: at [12]-[13]

<u>"Special or exceptional circumstances"</u>

. There are no appellate decisions concerning the operation of s 22. However, s30AA of the old *Bail Act 1978* had a similar requirement and was considered in a number of cases: see at [17]-[26].

. It is not accepted an applicant must establish their appeal will either "inevitably succeed" or that success is "virtually inevitable": at [24]. Where the applicant relies exclusively on the strength of the appeal, it may be necessary to establish the appeal is "most likely" to succeed. When the merit of the appeal is relevant as part of a combination of factors, the authorities suggest the question is whether the proposed grounds of appeal are arguable or enjoy reasonable prospects of success: at [27]; see authorities there discussed.

. This approach accords with language of s 18(1)(j) *Bail Act 2013*:

> *"18 (1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division:*
>
> *(j) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success."*

. The list of factors in s 18 is specifically brought into s 22 by sub-s (3). However, those factors are subject to sub-s (1), that is, the requirement for special or exceptional circumstances. In a case where the appeal is from a conviction on indictment, the question is whether there are special or exceptional circumstances justifying the grant of bail: at [28]. "Special or exceptional circumstances" may exist in the combination of factors or in "the coincidence of a number of features": It is not possible to determine or predict those features. Two features that frequently arise are (i) the merit of the appeal and (ii) the possibility the applicant will have served their sentence or non-parole period, or a substantial part, before the appeal is determined: at [29].

The CCA considered in detail the offences, the merit of the proposed appeals and other relevant matters including whether the applicants would have substantially served their sentences (or their non-parole periods) before their appeal is determined. In each case the CCA concluded that it was not satisfied there are special or exceptional circumstances justifying the grant of bail: at [63].

Manslaughter by dangerous act - accused's level of intellectual disability attributed to reasonable person

In ***Thomas*** [2015] NSWSC 537 the accused had been found unfit to be tried for the murder of his mother, who died as a result of the accused striking her across the face. He was assessed as having a moderate intellectual disability. His intellectual capacity was assessed as below the capacity of 99.9 per cent of the population: at [49]. RA Hulme J conducted a special hearing under s19(2) *Mental Health (Forensic Provisions) Act 1990* and found the accused not guilty of manslaughter (and guilty of the alternative charge of recklessly cause GBH).

RA Hulme J held that the accused's intellectual disability could be attributed to the reasonable person test for manslaughter (whether a reasonable person in the position of the accused would have realised or appreciated the act was dangerous). Like the age of the teenage child in *DPP v TY* (2006) 167 A Crim R 596 and the mildly intellectually handicapped plaintiff in *Russell v Rail Infrastructure Corporation* [2007] NSWSC 402, the moderate intellectual disability of the accused is an objectively ascertainable attribute. There is nothing transient or borderline about it. The accused's intellectual capacity is so far removed from the vast majority of people, it is unfair to require him and his actions to be judged by standards he could never hope to emulate: at [69].

The law has developed towards a closer correlation between moral culpability and legal responsibility: *Wilson* (1992) 174 CLR 313. To judge the actions of a person with an intellectual capacity in the bottom 0.1 per cent of the population by the standards of the vast majority of citizens is to widen the gap between moral culpability and legal responsibility to a point that is unacceptable: at [70].

The assessment of manslaughter would involve consideration of whether a reasonable person possessed of a moderate intellectual disability rendering that person with extremely poor information processing speed and impaired conceptual reasoning abilities, with knowledge the deceased was weak and frail due to debilitating illness, would have realised that striking her to the left side of the face at least once would expose her to a risk of serious injury: at [71].

Trial by judge alone – summary of the principles and example of their practical application

In ***Simmons (No 4)*** [2015] NSWSC 259, Hamill J undertook an analysis of the principles applicable to applications by an accused, over objection, for a trial by judge alone. In particular, he observed that there is no presumption in favour of a trial by jury and that, while an accused does not have a right to trial by judge alone, "the fact that the accused has decided on legal advice to relinquish his right to a jury trial" is a relevant factor, as is "a subjective apprehension in the accused that he will not receive a fair trial in the hands of the jury".

Hamill J did not consider that questions of intention involve the application of community standards and was not persuaded by *obiter* in authorities that suggested that in some cases they might. He found that issues of the credibility of witnesses were a neutral consideration. The efficiencies of a trial by judge alone were not in themselves significant. However, in the particular case, there was considerable risk of prejudicial material coming before the jury and the likelihood of multiple applications for discharge, some of which would be likely to have merit. The most significant factor was the extensive prejudicial material which would need to be adduced for the Crown to present its case and the accused to meet that case. In granting the application Hamill J said, "I am unable to envisage any direction to the jury that will alleviate the prejudice that will be aroused by the material that it is anticipated will be led in this trial."

Note: Hamill J's summary of the principles was cited with approval in ***Redman*** [2015] NSWCCA 110 (at [13]), a case in which the CCA found that a judge was wrong to refuse to order a trial by judge alone on the basis that a jury would be in a better position to assess the credibility of witnesses. The judge was also found to have erred by finding that the applicant's fair trial would not be compromised by being unable to give a full and candid account of his defence without exposing significant criminality because he could choose to give a partial account as proposed by the Crown and the jury could be told not to speculate.

HIGH COURT CASES

CMB v R [2015] HCA 9. Appeal from NSW.

Crown appeal – Respondent does not bear onus of demonstrating reasons justifying the dismissal of a Crown appeal in the exercise of discretion - Voluntary disclosure of guilt to an unknown offence (R v Ellis (1986) 6 NSWLR 603) - s 23 Criminal Procedure Act. Held: Appeal allowed.

In ***CMB*** [2015] HCA 9 (child sexual assault offences) the appellant was referred to the Cedar Cottage Program under Regulations to the *Pre-trial Diversion of Offenders Act 1985*. As part of his assessment into the Program, he made disclosures of further offences. As the Regulations had been repealed before the disclosures, the further offences could not be dealt with under the Program. The Appellant pleaded guilty to the further offences and received good behaviour bonds conditioned on completing the Program. In the circumstances the DPP supported the non-custodial sentences. The Attorney General appealed successfully to the CCA and a sentence of imprisonment was imposed: *CMB* [2014] NSWCCA 5.

The High Court allowed the appeal. The CCA erred in stating it was the respondent who bears the onus of demonstrating reasons justifying the dismissal of a Crown appeal in the exercise of discretion. On a Crown appeal, the prosecution must, first, locate an appellable error in the sentencing judge's discretionary decision. Second, negate any reason why the residual discretion

of the CCA not to interfere should be exercised: at [56]; *Hernando* (2002) 136 A Crim R 451 at 458. Further, in determining whether the sentences were manifestly inadequate, the issue for the CCA was not whether it regarded non- custodial sentences as *unreasonably* disproportionate to the nature and circumstances of the offences but whether, in the exercise of the discretion that the law reposed in the judge, it was open to his Honour upon his unchallenged findings to determine that they were not: at [78].

The court emphasised that, where s23 is engaged, a sentence will be disproportionate the criminality of the offending, but must not be *unreasonably* so: at [78].

Independent Commission Against Corruption v Cunneen **[2015] HCA 14.** Appeal from NSW.

Appeal by ICAC – "corrupt conduct". Held: Appeal dismissed

ICAC issued a summons based on an allegation that the first respondent, a Deputy Senior Crown Prosecutor, told the third respondent to pretend chest pains to avoid police officers taking her blood alcohol level following a motor vehicle accident. The NSW Court of Appeal held the allegations did not amount to "corrupt conduct" within the meaning of s 8 *ICAC Act* 1988 and therefore ICAC did not have power to issue the summons: *Cunneen v ICAC* [2014] NSWCA 421. ICAC appealed to the High Court.

Dismissing the appeal, the High Court held the alleged conduct did not constitute "corrupt conduct" under s 8. Corrupt conduct is conduct that "adversely affects" the 'probity' of the exercise of an official function by a public official in any of the ways set out under s 8(1)(b)-(d): at [3], [42], [46]. The alleged conduct may be accepted as having the capacity to detrimentally affect the exercise of the police officers' investigative powers. However, it could not affect the probity of the exercise of an official function by police officers or any other public official in the ways listed under s 8(1)(b)-(d): at [24],[30], [71].

Lindsay v The Queen **[2015] HCA 16**. Appeal from SA.

Whether provocation should have been left to jury- homosexual advance. Held: Appeal allowed. New trial ordered.

The appellant was convicted of murder. The victim made a sexual advance and an offer of payment for sex to the appellant in his home in the presence of his wife and friends. The SA CCA held the trial judge was wrong to give directions for manslaughter based on provocation. The appeal was dismissed under the proviso: *Lindsay* (2014) 119 SASR 320.

The High Court allowed the appellant's appeal. The trial judge did not err in leaving provocation to jury: at [4]. The capacity of the evidence to support a conclusion that the prosecution might fail to negative the objective limb of the partial defence did not turn upon the appellate court's assessment of attitudes to homosexuality in 21st century Australia. It was open for the jury to consider the sting of the provocation lay in the suggestion that, despite rejection of V's advance, A was so lacking in integrity that he would have sex with V in the presence of his family in his own home for money. It was open to a jury to consider that an offer of money for sex made by a Caucasian man to an Aboriginal man in such circumstances may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances would not have: at [37]. The SA CCA made a factual conclusion encompassing an estimate of the

degree of outrage which A might have experienced. It was for the jury to make that assessment: at [39]. It was an error for the SA CCA to dismiss the appeal under the proviso: at [42]-[49].

Note: this case is only of relevance in NSW for an offence which is alleged to have occurred prior to the introduction of the new partial defence of "extreme provocation" on 13 June 2014 which specifically excludes non-violent sexual advances. (See p57 of the 2014 update paper).

HIGH COURT SPECIAL LEAVE

Filippou v The Queen [2015] HCATrans 61

Special leave granted on limited grounds. Appealed from NSW:- [2013] NSWCCA 92.

s 23 *Crimes Act* 1900 (NSW) – Convicted of murder by judge alone – Not determined beyond reasonable doubt whether A or one of the victims brought murder weapon to scene – Whether trial judge erred in application of provocation test – Whether as a consequence CCA should have held this to be error of law requiring convictions be quashed – Whether CCA erred in failing to take into account matters mitigating sentence in respect of fact that not reasonably possible to conclude who brought murder weapon.

LEGISLATION 2015

Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014

This Act commenced on 1 June 2015. The Act amends the ***Criminal Procedure Act*** to allow domestic violence complainants to give evidence by way of audio or video recorded statements.

Main amendments include:

1. Recorded statements available in committal and summary proceedings

s 76A Recordings of interviews with domestic violence complainants. Prosecution evidence may be given in form of a recorded statement instead of written statement, if offence is domestic violence offence. Service and access requirements in Act must be complied with. If not, court may admit recorded statement if (a) parties consent; or (b) accused or legal practitioner have been given a reasonable opportunity to listen to / view recorded statement and it would be in the interests of justice to admit it.

s s 79A Form and requirements for recorded statements. Recorded statement may be in form of questions and answers; must contain by complainant a statement as to age, truth of representation, any other matter required by the rules.

ss 85 and 189 False statements or representations. It is an offence if representation contains any matter the person knew to be false or did not believe to be true. Maximum penalty 20 penalty units and/or imprisonment 12 months summarily; 50 penalty units and/or imprisonment 5 years on indictment

2. Part 4B inserted into Chapter 6, Evidentiary Matters

Part 4B 'Giving evidence by domestic violence complainants' is inserted into Chapter 6 Evidentiary Matters. Chapter 6 applies to whatever court in which a matter is heard: s 274.

Division 1 Preliminary

s 289E Relationship to *Evidence Act 1995*. Part 4B provisions are in addition to the *Evidence Act* and do not, unless contrary intention is shown, affect its operation. See s 289I below.

Division 2 Giving of evidence of out of court representations

s 289F Complainant may give evidence in chief in form of recording. In proceedings for a domestic violence offence, complainant may give evidence in chief by recorded statement which may be in form of questions and answers; must contain by the complainant a statement as to age, truth of the representation, or any other matter required by the rules. A complainant who gives evidence in the form of a recorded statement must be available for cross-examination and re-examination.

s 289G Determination as to whether evidence will be given by recording. In determining whether a complainant will give evidence by recorded statement, prosecutor must take into account wishes of complainant, any evidence of intimidation of complainant by the accused, and objects of the *Crimes (Domestic and Personal Violence) Act 2007.*

s 289H Use of evidence in concurrent or related domestic violence proceedings. Recorded statement may be given in the same form in proceedings arising from the conduct for an order under the *Crimes (Domestic and Personal Violence) Act 2007.*

s 289I Admissibility of recorded evidence. The hearsay rule and opinion rule (in the *Evidence Act 1995*) do not prevent admission or use of a representation in the form of a recorded statement. Recorded statement not to be admitted unless accused given, in accordance with Division 3, reasonable opportunity to listen to / view. If not, recorded statement may be admitted if court satisfied parties consent to it being admitted, or accused or legal practitioner have been given a reasonable opportunity to listen to / view recording and it would be in the interests of justice to admit it.

s 289J Warning to jury. Judge must warn jury not to draw any inference adverse to accused or give evidence any greater or lesser weight because evidence given in that way.

Division 3 Service of and access to recorded statements

ss 289L – 289O make provision for service and access. Copy of recorded statement must be served on defence: s 289L.

Where accused is unrepresented, service and access must be given: s 289M. Evidence may not be adduced in any proceedings of accused's behaviour or response when viewing a recorded statement unless: (a) viewing took place while being questioned in relation to an alleged domestic violence offence, or (b) the proceedings relate to the behaviour: s 289M(5).

Division 4 Miscellaneous

s 289P Improper copying or dissemination of recorded statement. An offence to copy or permit a person to copy / publish the recorded statement. Maximum penalty 2 years' imprisonment and/or 100 penalty units.

Crimes Legislation Amendment (Penalty Unit) Bill 2015 (Cth)

This Act was passed on 16 June. Effective from 31 July 2015, Commonwealth penalty units are increased from $170 to $180 with indexation every three years according to the Consumer Price Index.