

# **COURT OF CRIMINAL APPEAL UPDATE**

## **REVIEW OF 2015** **2016: The Story So Far**

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## **INTRODUCTION**

It is always a busy year for the criminal law and 2015 was no exception. In sentencing there were a significant number of decisions on aggregate sentencing in the Court of Criminal Appeal. The High Court handed down a number of decisions in the criminal law area including, in particular, consistency in sentencing (*Pham* [2015] HCA 39; 90 ALJR 13) and Crown Appeals (*CMB* [2015] HCA 9; 89 ALJR 407).

## **NEW SOUTH WALES COURT OF CRIMINAL APPEAL**

### **SENTENCE APPEAL CASES**

#### **1. SENTENCING**

##### ***Assessment of objective seriousness – ex-tempore judgments***

In *Gal* [2015] NSWCCA 242 the judge erred in failing to assess the objective seriousness of the offence. The assessment of objective seriousness has always been a critical component of sentencing. Nothing in *Muldrock* (2011) 240 CLR 120 cuts across that principle: at [31]-[32]; *Campbell* [2014] NSWCCA 102 at [27]. At a minimum, reasons for sentence should refer to the essential facts upon which an offender is sentenced and provide some assessment of the seriousness of the conduct: at [39]

On an appeal, error will not be demonstrated by failure to include a specific formula of words: at [33]; *Delaney* [2013] NSWCCA 150. However, this is not such a case. The judge did not make any comment about objective seriousness and did not describe the facts of the offence at all: at [34]. Some latitude is given to ex tempore judgments delivered immediately after submissions: at [35]; *AB* [2015] NSWCCA 57. However, in this case there was an insufficient statement of the basis upon which the applicant was sentenced. The importance of an assessment of objective seriousness is such that its absence in this case cannot be explained by the fact the remarks were delivered ex tempore: at [38]; *Cowan* [2015] NSWCCA 118 at [60].

##### ***‘Ceiling’ principle – sentencing upon conviction at retrial - sentenced for manslaughter following successful appeal against murder conviction***

The ceiling principle is that ordinarily a successful appellant should not receive a longer sentence after conviction on a re-trial than received at the original trial. Otherwise, if raising a sentence after a successful appeal became common, it might discourage appeals: *R H McL* (2000) 203 CLR 452. The principle is straightforward when the second sentence is for the same offence for which the offender was originally sentenced.

However, in *Armstrong* [2015] NSWCCA 273 the second sentence was in relation to a different and lesser offence than the original offence. The applicant was originally convicted and sentenced for murder, as well as unrelated sexual assault offences. He successfully appealed his murder conviction, and at a new trial pleaded guilty to manslaughter. The applicant received a lesser sentence for the manslaughter offence than the murder. However with the unrelated sexual assault offences, his new overall sentence was lengthier than his original overall sentence.

The CCA allowed the applicant's appeal. The judge failed to apply the ‘ceiling’ principle. The manslaughter sentence was heavy and failure to apply the principle cannot be explained by the fact that because a lesser overall sentence for manslaughter was imposed, there was no need for any concurrence with the sexual assault: at [50]-[52]. The judge gave no reasons for failing to consider the principle and regarded the earlier sentences as irrelevant, thus falling into error: at [53]. Cases in which the principle has been applied were discussed: at [46]-[49].

##### ***Moral culpability - where evidence does not enable differentiation between participants in joint criminal enterprise***

In *Filippou* (2015) 89 ALJR 776 at [70] the High Court stated that a sentencing judge must do their best to “find the facts which determine the nature and gravity of the offending, including the facts which inform the offender’s moral culpability”. Moral culpability (as opposed to criminal responsibility) is an important distinction in sentencing in a joint criminal enterprise.

In **Beale** [2015] NSWCCA 120 the CCA stated that in a joint criminal enterprise case, where the evidence does not permit a differentiation between the roles of the participants, then an analysis of their “moral culpability” separate to their criminal responsibility cannot be undertaken:[59].

In this case, the applicant was sentenced for home invasions committed with unidentified co-offenders. The Agreed Facts did not attribute any act to any particular offender and the applicant gave no evidence as to his role and conduct. The applicant submitted the judge erred in sentencing him on the basis that he was criminally culpable for all of the criminal activity.

The CCA dismissed the appeal. Evidence may allow a distinction between the conduct of participants in a joint criminal enterprise, to show one participant bears less moral culpability than others, notwithstanding they are all criminally responsible: at [58]; *KR*; *Wright* [2009] NSWCCA 3. The applicant has not demonstrated, on the balance of probabilities, that he did not perform some particular act and thereby had less moral culpability. Instead the applicant is sentenced on the basis he bears criminal responsibility for “the full range of the criminal acts done by any of the parties to the joint criminal enterprise in the carrying out of the enterprise” even though it is not known whether he personally performed those acts: at [59]; *Wright* at [27]-[29].

## 2. AGGRAVATING FACTORS

### ***Offence committed in the home of the victim - s.21A(2)(eb) Crimes (Sentencing Procedure) Act – state of authorities unclear – victim asked offender to leave her home***

In **Aktar** [2015] NSWCCA 123 Wilson J revisited the tension between the authorities regarding s 21A(2)(eb).

On one hand, s 21A(2)(eb) is said to apply 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* (2010) 208 A Crim R 157.

On the other, there have been suggestions this interpretation is too narrow and s 21A(2)(eb) should apply to offences committed in the home by an offender lawfully present: at [55]-[63]; *Melbom* [2013] NSWCCA 210; *Montero* (2013) 234 A Crim R 532.

In this case the applicant visited his cousin in her home and indecently assaulted her. Dismissing the appeal, Wilson J found the sentencing judge did not err in finding the offence aggravated under s 21A(2)(eb). Whilst the applicant was initially a guest in the victim's home, and lawfully inside, his status changed the moment the victim told him to leave: at [67].

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: at [64]. Hoeben CJ at CL reserved his position: at [1]. RA Hulme J did not wish to say any more on the subject at this point: at [2].

In **Sumpton (No. 4)** [2015] NSWSC 684, Hamill J, sentencing for a murder of the victim in her home, said given that the state of the authorities remains unclear, he would not treat the location of the murder as an aggravating feature under s 21A(2)(eb). However, the fact the victim was killed in her home remained relevant to an 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 one: at [27]-[31]. Similarly, see **Murray** [2015] NSWSC 1034 at [77] (Schmidt J).

### ***Abuse “a position of trust or authority in relation to the victim” – s.21A(2)(k) Crimes (Sentencing Procedure) Act - offender a friend of victim – appeal allowed***

In **Cowling** [2015] NSWCCA 213 the victim was sexually assaulted by a person she had known for 5 years. The CCA held the judge erred in finding “the breach of trust ... renders the act more serious.”

More must be established than a mere breach of trust in order for the statutory factor to be made out. The relevant factor is that there was at the time of the offending a particular relationship between the offender and the victim that amounted to ‘a position of trust’: at [10]; *Suleman* [2009] NSWCCA 70 at [22]. The judge did not refer to s.21A(2)(k) and it is not regarded that the judge found that statutory aggravating factor established. The judge was merely concluding that the fact that the offender and the complainant were friends and trusted each other meant that the offending conduct was objectively more serious. Nevertheless, that reasoning discloses error. The friendship between victim and offender supplied the occasion and opportunity for the assaults. But those circumstances did not increase the seriousness of the offender's conduct: at [11]-[12].

### ***Intoxication by “ice” as an aggravating factor***

In **King** [2015] NSWCCA 99 the sentencing judge was entitled to take into account, as an aggravating feature, the appellant's intoxication by “ice” (methamphetamine) at the time of the offence in circumstances where there was expert evidence of the connection between aggression and methamphetamine 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].

## **3. 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 and was asked to leave his adoptive parents' home at 17. He suffered mental health issues.

Rothman J (Bathurst CJ and McCallum J agreeing) noted studies showing that social exclusion can cause high levels of aggression, self-defeating behaviours, poor performance and impaired self-regulation (citing **Lewis** [2014] NSWSC 1127). A person, such as the appellant, who has suffered extreme social exclusion on account of race, even from the family who adopted him, is likely to engage in self-defeating behaviours. Such circumstances are akin to a systemic background of deprivation that may compromise the person's capacity to mature and learn; and will explain the “offender's recourse to violence...such that ... moral culpability for the inability to control that impulse may be substantially reduced”: **Bugmy** (2013) 249 CLR 571 at [41]-[44]. There must be evidence to suggest the application of these principles and the effect of the exclusion. The evidence here is substantial: at [90]-[94].

Bathurst CJ accepted at [13] that the removal of the applicant from his natural parents and his difficulty 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 (**Kennedy** [2010] NSWCCA 260 at [53]; **Bugmy** (2013) 249 CLR 571 at [37]-[44]).

### ***Delay – absence of evidence that delay caused change in offender's circumstances - delay caused applicant anxiety and concern – failure to give due weight to delay***

It has been suggested that mere unnecessary delay is not usually a reason to mitigate sentence and that the defendant must have taken major steps resulting in a substantial change in personal circumstances. Thus 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.

However, in **Sabra** [2015] NSWCCA 38 the CCA held delay can operate to mitigate sentence in the absence of evidence that it caused a particular change in an offender's circumstances: **Blanco** (1999) 106 A Crim R 303; **Giourtalis** [2013] NSWCCA 216.

Thus 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.” **Giourtalis** citing **Scook** [2008] WASCA 114 at [57]-[65].

In this case, the sentencing judge found an 18 month delay between execution of a search warrant and fraud charges being laid caused the applicant to become “anxious and concerned”: at [21]. The CCA held that the judge, having found the delay caused anxiety and concern, erred by not having regard to it 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 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.

### ***Victim suffered pre-existing life threatening medical condition - murder - whether a mitigating factor***

In **Davis** [2015] NSWCCA 90 a pre-existing heart condition, which may have contributed to the victim's death, was not a mitigating factor. None of the stab wounds inflicted by the applicant directly caused death. The victim died a few days later from the indirect consequence of blood loss which triggered a cardiac arrest, of which the victim was susceptible due to heart disease.

Simpson J (Basten JA and Adamson J agreeing) said that death was caused by a combination of the heart disease and the stabbing: at [45]-[47]. The focus is on the objective criminality of the act that caused death, that is, the triple stabbing. The third wound was sufficient to cause death, and would have done so but for quick treatment of the victim. The fact that some other circumstance contributed to the death is not, in the circumstances of this case, a mitigating circumstance: at [62]-[63] (*LAL*; *RPN* [2007] NSWSC 445; *Munter* [2009] NSWSC 158).

The present case was difficult to reconcile with *Matthews* [2013] NSWSC 659, a later decision of the same sentencing judge, in which the murder victim's aneurism was a significant mitigating feature. However, Simpson J said that the present case accurately states the law: at [50].

Basten JA expressed a point of clarification concerning the relevance of a susceptibility in the victim. Here, the relevance is that the attack was not as serious as a ferocious attack almost leading to death. Moral culpability is assessed by reference to the severity of the attack, amongst other factors. The application of a principle will vary from case to case. It is not necessary to seek to reconcile how the principle has been applied in other circumstances. It is a factor which mitigates the seriousness of the offending in the present case, to a limited degree, and only in the sense that it demonstrates why the moral culpability of the offender was not of the highest order: at [2]-[6].

### ***s 21A(5) Good character - special rules for child sexual 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."

Victim daughter of applicant's de facto partner. In **AH** [2015] NSWCCA 51 the applicant sexually assaulted the daughter of his de facto partner. The CCA held the judge erred in applying s.21A(5A). The applicant's good character played no part in obtaining access to the victim. He was not exercising a community role which might have given access to children, such as teacher, sports coach or pastor: at [21]; (*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: [25].

Offender childcare worker. In **Stoupe** [2015] NSWCCA 175 the offender was a childcare worker. The offender's prior good character assisted him to hold that position, which he abused to commit the offences, and the case fell squarely within s 21A(5A). The judge erred in taking into account prior good character and lack of prior convictions as a mitigating factor: at [86]-[87].

## **4. AGGREGATE SENTENCES**

### ***No power suspend an aggregate sentence***

**RM** [2015] NSWCCA 4 confirmed that there is no power under the legislation to make an order suspending an aggregate sentence: at [50]-[52]; s 12(3) *Crimes (Sentencing Procedure) Act 1999*.

### ***Offence not subject to a standard non-parole period (SNPP) – court can indicate a fixed term***

Under s 53A (2)(b) *Crimes (Sentencing Procedure) Act*, a court imposing an aggregate sentence for multiple offences is required to "indicate to the offender, and make a record of" the sentence that would have been imposed for each offence, had separate sentences been imposed instead of an aggregate sentence.

In **McIntosh** [2015] NSWCCA 184 the CCA said that the terms of s 53A have led to a degree of confusion concerning what is required by way of indication of separate sentences under s 53A. Is the judge required to identify the full sentence with a non-parole period and balance of term, or else a fixed term? : at [135]-[138].

Basten JA (Wilson J agreeing; Hidden J dissenting on this point) held that a court can indicate a fixed term (a mandatory period of custody) for an offence that is not subject to a SNPP: at [166]-[167]; following *Dunn* [2004] NSWCCA 346. *Dunn* held that for offences not subject to an SNPP, it is open to a court when accumulating sentences to impose a sentence which constitutes the intended period of mandatory custody (or fixed term).

Basten JA referred to what was said in *JM* [2014] NSWCCA 297 at [39] that “Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a SNPP is prescribed.” Basten JA said this might be taken to mean that a judge must indicate a full term, however, there is nothing in the legislation that warrants such a constrained approach: at [142].

In this case, the judge indicated sentences for each offence, without indicating a non-parole period. As several were the maximum sentence available for the offence it was assumed that each indication was intended to be a full term. It would be preferable to indicate, by a fixed term, the minimum period of mandatory custody for each offence: at [139].

*Note:* The Sentencing Bench Book notes that if a court does indicate a fixed term that it would be prudent, for appeal purposes, to make it clear that the indicative sentence is a fixed term rather than a head sentence. It is also advisable to make clear the court’s intention that it is applying the approach in *Dunn*: NSW Judicial Commission, *Sentencing Bench Book* [7-507] ‘Settled propositions concerning s 53A’.

### ***Aggregate sentencing - criminality of individual offences properly assessed - judge not required to set out in detail process of accumulation and totality - 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 applicant submitted that the judge made a “blanket assessment” and failed to determine an appropriate sentence for each offence because criminality differed but the same sentence was indicated for each offence. Further, the judge failed to specify the structure of the aggregate sentence and the extent of accumulation of indicative sentences. The CCA dismissed the appeal.

The judge discriminated between the offences based upon the value of the goods 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 the value of goods would be a significant indicator of the seriousness of each offence. However, these were not isolated acts but systematic, frequent and fraudulent activity. The value of the individual transactions is of lesser importance where the pattern of offending is more blatant, frequent and entrenched: at [28]-[29].

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].

### ***Discount for guilty plea applied to indicative sentences and not to aggregate sentence - s 53A(2)(b) Crimes (Sentencing Procedure) Act***

In a number of cases the CCA reiterated that the discount for a plea of guilty is not applied to the ultimate aggregate sentence but to the indicative sentences: *Cahill* [2015] NSWCCA 53; *Tweedie* [2015] NSWCCA 71; *Hoskins* [2015] NSWCCA 245 at [57]; *Glare* [2015] NSWCCA 194.

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: *Tweedie* [2015] NSWCCA 71 at [41] citing *Liles v R (Cth)* [2014] NSWCCA 289 at [45]; *JM* [2014] NSWCCA 297 at [92].

In *Sparkes* [2015] NSWCCA 203 the CCA said that sentencing judges should apply the relevant sentencing discount when setting an indicative sentence and state that they have done so: at [24].

### ***Only aggregate sentence can be subject of appeal - not inapposite to reflect upon notional starting points of both indicative sentences and aggregate sentence***

In *Hoskins* [2015] NSWCCA 245 the applicant was sentenced for two offences of aggravated break, enter and steal to 5 years imprisonment with a NPP 2 years 6 months. The applicant received a combined 40% discount for his guilty plea and assistance to authorities. The applicant submitted the sentence was manifestly excessive.

Button J stated at [57] that only the aggregate sentence can be the subject of appeal (*Rae* [2013] NSWCCA 9 at [32]). It is the sentence ultimately imposed that is under appeal, not the starting point: *Alpha* [2015] NSWCCA 225 at [32].

Nevertheless, Button J said that in that context it was not inapposite to reflect upon the notional starting points of both the indicative sentences and the aggregate sentence (the latter as a way of generally testing the application of the principle of totality) as a guide to analysis, so long as one does so cautiously, and bears in mind it is the aggregate sentence actually imposed that is the subject of appeal, nothing else: at [58].

The CCA held that after removing the discount of 40%, the starting point of the aggregate head sentence of 8 years 4 months was too high. The CCA allowed the appeal and imposed a new sentence of 4 years with NPP 2 years: at [66]-[67].

## 5. SPECIAL CIRCUMSTANCES

### ***Special circumstances not reflected in individual sentences nor total effective sentence***

In **MD** [2015] NSWCCA 37 the CCA allowed the applicant's appeal on the basis the sentence failed to reflect the judge's finding of special circumstances. Gleeson JA (Johnson and Hall JJ agreeing) collected the authorities relevant to this type of submission:

38. The principles applicable to the setting of the non-parole period of a sentence under s 44 of the Sentencing Act are well settled. A non-exhaustive statement of principles may be found in *Caristo v R* [2011] NSWCCA 7 at [26]-[31] (R A Hulme J; Giles JA and Adams J agreeing). Three matters are of particular relevance in the present case.
39. First, the non-parole period is the minimum period of actual incarceration that the offender must spend in custody having regard to all the elements of punishment, including rehabilitation, the objective seriousness of the offence and the offender's subjective circumstances: *Power v R* [1974] HCA 26; 131 CLR 623 at 627-629; *R v Simpson* [2001] NSWCCA 534; 53 NSWLR 704 at [59]; *R v Cramp* [2004] NSWCCA 264 at [34].
40. Secondly, simply because there are circumstances which are *capable* of constituting special circumstances, does not compel the Court to make such a finding and reduce the non-parole period: *R v Fidow* [2004] NSWCCA 172 at [22]. The decision to find special circumstances is first, one of fact, to identify the circumstances and secondly, one of judgment, to determine that those circumstances justify a lowering of the non-parole period below the statutory ratio: *R v Simpson* at [73]. The degree or extent of any adjustment of the "statutory ratio" is a matter for the discretion of the sentencing judge: *R v Cramp* at [31]; *Trad v R* [2009] NSWCCA 56; 194 A Crim R 20 at [33].
41. Thirdly, in setting an effective a non-parole period for more than one offence the focus should not be solely upon the percentage proportions that the non-parole and parole periods bear to the total term: "the actual periods involved are equally, and probably more, important" (*Caristo v R* at 42 (R A Hulme J)).
42. Generally speaking where this Court has intervened, it has usually been the case that the sentencing judge has not given effect to a finding of special circumstances through inadvertence or miscalculation. Examples can be found in the cases collected by McClellan CJ at CL in *Fina'i v R* [2006] NSWCCA 134 at [31]-[40].
43. The starting point with appeals asserting such error is to ascertain "what can be gleaned of the judge's intention from the sentencing remarks": *Maglis v R* [2010] NSWCCA 247 at [24] (Howie AJ)."

In this case, the judge's statement regarding the release of the applicant after completing "about 65% of his total sentence" is inconsistent with the total NPP imposed, being 74.8% of the total sentence, as well as the individual NPPs on each count. There is nothing to indicate the judge was aware of, or intended, this result and the sentencing discretion miscarried: at [43]-[46].

### ***Special circumstances not reflected in total effective sentence - effect of accumulated sentences – long period of rehabilitation - special circumstances found in factors other than accumulation***

**Hutchen** [2015] NSWCCA 101 was a case where the combined effect of the accumulated sentences produced a total sentence which did not reflect the sentencing judge's express finding of special circumstances.

There is no rule that just because an overall sentence does not reflect a finding of special circumstances, a sentencing judge must, having found special circumstances in respect of individual counts, make a further adjustment to the ratio in respect of the total accumulated sentence. Each case depends upon its own particular facts: at [28].

In a case where the express purpose for the finding of special circumstances was to satisfy the need for a long period of rehabilitation including residential rehabilitation, it is not only the ratio of the non-parole period to the head sentence which is important, but the actual periods involved are equally, if not more important: at [29]; *Caristo* [2011] NSWCCA 7 at [41].

The CCA referred to **Sabongi** [2015] NSWCCA 25 where the issue was comprehensively examined at [83]-[84] (citations omitted):

Where there is no adjustment of the statutory ratio reflected in the overall term, it may either reflect what the sentencing judge specifically intended, or it may be the result of inadvertence or miscalculation.

Where a sentencing Judge makes clear that they are aware that the total sentence is in accordance with the “statutory ratio”, it is rare that this Court would intervene.

.Conversely, in cases where the finding of special circumstances was more broadly based than the accumulation itself and where the sentencing Judge has not clearly indicated their awareness of the fact that the total effective sentence will remain in accordance with (or close to) the “statutory norm” the court has intervened.

In **Hutchens** there was no indication of the judge’s awareness that the total sentence would remain close to the “statutory norm”. The combined effect of the total sentence had not given effect to the judge’s intention of a finding of special circumstances and error had occurred: at [32].

In **Sabongi** [2015] NSWCCA 25 the judge made a finding of special circumstances identifying rehabilitation, first time in custody and the applicant’s young age as relevant matters; as well as accumulation. The CCA said it is significant the finding of special circumstances was not based solely upon the accumulation, but also other matters. If the only matter had been accumulation, then a collection of sentences in which the total parole period was slightly less than one-third of the total of the non-parole periods might be sufficient implementation of sentencing intention (*Cicekdog* [2007] NSWCCA 218 at [46]-[49]). However, other factors were identified such as the need for rehabilitation, which ought to have resulted in greater adjustment to the statutory proportion. The sentencing discretion miscarried: at [90]-[91].

## 6. INTENSIVE CORRECTION ORDERS

### ***Revocation of bond – failure to consider Intensive Correction Order under s 99(2) Crimes (Sentencing Procedure) Act***

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).

In **Lambert** [2015] NSWCCA 22 the appeal was allowed on the ground that the judge did not consider s 99(2). On revoking a bond, sentence proceedings can miscarry if the court fails to consider an intensive correction order (or home detention) under s 99(2) where these options are realistic sentencing outcomes: at [46]. If it were apparent the applicant could not be assessed as suitable for an ICO, this ground would fail. However, in this case there was promising rehabilitation: at [44].

### ***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***

s 5(1) *Crimes (Sentencing Procedure) Act* states 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.

In **EF** [2015] NSWCCA 36 the applicant was sentenced to imprisonment for drug supply. His evidence at sentence was that he sold drugs to support his habit. His legal representative at sentence did not submit otherwise than that a full-time custodial sentence had to be considered.

The CCA allowed the appeal.

The judge failed to consider the availability of an ICO in accordance with s 5(1): at [40]-[41]. Although, in cases of drug supply, a custodial sentence will ordinarily be imposed unless there are exceptional circumstances (*Clark* (NSWCCA, 15 March 1990, unreported) this does not obviate 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]; **Lambert** [2015] NSWCCA 22. The judge was not adequately assisted in a busy circuit sitting: at [58]. Matters relevant to an assessment of suitability for an ICO, suggested there were real prospects he would be found suitable if assessed: at [60].

[The CCA found an ICO was no longer appropriate in the circumstances. A suspended sentence of imprisonment was imposed].



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.”

## 7. VICTIM IMPACT STATEMENTS (VIS)

### ***Extent to which Victim Impact Statement can be used to prove aggravating factor – caution to be exercised***

In *Tuala* [2015] NSWCCA 8 the Crown appealed against a sentence imposed for shoot with intent to cause GBH (s.33A(1) *Crimes Act*). The Crown submitted the judge failed to find substantial harm was caused to the victim as 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 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 s.21A(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 s.33A(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 held 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 s.33A(1) *Crimes Act*. It is not an element of s.33A(1) that grievous (or any other) harm was in fact caused.

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 s.33(1) Crimes Act - Emotional harm, not physical harm, can be taken into account*

In *Muggleton* [2015] NSWCCA 62 the CCA stated 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 on an offence under s.33(1).

However, emotional harm suffered by a victim of a s.33(1) offence may not necessarily be 'substantial'. Thus substantial emotional harm under s.21A(2)(g) 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].

***Where 'VIS' is a report by an expert – expectation that expert author would be cross-examined - substantial emotional harm s 21A(2)(g) Crimes (Sentencing Procedure) Act***

In *Muggleton* [2015] NSWCCA 62 the applicant was sentenced for wound with intent to cause GBH (s 33(1) *Crimes Act*). The applicant submitted the Judge erred in taking into account as an aggravating factor the 'emotional harm' suffered by the victim under s 21A(2)(g). Evidence of emotional harm was given via a VIS by the victim, a psychologist report and a trauma counsellor report.

The CCA dismissed the appeal. Whether emotional harm is 'substantial' within s 21A(2)(g) *Crimes (Sentencing Procedure) Act* can be established by a VIS: ss 28(1), 30A: at [39]-[40]. 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: at [44].

The psychologist report was admissible as evidence from a qualified person on the impact on the victim. The applicant did not cross-examine the authors of the reports. 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. The evidence as to emotional harm thus stands unchallenged: at [45]; see *Aguirre* [2010] NSWCCA 115 at [77].

***No requirement to address level of 'substantial emotional harm' on 'Wounding with intent to cause GBH' s.33(1) Crimes Act***

In *Muggleton* [2015] NSWCCA 62 the judge found as an aggravating factor that the victim of a s.33(1) offence suffered 'substantial emotional harm' (s.21A(2)(g)). The applicant submitted the judge failed to detail what would normally be expected to be suffered by a victim of a s.33(1) offence and in what way the victim suffered harm over and above that threshold.

The CCA rejected this submission. 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 s.33(1) offence, in the circumstances of the present case, particularly in remarks delivered *ex tempore*. It was open to the judge to find the victim suffered "substantial ongoing emotional harm which has impacted enormously on him and his family" and was obliged to take it into account as an aggravating factor by reason of the mandatory wording in s.21A: at [35]-[36], [46].

## **8. PROCEDURE AND EVIDENCE**

***Procedural fairness – no error in inviting Crown to give opinion on sentence - Barbaro (2014) 88 ALJR 372***

In *Browning* [2015] NSWCCA 147 the applicant submitted the judge erred in inviting the Crown to give its opinion as to quantum of the sentence and what quantum would be "*appealable*". Further, that the judge erred in increasing the quantum of the sentence the judge proposed to impose.

Dismissing the appeal, the CCA said that where a judge gives an indication of his thinking as to a sentence, invites submissions and then reconsiders what the sentence ought be, provided that the offender's lawyer is given an opportunity to be heard, there can be no error: at [148].

The prosecutor did not advocate any term of imprisonment in any numerical sense: *Barbaro* (2014) 88 ALJR 372. *Barbaro* is not authority for the proposition that the obligation of a prosecutor to render assistance to the Court has been entirely removed. The Crown has a duty to assist a sentencing court to avoid appealable error: at [144]-[146]; *CMB v AG (NSW)* (2015) 89 ALJR 407 at [38]; [64]. The only submission by the prosecutor was that the judge would

fall into appealable error if he imposed a sentence reflecting either of the two proposals by the applicant's lawyer, in accordance with his duty: at [148].

### ***Procedural fairness – excessive intervention by judicial officer***

In *Ellis* [2015] NSWCCA 262 there was a miscarriage of justice due to excessive intervention by the sentencing judge.

While giving evidence on a drug matter, the judge asked the applicant to identify a person in a photograph tendered by the Crown. When the applicant refused, the judge began to intervene with comments including: "...you're going to tell me the whole story and not be selective about it because otherwise what's the value of your evidence ..?" The applicant withdrew his evidence. In his remarks, the judge said that due to the absence of evidence from the applicant, he could not accept submissions favourable to him.

The ultimate question is whether intervention was unjustifiable and resulted in a miscarriage of justice. A miscarriage of justice will occur where the conduct of the judge prevents a party from properly presenting his or her case: at [57], [65]; *Jones v National Coal Board* (1957) 2 QB 55. Three ways in which a judge's intervention may be excessive and lead to miscarriage of justice are:

- (i) the questioning unfairly undermines the proper presentation of a party's case (the disruption ground)
- (ii) the questioning gives an appearance of bias (the bias ground); and
- (iii) the questioning is such an egregious departure from the role of a judge presiding over an adversarial trial that it unduly compromises the judge's advantage in objectively evaluating the evidence from a detached distance (the dust of conflict ground): at [65] citing *T, WA* (2013) 118 SASR 382 at [38].

The CCA had sympathy for the judge, having regard to the unsatisfactory statement of facts. However, intervention was unwarranted and deprived the applicant of the opportunity to properly present his case for a number of reasons at [67]-[70]. In particular,

The timing of the question about the photograph, when the applicant's solicitor had advised the applicant would be reluctant to identify other persons. There are good and valid reasons for drug offenders facing terms of imprisonment to be reluctant to identify co-offenders: *Pham* [2010] NSWCCA 208 at [27].

The reaction of the sentencing judge after the applicant declined to answer the question.

In making the comment above, the judge misapprehended his role. It not the function of the judge to perform an inquisitorial role, as distinct from adjudicating on issues raised by the parties, although the judge has an entitlement to seek clarification of matters raised in evidence: *Jones v National Coal Board*.

### ***Fact finding - disputed facts - importance of identifying facts that are agreed***

In *Porter* [2015] NSWCCA 59 the applicant submitted the judge erred by failing to make critical factual findings about which there was unchallenged evidence by the applicant. The CCA dismissed the appeal. The judge was not obliged to accept the applicant's account merely because the victim or another witness were not called to controvert it: at [34]-[36].

The dispute as to facts was flagged by the defence at sentence but was not described with precision. The Statement of Agreed Facts was neither signed nor objected to. However, it was irreconcilable with the applicant's evidence: at [34]. The CCA stated:

It is desirable the Statement of Agreed Facts be signed by or on behalf of the offender and the Crown.

Any disputed facts should be described with precision so that it can be recorded on the transcript or document. Evidence relating to the disputed factual issue can then be adduced and the issue determined, if required, by the judge in remarks: at [39].

Even if negotiations about facts are continuing until the hearing, a draft brought to Court should be amended so as not to delay proceedings. The sentencing judge, and this Court, are thus in a position to know the extent of the agreement as to the facts: at [40].

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

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. Section 43 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.

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

In *Halac* [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."

An application for special leave to appeal to the High Court in this matter was refused on 13 November 2015.

## **9. STATISTICS AND COMPARABLE CASES**

***Statistics – limited utility – aggregate sentences***

The limited utility of the statistics where an aggregate sentence has been imposed was noted in *Tweedie* [2015] NSWCCA 71, *Knight* [2015] NSWCCA 222 and *Chidiac* [2015] NSWCCA 241.

The statistics relate to the "principal offence" not the overall or aggregate sentence. The statistics only record the sentence imposed for one offence in a multi-offence sentencing exercise - what it terms the "principal offence". The applicant was seeking to compare sentences imposed for a single offence with his aggregate sentence imposed for 38 offences: *Tweedie* [2015] NSWCCA 71 at [47].

The statistics demonstrate the indicative sentences in each case fall at the high end of the range of sentences imposed for a single offence. But indicative sentences are not sentences against which any appeal is determined: *Knight* [2015] NSWCCA 222 at [87]-[88].

***Statistics – statistics and the limits of their utility should be understood - multiple drug offences***

In *Knight* [2015] NSWCCA 222 the CCA emphasised that where statistics are relied upon, then counsel ought to ensure the statistics and the limits of their utility are understood: at [8], [89].

The applicant received an aggregate sentence for four supply drug offences. The statistics relied upon were for supply amphetamines in less than commercial quantity, based upon a selection of the variables "multiple offences" and "plea of guilty": at [5]. Dismissing the appeal, the CCA said:

The variable "plea of guilty" did not refine the statistics in any useful way as there are 123 cases out of which pleas of guilty were entered in 120: at [6].

The variable "multiple offences" is of no utility because it compared a case of four counts of drug supply with cases which might involve one drug supply and other unrelated offences not necessarily of the same seriousness: at [7].

In *Chidiac* [2015] NSWCCA 241, also an appeal against an aggregate sentence imposed for drug offences, the CCA said that:

The statistics do not identify the broad range of weight and purity of drugs;

The role of offenders in the commission of such offences can vary greatly;

The statistics do not identify whether other offences on a Form 1 were taken into account on sentence or whether there were aggravating features, such as being on conditional liberty at the time of the offending, that were factors in the sentencing exercise: at [40].

### **Comparable cases - “systematic fairness” and “reasonable consistency” in sentencing – s.33 Crimes Act wound with intent to inflict GBH – appeal allowed**

In *Newman* [2015] NSWCCA 270 the CCA allowed the applicant's appeal against sentence for wound with intent to inflict grievous bodily harm (s 33(1)(a) *Crimes Act*). The CCA took into consideration comparable cases. The Court noted:

Consideration of other sentences imposed is essential if consistency is to be achieved: at [19]. The administration of criminal justice should be systematically fair, and that involves, amongst other things, reasonable consistency: at [22]; *Wong* per Gleeson CJ at [6].

Regard must be had to all of the factors before the other sentencing court - objective circumstances, when a plea of guilty was entered, antecedents and personal attributes of the offender, whether a standard non-parole period applied: at [20].

Bare statistics tell very little that is useful without **why** those sentences were fixed: *Wong* (2001) 207 CLR 584 at [59].

Past sentences provide guidance and stand as a yardstick against which to examine a proposed sentence. When considering past sentences, ‘it is only by examination of the whole of the circumstances that have given rise to the sentence that ‘unifying principles’ may be discerned”: at [23]; *Hili* at [54]; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [303]-[305], *Green* (2011) 244 CLR 462 at [28]-[29].

The CCA said that, for sentences under s 33(1), severity of the wound or bodily harm and long term effects of the injury are given considerable weight: at [25]. Comparable cases under s 133(1)(b) (causing GBH with intent) which involves an allegation of a more serious outcome for the victim than under s 33(1)(a) (of which the Applicant was convicted) can be considered. This is because there is no sharp delineation between the class of violence and injury which may be charged under subpar (a) and subpar (b). Some more serious instances of wounding may be not greatly different from lower order instances of grievous bodily harm: at [26].

By reference to comparable cases, the CCA concluded the Applicant's offence was at the low end of seriousness by the measures of both the nature of the attack and the injury inflicted: at [47]-[48].

### **Comparable cases – comparable cases not relied on by sentencing judge not precluded from being referred to on appeal – manslaughter**

In *Robertson* [2015] NSWCCA 251 the CCA said that *Zreika* (2012) 223 A Crim R 460 at [81] should not be read as precluding reference on appeal to comparable cases not relied on before the sentencing judge: at [26].

In manslaughter cases, caution is appropriate in using statistics and comparable cases for manslaughter which can involve a wide range of offending: at [18]. The applicant was entitled to rely upon the comparable cases, though the extent to which they provided assistance in the particular circumstances of this case was perhaps limited: at [24].

## **11. DE SIMONI PRINCIPLE**

A judge is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence: *De Simoni* (1981) 147 CLR 383 at 389 per Gibbs CJ.

***Arson - Applicant sentenced on basis he believed co-offenders would financially benefit from crimes through fraudulent insurance claim - Applicant charged with offence containing no element concerning financial gain - breach of De Simoni principle***

In **Ruge & Cormack** [2015] NSWCCA 153 Ruge was charged under s 197(1)(b) *Crimes Act* with 'Dishonestly destroying or damaging property' carrying a maximum penalty of 14 years imprisonment. The elements of that offence include that the act was done "dishonestly, with a view to making a gain". Cormack was charged under s 195(1A)(b) with 'Destroying or damaging property in company' carrying a maximum penalty of 11 years. That offence does not involve an allegation that he was motivated to obtain a gain.

In sentencing Cormack, the judge took into account as an aggravating factor that Cormack was aware Ruge wished to commit an "insurance job" and that Ruge "was to gain substantially".

The CCA held the sentencing judge infringed the principles in *De Simoni* (1981) 147 CLR 383. Section 197 creates an offence carrying a maximum penalty of 14 years whereas s 195(1A)(b) creates an offence carrying 11 years when committed in company. The element of "dishonestly, with a view to making a gain for that person or another" in s 197 is a factual circumstance that aggravates the criminality of a particular case and exposes an offender to a higher penalty. The judge erroneously took into account a circumstance of aggravation that was not charged against Cormack but which exposed him to a more severe maximum penalty: at [39]-[40].

***Drug supply - uncharged conduct – no breach of De Simoni principle***

In **Lago** [2015] NSWCCA 296 the applicant was sentenced for drug supply. The judge found the offending was an objectively serious example of the drug supply offence given "the amount of the drug, and that it was not an isolated occasion...". The applicant submitted the judge erred in making a finding of guilt on an earlier drug supply offence not charged on indictment, using that finding concerning the uncharged conduct as a circumstance of aggravation and that the applicant was punished for an earlier offence for which he had not been convicted and sentenced, contrary to *De Simoni* (1981) 147 CLR 383.

The CCA dismissed the appeal. The *De Simoni* principle is breached only if the offender is actually punished for the conduct constituting the uncharged offence or aggravating circumstance. An assessment whether a breach has occurred involves consideration of the substance of what was said, in the context of the case, and not merely the form of words used: at [41]; *SBF* (2009) 198 A Crim R 219 at [128].

***Drug supply - judge took into account the frequency of sales making up one count of supply – De Simoni principle did not apply***

In **Jadron** [2015] NSWCCA 217 the CCA held the *De Simoni* principle had no application where the applicant was charged with supply 157.9g of methylamphatmine under s25(1) *Drug Misuse And Trafficking Act 1985* ('DMTA') and the sentencing judge took into account the number of the sales which constituted the supply and that the sales were for reward: at [38], [47], [52].

It is well settled that a single count under s 25(1) may charge a course of selling which involves multiple acts, each of which may amount to an offence: at [39]; *Locchi* (1991) 22 NSWLR 3.

The frequency of the sales and that they were for reward were simply particulars of how the physical elements of the offence were carried out, not additional or extraneous matters of aggravation: at [38]. Upon a plea of guilty to s 25(1), the Crown does not prove any circumstance additional or extraneous to the elements of offence merely by particularising the frequency of transactions which comprised the supply and that they were sales rather than gifts. *De Simoni* is not attracted because the particulars relied upon by the Crown (and agreed to by the Appellant) as constituting the supply did not go beyond the elements of s 25(1): at [47]. The judge was bound to make findings about the manner in which the 157.9g of methylamphetamine had been supplied and to take those findings into account in determining the objective seriousness of the offence, similar to a charge of conspiracy to import drugs: at [42]-[46]; *Savvas* (1995) 183 CLR 1.

## **11. PARTICULAR OFFENCES**

***Manslaughter – excessive self-defence – s 421 Crimes Act - judge must identify the circumstances as the applicant perceived them***

In **Smith** [2015] NSWCCA 193 the appellant was found guilty of manslaughter by excessive self-defence. The appellant believed the deceased was armed with a gun and that three men who accompanied the deceased were going to attack him. The appellant thus fired his rifle killing the deceased. Section 421 *Crimes Act* states:

#### **421 Self-defence - excessive force that inflicts death**

(1) This section applies if:

- (a) the person uses force that involves the infliction of death, and
- (b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:
- (c) to defend himself or herself or another person, or
- (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter."

The CCA allowed the applicant's sentence appeal. The sentencing judge failed to make any express finding of what the circumstances were as perceived (rightly or wrongly) by the applicant: at [59]. That omission had repercussions in the evaluation of the degree of unreasonableness (excessiveness) of the applicant's response, which the judge characterised as "manifestly" and "grossly" excessive: at [45], [61].

The applicant's perception of the circumstances is relevant to the determination of what he believed it was necessary to do to defend himself: s 421(1)(c). And his perception was integral to the issue raised by s 421(1)(b) - the reasonableness of his conduct. Both questions are assessed by reference to the applicant's subjective perception: at [45]. "[I]n the circumstances as he or she perceives them" in s 421 calls for an evaluation of the degree to which the response exceeds that which would be a reasonable response if those circumstances existed: at [58].

Had the sentencing judge made an express finding of what the circumstances were as perceived by the applicant, he must have concluded that that perception included the presence of a loaded gun that the deceased was about to use: at [60].

#### **Supply drugs – "exceptional circumstances"**

Drug trafficking or supply to a substantial degree will receive a full-time custodial sentence unless there are exceptional circumstances: *Clark* (unreported, 15/3/90, NSWCCA). There is no exhaustive definition of "exceptional circumstances": *Saba* [2006] NSWCCA 214.

In *Polley* [2015] NSWCCA 247 at [37]-[40] the CCA upheld the judge's finding that the applicant's subjective circumstances and rehabilitation did not constitute exceptional circumstances. The Court discussed those cases offering some guidance regarding exceptional circumstances (*Cacciola* (1998) 104 A Crim R 178 at 181; *Carrion* (2000) 49 NSWLR 149 at 153)). The CCA at [40] cited *Smaragdis* [2010] NSWCCA 276 per Fullerton J:

"While the Court has not undertaken an exhaustive definition of what does and does not constitute exceptional circumstances there are nevertheless some clear guidelines that have emerged. In particular, the authorities have made it clear that a plea of guilty, remorse, an intention not to re-offend and proven rehabilitation in relation to an offender's drug use, even where such circumstances can in combination be described as strong, are not matters of mitigation constituting an exceptional reason for departing from the general principle unless the aggregate of the circumstances point to the case being one of real difference from the general run of cases ..."

#### **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* [2015] NSWCCA 36, above, in relation to the *Clark* principles and the availability of an ICO.

### ***Principles regarding sentencing for Commonwealth and State child pornography offences***

In **Porte** [2015] NSWCCA 174 and **De Leeuw** [2015] NSWCCA 183 the CCA allowed Crown appeals against Intensive Correction Orders imposed for serious child pornography offences.

In **Porte** at [63] the CCA reaffirmed the sentencing principles with respect to child pornography offences as set out in *Minehan* [2010] NSWCCA 140; 201 A Crim R 243 at [94]-[95]:

- "1. Whether actual children were used in the creation of the material.
2. The nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed.
3. The extent of any cruelty or physical harm occasioned to the children that may be discernible from the material.
4. The number of images or items of material – in a case of possession, the significance lying more in the number of different children depicted.
5. In a case of possession, the offender's purpose, whether for his/her own use or for sale or dissemination. In this regard, care is needed to avoid any infringement of the principle in The Queen v De Simoni (1981) 147 CLR 383.
6. In a case of dissemination/transmission, the number of persons to whom the material was disseminated/transmitted.
7. Whether any payment or other material benefit (including the exchange of child pornographic material) was made, provided or received for the acquisition or dissemination/transmission.
8. The proximity of the offender's activities to those responsible for bringing the material into existence.
9. The degree of planning, organisation or sophistication employed by the offender in acquiring, storing, disseminating or transmitting the material.
10. Whether the offender acted alone or in a collaborative network of like-minded persons.
11. Any risk of the material being seen or acquired by vulnerable persons, particularly children.
12. Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.
13. Any other matter in s 21A(2) or (3) Crimes (Sentencing Procedure) Act (for State offences) or s 16A Crimes Act 1914 (for Commonwealth offences) bearing upon the objective seriousness of the offence."

The CCA referred to additional propositions:

The absence of features such as the offender not being charged with sale, distribution or dissemination of material does not operate to mitigate penalty for a possession offence: at [64].

Possession of child pornography is not a victimless crime: at [65].

Given the predominance of general deterrence and denunciation in the sentencing process for offences of this type, rehabilitation may have reduced significance, with the weight to be attributed to rehabilitation depending upon the seriousness of the particular offence: at [72].

Prior good character is to be afforded limited weight. Prior good character, positive personal antecedents and a reduced or absent need for personal deterrence are relatively commonplace amongst offenders in possession of child pornography. Significant weight is to be given to general deterrence and correspondingly less weight to matters personal to the offender: at [126].

**De Leeuw** [2015] NSWCCA 183 adopts the observations made in **Porte** and provides a summary of principles made by other Australian courts at [72].

### ***Child pornography – nature of harm discernible from CETS classification***

In **Fitzgerald** [2015] NSWCCA 266 the judge was provided with a representative sample of images from a larger number of 1145 images involving child pornography. A statement of facts classified the images according to the Child Exploitation Tracking Systems (CETS) scale of objective seriousness. The appellant submitted the judge erred in his assessment of objective seriousness.



Dismissing the appeal, the CCA said it was not necessary for the judge to view all or even most of the images and videos. It was sufficient to have regard to the fact that 294 (25%) of the images and videos were within categories 4 (penetrative sexual activity between adults and children) and 5 (children subjected to sadism, humiliation or bestiality). Such activity involving children cannot occur without manifest inherent cruelty, harm and injury. The nature of the harm is readily discernible from the CETS classification. No further evidence of the depiction of actual cruelty or harm was necessary: at [36].

### ***Dealing with suspected proceeds of crime – s 400.9 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.

## **12. MENTAL ILLNESS**

### ***Mental illness – evidence of mental disability - no specific submission by counsel – obligation of sentencing judge to consider issue notwithstanding absence of submission***

In *Cowan* [2015] NSWCCA 118 there was considerable evidence before the sentencing judge regarding the applicant’s mental state. No submission as to the principles for sentencing of mentally ill offenders was made by counsel.

The CCA allowed the appeal. The sentencing judge was under an obligation to consider and apply those principles if appropriate: at [40]. The judge was obliged to expressly make some assessment as to whether the applicant’s moral culpability was reduced by his mental condition. In assessing objective seriousness, it was an error not to refer to the applicant’s mental health: at [40]; *Martin* [2015] NSWCCA 6 at [53]. That obligation extended to an obligation to consider the principles set out in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177]-[178] on the relevance of mental illness on sentence: at [41].

### ***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 [67],[75]; *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 at [177].

### ***Limiting term - purpose of limiting term is not to punish: Mailes (2004) 62 NSWLR 181 – purposes 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 CCA made these observations regarding the application of s 3A in this case:

s3A(a) does not apply. The purpose of nominating a limiting term is not to punish: *Mailes* (2004) 62 NSWLR 181 at [32], [42].

ss 3A(b), (c), (d) and (e) have little bearing in this case. By reason of mental disability, the respondent was an unsuitable vehicle for general deterrence. Progressive dementia, and the finding he would not commit another act of violence, mean protection of the community and rehabilitation have little relevance. There is little to be gained by making an offender suffering from progressive dementia accountable for his actions: at [42].

s 3A(f) - An offender, by reason of mental disability, is unsuitable to be the subject of denunciation. The irrelevance results from diminished moral culpability, which results from impaired mental capacity: at [45].

s3A(g) – ‘Recognition of the harm done to the victim and community’ 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].

### 13. POWERS AND PROCEDURE ON SENTENCE APPEALS

#### ***Crown ought to give careful consideration to the position it adopts in ‘Muldrock error’ cases***

The High Court in *Muldrock* (2011) 244 CLR 120 held that the CCA judgment in *Way* (2004) 60 NSWLR 168 regarding sentencing for a standard non-parole period (SNPP) offence is incorrect.

Cases have decided *Muldrock* error cannot be assumed simply because a sentence was imposed between the dates of *Way* and *Muldrock*: see *Buttrose v A-G NSW* [2015] NSWCA 221 per McFarlane J at [51]ff.

However, in *Davis* [2015] NSWCCA 90 Simpson J (Basten JA and Adamson J agreeing) said *Way* was well-known and fundamental to the sentencing for SNPP offences. It is not to be lightly concluded a judge departed from *Way*. Even if the language of *Way* is not reproduced in the Remarks on Sentence, the strong likelihood is that *Way* governed the sentencing: at [30]-[31].

The Crown has persisted in routinely opposing applications for leave to appeal against sentence, and extensions of time, on the basis that “*Muldrock* error” has not been shown. The Crown ought to give careful consideration to the position it adopts. It is not helpful to the administration of criminal justice for Court time to be taken on frivolous opposition to reasonable applications: at [32].

See also *Aytugrul* [2015] NSWCCA 139 at [22] where Simpson J said it is hoped the Crown will reconsider its position with respect to asserted “*Muldrock* error” cases.

By contrast, in the earlier judgment of *McDonald* [2015] NSWCCA 80, R A Hulme and Adamson JJ found that the sentencing judge had simply used the SNPP as a legislative guidepost without giving it determinative significance or adopting a two-stage approach, as the judge had applied other authority that a plea of guilty was accepted as a reason not to impose a SNPP (at [43]–[47]). Dissenting, Basten JA said that “there is no reason to suppose that the sentencing judge was doing [anything] other than having regard to the standard non-parole period in accordance with the approach, then understood to be correct, as identified in *Way*” (at [7]).

#### ***Kentwell [2015] HCA 37; 313 ALR 451 - Court's role in exercising sentencing discretion afresh under s 6(3) - relevance of original sentence***

In *Thammavongsa* [2015] NSWCCA 107 the CCA discussed the relevance of the original sentence where error is established and the Court is required to make an independent assessment of the appropriate sentence: *Kentwell* [2015] HCA 37; 313 ALR 451; s 6(3) *Criminal Appeal Act* 1912.

Bellew J (R A Hulme J agreeing with additional remarks; Simpson J dissenting but agreeing with Bellew J's approach) said the Court is required to make an independent assessment of the appropriate sentence; and to compare it with that originally imposed in order to determine whether there should be a lesser sentence. That has to be done in the context of the submissions made before this Court; and includes matters which have arisen since the original sentence was passed: at [43]–[45]; *Application by MLP pursuant to s 78 of the Crimes (Appeal and Review) Act* 2001 [2015] NSWSC 349 at [9] per R A Hulme J.

RA Hulme J explained it is not a matter of carrying out a comparison through the course of this Court independently determining the appropriate sentence. The point of comparison is at the end of the process. The Court determines what it considers the sentence should be. It then has to make a comparison of that determination with the original sentence: at [21]-[23].

Simpson J noted that Bellew J's comments might be incorrectly interpreted to mean the original sentence has some bearing on the selection of the re-determined sentence. However, by making such a "comparison", all that is intended is that a check be made that the proposed re-sentence does not exceed that originally imposed (for reasons of fairness - see *Parker v DPP* (1992) 28 NSWLR 282), or for the formulation of the final order (see *Davis* [2015] NSWCCA 90): at [5]-[6].

In *Aytugrul* [2015] NSWCCA 139 Simpson J (Beazley P and Adamson J agreeing) observed at [24]-[25]:

That upon re-sentencing, the Court must do so independently of the sentence determination at first instance, although, obviously, the sentencing considerations then relevant will continue to be relevant, as well as any additional information available to this Court: *Kentwell*; *Davis* at [75]-[86].

It would not ordinarily be appropriate to depart from findings of fact made by the sentencing judge, particularly where those facts are found after a trial, in which the judge has had the advantage of seeing and hearing witnesses, and making an assessment of the whole of the evidence.

### ***Severity appeals - practice of Crown relying on bare words in s 6(3) that "no lesser sentence is warranted" ought to cease***

In *Davis* [2015] NSWCCA 90 Simpson J (Basten JA and Adamson J agreeing) said that the routine practice of the Crown relying on those words in s 6(3) that "no lesser sentence is warranted in law" ought to cease. Once error is established, the CCA must exercise its own sentencing discretion; not to ask whether the sentence imposed at first instance is "within range". In the exercise of that discretion, it may or may not conclude the appropriate sentence is that imposed at first instance. That is not the result of concluding that "no lesser sentence is warranted in law", but the result of an independent consideration of all relevant sentencing factors: at [76]-[84]; *Kentwell* (2014) 313 ALR 451; *Baxter* (2007) 173 A Crim R 284.

In *Thammavongsa* [2015] NSWCCA 107 RA Hulme J at [16]-[18] said the bare submission that "no lesser sentence is warranted in law" lacks clarity. In this case the Crown submissions are a model of the correct approach. They reviewed objective and subjective facts and circumstances, engaging with matters the Crown submits the Court should consider in its independent exercise of the sentencing discretion: at [16]-[20].

### ***Fresh evidence – three types of medical condition***

In *Cornwell* [2015] NSWCCA 269 the CCA allowed fresh evidence of the applicant's post-sentence diagnosis of Huntington's disease.

The general principle is that fresh or new evidence will not normally be allowed on appeal due to the principle of finality. However, evidence as to a medical condition may form the basis for an exception to this general principle: at [39], [57]-[59]; *Turkmani* [2014] NSWCCA 186.

Three types of medical condition were identified in *Turkmani* at [66]:

Firstly, where the offender was only diagnosed as suffering from a disease or condition after sentence but was affected at the time of sentence (e.g. HIV/AIDS as in *Bailey* (1988) 35 A Crim R 458.

Secondly where, although symptoms of a condition may have been present, their significance was not appreciated at the time of sentencing (*Iglesias* [2006] NSWCCA 261; *Springer* (2007) 177 A Crim R 13).

Thirdly, where a person was sentenced on the expectation that they would receive a particular level of medical care in custody but they did not (*Keir* [2004] NSWCCA 106; *Springer*).

The present case falls within either the first or second category. The applicant's condition was unknown at the date of sentence, despite the applicant being symptomatic and there being indications he may have then suffered from Huntington's disease: at [38].

The CCA exercised its discretion to admit the fresh evidence. Unique psychological factors led to the applicant's decision to refuse testing for the disease prior to sentencing. The applicant was suffering from the disease at the time of sentencing, and custody is likely to be more burdensome having regard to his circumstances: at [59].

Whilst no error is alleged in the sentence, the fresh evidence as to the applicant's subsequent diagnosis, deteriorating condition, limited life expectancy and adverse psychological impact of the diagnosis, support intervention by the Court: at [66]. The appeal was allowed and new sentence imposed.

### ***Weight to be attributed to particular sentencing considerations is a matter for 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].

## 14. FEDERAL OFFENCES

### ***Guilty plea to federal matters - obiter remarks regarding approach to discount - utilitarian value of plea***

In *Lee* [2012] NSWCCA 123 at [58] it is said that *Cameron v The Queen* (2002) 209 CLR 339 held a guilty plea is to be taken into account “as recognition of an offender’s willingness to facilitate the course of justice but not on the basis that the plea has saved the community the expense of a contested hearing.”

In *Gow* [2015] NSWCCA 208 Basten JA in obiter dictum (Hamill J agreeing at [72]; Garling J dissenting) said that *Cameron* has been incorrectly applied in NSW and is not authority for that principle (see at [26]-[27]). It is doubtful *Cameron* limits the basis upon which a plea of guilty may be taken into account in the way suggested in *Lee*. It is not possible to read *Lee* as excluding other relevant bases upon which a plea may be considered – such as remorse; sparing the community the expense of a trial; acceptance of responsibility and willingness to facilitate the course of justice. Properly understood, all four overlapping considerations are available bases for reducing a sentence following a plea of guilty: at [28].

However, in *Saleh* [2015] NSWCCA 299 Beech-Jones J said that, in his view, *Tyler* [2007] NSWCCA 247; 173 A Crim R 458 represents the law. In *Tyler* at [114] the Court held that the utilitarian value of the guilty plea is excluded when determining the discount for a Commonwealth offender. Beech-Jones said that the Court in *Gow* does not appear to have been referred to *Tyler* and cases that followed it (*C* (2013) 229 A Crim R 233; *Isaac* [2012] NSWCCA 195. Unless and until it is determined in an appropriate case that *Tyler* was clearly wrong then it should be applied: at [5].

### ***Effect of imprisonment on offender’s family – test of “exceptional hardship” applies – s 16A(2)(p) Crimes Act 1914 (Cth) – appeal allowed***

Section 16A(2)(p) *Crimes Act* 1914 (Cth) states a court is to take into account the “probable effect” upon an offender’s family or dependants on sentence. *Zerafa* (2013) 235 A Crim R 265 held the common law rule that only “exceptional hardship” to an offender’s family can be taken into account applies to s 16A(2)(p): at [3], [30].

In *Elshani* [2015] NSWCCA 254 the psychological injury suffered by each member of the applicant’s family was found to be “exceptional” and thus to be taken into account under s 16A(2)(p). Evidence showed the applicant’s wife and four children suffered from various serious psychological conditions due to his incarceration for drug offences. These included suicidal ideation, panic attacks, severe anxiety, depression and anorexia. The CCA allowed the appeal: at [6]; [36].

Counsel for the applicant had sought to argue that *Zerafa* was incorrect relying upon the dissenting judgment of Beech-Jones J at [141] that “s 16A(2)(p) should be applied by sentencing courts according to its terms, without having to determine whether the circumstances are exceptional or otherwise”. Adams J (Gleeson JA agreeing) however said despite the persuasive dissenting judgment of Beech-Jones J the principle stated by the majority has now become too embedded for this Court to reconsider it: at [4]-[5]; [35]. Beech-Jones J, who happened to be sitting in *Elshani*, confirmed his dissenting judgment in *Zerafa*: at [40].

## **CONVICTION APPEALS, OTHER CASES and BAIL ACT 2013 CASES**

### **1. EVIDENCE**

#### ***Section 97 Evidence Act – meaning of ‘tendency’ evidence – relevance of similarity in conduct***

*Hughes* [2015] NSWCCA 330 involved child sexual assault against multiple victims. The CCA discussed tendency evidence:

It is not necessary, for evidence to be admissible as a “tendency” that it exhibit, “underlying unity”, “a modus operandi” or a “pattern of conduct”: see *Saoud* (2014) 87 NSWLR 481 and other NSW authorities cited; disapproving the Victorian Court of Appeal in *Velkoski* [2014] VSCA 121: at [166];.

Rather, the evidence must have “significant probative value”. The extent and nature of any similarity between the conduct and the alleged offence is relevant to whether the evidence has significant probative value: at [167]; *Ford* (2009) 201 A Crim R 451.

The critical point is that tendency evidence need not show a tendency to commit acts that constitute the crime/s charged. There only needs to be a “tendency ... to act in a particular way” (s 97(1)) relevant to the

conduct subject of the charge. There is a wide range of evidence relevant. The question is whether conduct said to exhibit a tendency allows, by an inferential process of reasoning, that the person was more likely to act in a particular way or have a relevant state of mind on the particular occasion that is the subject of the charge/s (see *Gardiner* (2006) 162 A Crim R 233): at [160], [182]-[185].

The appeal was dismissed. In this case, the evidence relied upon as tendency had significant probative value. The two essential tendencies were sexual interest in female children under 16 and to engage in sexual conduct with them in different, but not disassociated, contexts of social familial relationships; relationships with the his daughter's friends; and work environment. Despite dissimilarities in sexual conduct, the conduct was sexual, directed towards young females, and referable to the opportunistic circumstances: at [197]-[200].

### **Section 97 Evidence Act – single incident may constitute tendency evidence**

In *Aravena* [2015] NSWCCA 288 it was not an error to admit evidence of a single incident that occurred 7 years prior before the alleged event as tendency evidence.

The accused was charged with recklessly inflicting actual bodily harm with intent to have sexual intercourse. The Crown was permitted to use as tendency evidence an earlier event which led to the appellant being charged with indecent assault. The evidence was admissible as establishing a tendency that the appellant preyed upon young vulnerable women at night, to offer them transport, isolate them and to sexually assault them in the vagina area.

It is not necessary, for evidence to be admissible as tendency, that the conduct occur on a number of occasions so as to evince a particular pattern of behaviour or modus operandi: at [86]; *Ford* (2009) 201 A Crim R 451 at [45], [125]-[126]; *FB* [2011] NSWCCA 217 at [26]; *Saoud* (2014) 87 NSWLR 481 at [40]. A single incident some years before may provide a weaker foundation than tendency sought to be proved by multiple instances of conduct or more recent conduct. However, such considerations did not deprive the evidence in this case of significance in the sense contemplated by s 97: at [89].

### **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) *Evidence Act* on the basis their maker was unavailable. Section 65 states:

#### **65 Exception: criminal proceedings if maker not available**

(1) *This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.*

(2) *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:*

*(a) was made under a duty to make that representation or to make representations of that kind, or*

*(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or*

*(c) was made in circumstances that make it highly probable that the representation is reliable, or*

*(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 stated at [24]-[30]:

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

- 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].
- 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).
- 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 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.

**Special Leave to Appeal to the High Court was granted in this matter on 11 March 2016.**

### ***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]; *Smith* (1999) 47 NSWLR 419 at [19]; *Smith* (2001) 206 CLR 650 at [54]; *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. *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. *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. *R v Beattie* [2001] NSWCCA 502; 127 A Crim R 250, evidence of prison officers of photographic identification of the accused, in circumstances where they had not observed the events in question, was held to have been wrongly admitted applying *Smith v The Queen*;
4. *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.

## **s 137 Evidence Act - DNA evidence – issues of continuity, contamination and transference**

In *Ali* [2015] NSWCCA 72 the trial judge erred in excluding evidence of DNA certificates under s 137 *Evidence Act* on the basis their slightly probative value was outweighed by the danger of unfair prejudice in that there was a distinct possibility of contamination and/or DNA transference: at [25]-[26]. The CCA allowed an appeal by the DPP against the ruling under s 5F(3A) *Criminal Appeal Act 1912*: at [74].

The judge trespassed upon the function of the jury in rejecting the evidence based on continuity, contamination and transference. The judge's task did not require the assessment of the credibility, reliability or weight of such evidence since those were matters which should be left to the jury if the evidence were admitted: at [45], [48]; *Shamouil* (2006) 66 NSWLR 228; *XY* (2013) 84 NSWLR 363. It is open to a jury to use the certificates in assessing whether the respondent committed the offences. The capacity of the certificates to establish that issue, as distinct from the weight likely to be given to them, is substantial. Accordingly, the certificates have significant probative value: at [50].

That has to be balanced against any unfair prejudice, i.e. the likelihood the jury would give the evidence more weight than it deserved, that it might inflame the jury or divert them from their task. Such unfair prejudice is unlikely given the relatively simple issues of continuity, contamination and the possibility of secondary transfer. Any such risk can be dealt with by appropriate directions: at [51].

## **2. PARTICULAR OFFENCES**

### ***Involuntary manslaughter by criminal negligence – incident on building site – common law duty of care***

In *Moore* [2015] NSWCCA 316, a case of involuntary manslaughter by criminal negligence, the judge erred in granting a permanent stay of proceedings on the basis the respondent (a bricklayer/builder) did not owe a legal duty of care to the deceased when an unbraced wall fell on the deceased. The CCA allowed the DPP's (appellant's) appeal.

For involuntary manslaughter by criminal negligence, the accused must owe a duty of care to the deceased to act in a particular way, which was breached in a gross fashion, meriting criminal punishment: [11], [64]; [140], [142]-[144]; *Lavender* (2005) 222 CLR 67; *King* (2012) 245 CLR 588; *Burns* (2012) 246 CLR 334. The existence of a duty of care is a question of law to be determined by the trial judge, not the jury. Where the existence of a duty of care is in dispute, the jury will be directed that only if certain facts are found, but not otherwise, will a duty exist: at [12]; [148], [153], [190]; *Burns* (2012) 246 CLR 334.

The legislature did not intend for a gross contravention of the statutory duty of care under s 20 of the *Occupational Health and Safety Act 2000* (NSW) to give rise to liability for manslaughter: at [89], [92]-[94]; [255], [257].

Here, it would be open to the trial judge to find there was a common law duty of care if certain facts were established beyond reasonable doubt: that a reasonable person in the position of the appellant would foresee a risk of serious injury to the deceased by reason of the wall not being braced; the deceased was vulnerable in that he was unaware of the danger presented by the unbraced wall; the respondent had assumed responsibility for safety and had the ability to direct steps be taken to secure the wall: at [111]-[116], [121]; [243]; [259], [260].

### ***“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 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].

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

In **Gall & Gall** [2015] NSWCCA 69 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 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]. Despite the judge’s misdirection, the CCA applied the proviso and dismissed the appeal: at [183].

### ***s 33B Crimes Act – use offensive weapon to resist arrest – offence of specific intent - also contains element of general intent – specific intention of ‘to prevent lawful apprehension’ – basic intention of ‘use a vehicle as an offensive instrument’***

In **Harkins** [2015] NSWCCA 263 the appellant was convicted of use weapon to avoid arrest under s 33B *Crimes Act*. The police officer stopped the appellant in his car and held his arm when the appellant accelerated and dragged the officer along the road. The appellant submitted the trial judge erred in holding intoxication was irrelevant to the issue of whether or not the appellant used the vehicle as an offensive instrument: at [2]. The CCA dismissed the appeal.

Under Part 11A, ss 428B-G *Crimes Act* evidence of self-induced intoxication may be considered in relation to offences of specific intent, but not offences of basic intent. Section 428C allows intoxication to be considered in determining whether the offender had the intention to cause a specific result: at [30]-[31].

Section 33B is characterised as an offence of specific intent under s 428B. However, the CCA found that to ‘use a vehicle as an offensive instrument’ is a basic intent; and ‘to prevent lawful apprehension’ is a specific intent: at [39].

Under a s 33B offence, s 428C applies only to the specific intention ‘to prevent lawful apprehension’; and does not apply to the basic element of intention to ‘use a vehicle as an offensive instrument’: at [39]-[40].

### ***“Dwelling house” – does not include front or side yard***

In **Nassr** [2015] NSWCCA 284 the applicant broke into premises intending to steal but was interrupted by the house owner. The applicant ran from the property and assaulted the house owner outside the dwelling-house while attempting to escape.

The CCA quashed the applicant’s conviction for an offence for aggravated breaking and entering dwelling-house and committing serious indictable offence “therein” under s 112(2) *Crimes Act*. The CCA said that “dwelling-house” (defined in s 4 *Crimes Act*) does not include the front or side yard of the property on which the relevant house, building or structure is erected.

## **3. TRIAL PROCEDURES**

### ***Where applicant in custody for 2 years awaiting trial - Judge erred in vacating trial date on basis trial would be likely to exceed its original estimate - s 5F appeal allowed***

In **Lin** [2015] NSWCCA 264 the applicant had been in custody for 2 years awaiting trial set down for 19 October 2015. On 18 September 2015, the judge granted the Crown’s application to vacate the trial date on the basis that the estimated length of trial had changed from 3 weeks to 6 weeks. The applicant appealed under s 5F *Criminal Appeal Act 1912*.

The CCA allowed the appeal, set aside the orders and remitted the matter to the District Court for the trial to commence on the set date.

The judge failed to properly exercise his discretion. The judge exercised his discretion on one basis, namely, that the trial would now be likely to exceed its original estimate and allowed that circumstance to prevail over the consequence that the applicant would be detained in custody for 2 years awaiting trial. A determination which allowed that circumstance to outweigh the obviously significant, and adverse, consequences to the applicant was one which was unreasonable and plainly unjust: at [27]-[28].

The judge made no reference to the significant inconvenience and expense to the applicant's family and witnesses should the trial be vacated: at [29]. There was no evidence to support the judge's finding that the District Court had "no capacity" to deal with the trial: at [30].

### ***Co-offender entered plea of guilty in presence of jury and Applicant Co-Accused - s 157 Criminal Procedure Act***

In *Humphries* [2015] NSWCCA 319, during a joint trial and at the close of the Crown case, the applicant's co-offender entered a plea of guilty in the presence of the jury. The CCA dismissed the applicant's appeal, finding there was no miscarriage of justice.

Section 157 *Criminal Procedure Act* governs the procedure: at [102]. The preferable course would have been to have the plea entered in the absence of the jury, to then discharge the jury with respect to all counts against him in accordance with s 157, and to direct the jury (inter alia) that they were not to speculate as to the reasons why the co-offender would play no further part in the trial: at [113]; see *Coates and Murphy* (2002) 136 A Crim R 252.

However the trial judge gave a comprehensive direction to the jury in which it was made clear that the plea of guilty entered by the co-offender:

was not to be taken into account, in any way, in determining whether the Crown had proved its case against the applicant;

was not relied upon by the Crown; and

meant nothing, other than the fact that the co-offender had pleaded guilty to the offence and would ultimately be sentenced in respect of it.

It would be prudent for the necessary direction to be given not only when the plea is entered, but also in the summing up: at [116].

### ***Discharge of jury - principles***

In *Miller* [2015] NSWCCA 206 the CCA summarised the principles relating to discharge of the jury:

#### ***"Principles relating to the discharge of the jury***

[126] The principles relating to an application for the discharge of the jury and appellate review thereof were reviewed by this Court in *Khazaal v R* [2010] (sic [2011]) NSWCCA 129 per Hall J at [265]ff. The following principles emerge from his Honour's review and from the two leading cases he cites *Crofts v R* [1996] HCA 22; 186 CLR 427 and *Maric v R* (1978) 52 ALJR 631:

1. In determining whether the jury must be discharged following the wrongful admission of evidence, there is no rigid rule to be applied: *Crofts* at 440.
2. In deciding an application to discharge the jury, key considerations include:
  - (a) the fairness of the trial: *Crofts* at 440;
  - (b) the nature of the statements said to have given rise to the prejudice, including whether they were such as to "*have been left vividly etched on the mind of the jury*": *Crofts* at 441;
  - (c) the seriousness of the occurrence in the context of the contested issues: *Crofts* at 440;
  - (d) the stage at which the mishap occurs: *Crofts* at 440; *Maric* at 635;
  - (e) the deliberateness of the wrongful conduct: *Crofts* at 440; *Maric* at 635;
  - (f) the likely effectiveness of a judicial direction designed to overcome the apprehended impact of the evidence, and particularly the difficulty of formulating a direction that does not refer specifically to the evidence and by doing so reinforce the prejudice: *Crofts* at 440-441; *Maric* at 635.

3. Such damage as was caused by the wrongly admitted evidence may not be capable of remedy by trial directions: *Maric* at 635.
4. The test to be applied by appellate courts reviewing the discretion to discharge has been stated in a variety of ways. However, in *Maric*, at 635, it was noted that “[a]t basis, the question is whether [the court] can be satisfied that the irregularity has not affected the verdict”, and in *Crofts*, at 441, the question was put similarly as whether, in the circumstances, the appellate court can “say with assurance that, but for the admission of the inadmissible evidence, the conviction was inevitable”.
5. Significant leeway must be allowed to the trial judge to evaluate these and other considerations, bearing in mind:  
 “... that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript”: *Crofts* at 440-441.
6. Nevertheless, the duty of an appellate court considering a challenge to the exercise of discretion to refuse a discharge “is not confined to examining the reasons given for the order to make sure that the correct principles were kept in mind”: *Crofts* at 441, but rather must apply the broader test stated at (4) above.

In this case, it was argued the trial judge erred in failing to the discharge jury exposed to allegedly prejudicial evidence contained in an exhibit. The CCA held there was error in the trial judge’s approach and this appeal ground was dismissed: at [129].

### ***Juror brought in newspaper clippings about trial into jury room – no error in not discharging jury***

In *Carr* [2015] NSWCCA 186 a juror brought in newspaper clippings about the trial. The CCA held the trial judge did not err in refusing an application by the accused that the jury be discharged. The bringing in of newspaper clippings did not come within the definition of “making an inquiry” in s 68C(5) *Jury Act 1977* and therefore was not “misconduct” under s 53A *Jury Act*. Reading an article is not “making an inquiry”. The focus of the prohibition is on obtaining or attempting to obtain extraneous information regarding the accused or other matter relevant to the trial: at [19].

### ***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 or that he had missed something “crucial”; ameliorative measures were available which were appropriate to managing the symptoms of sleeplessness; 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].

### ***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 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 have had momentary sleep episodes, on the evidence if they occurred they were not sufficient to establish the judge “substantially failed to discharge” his duty of supervision and control of the trial process: [75], [200]-[202], [220]; *Cesan* (2008) 236 CLR 358 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].

#### 4. SEXUAL ASSAULT

##### ***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]. 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. The NSW Judicial Commission has noted that the Trial Bench Book at [3-600] has been updated accordingly.

##### ***Sexual assault communications privilege – s 296 Criminal Procedure Act 1986 – communications were not a "protected confidence" – documents were not "counselling communications"***

In ***ER v Khan*** [2015] NSWCCA 230 the sexual assault victim/applicant applied to have the respondent's subpoenas set aside on the basis that documents requested were not admissible under sexual assault communications privilege. The documents related to communications between the victim/applicant and three caseworkers from the Joint Investigation Response Team (JIRT) at FACS.

The CCA rejected the application. The documents were not related directly to or were created derivatively from any "counselling communications" involving or concerning the victim/applicant: at [96].

Sexual assault communication privilege attaches to a "protected confidence" defined as, inter alia, a "counselling communication" made by, to or about a sexual assault victim under s 296(1) *Criminal Procedure Act 1986*. Central to the privilege are the concepts of "confidence" and "counselling". They apply where a victim of sexual assault offence has participated in "counselling" provided or conducted by a "counsellor". In determining a claim of privilege it is necessary to determine whether there existed a "counselling communication" within one or other of the four categories in 296(4): at [71]-[74].

The evidence did not establish that any of the caseworkers acted as a "counsellor" to the victim/applicant, for example, by providing support, advice or treatment in the course of counselling. The evidence of the caseworkers was not directed to establishing that any one of them had been a party to a "counselling communication" within s 296(4): at [86], [95].

The CCA also rejected a submission that the judge failed to make findings or disclose the reasoning process. The constraint in s 299B(3) not to disclose the contents of any documents containing counselling communications limited the judge in providing reasons that would expressly or inferentially disclose information as to any counselling communications: at [112]. The practical difficulties that face a judge in determining the existence of a protected confidence were noted: at [102]-[106].

The CCA at [106] cited a paper by **Ian Nash, Public Defender**, “*Use of the sexual assault communications privilege in sexual assault trials*” *Judicial Officers’ Bulletin*, April 2015, Vol 27, No 3.

### ***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 subparagraph. 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]. 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.

**An application for special leave to appeal to the High Court in this matter was refused on 10 December 2015 ([2015] HCA 232).**

## **5. OTHER CASES**

### ***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]; *Huynh* (2013) 87 ALJR 434 at [38]; *Osland* (1998) 197 CLR 316 at [27], [73]; *Tangye*. Reliance upon *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 the Crown could not establish the applicant was one of the two men directly involved in the robbery, the jury could be satisfied beyond reasonable doubt 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.

### ***Doli incapax - sexual assaults – circumstances of first offence used in assessing whether presumption rebutted for later offences***

In *RP* [2015] NSWCCA 215 the CCA looked at what acts may be considered to rebut the presumption of *doli incapax* where the offender was charged with three sexual assault offences.

The applicant, aged between 11-13 at the time of the offences, was convicted by a judge alone of two counts of 'Sexual intercourse with a child under 10' (counts 2 and 3 - penile/anal penetration) and one count of 'Aggravated indecent assault' (count 4 - applicant rubbed the complainant's penis outside his clothing). (No case to answer was found on Count 1).

Appealing against conviction, the applicant submitted the trial judge erred in finding the presumption of *doli incapax* was rebutted in relation to count 2; and in finding that "as a matter of logic" the accused must be guilty of counts 3 and 4.

The CCA upheld the convictions on counts 2 and 3; and quashed the conviction on Count 4.

The CCA said that the act charged is not without some relevance in determining whether the presumption has been rebutted; however, there must be more than proof of the act charged. The older the defendant and the more obviously wrong the act, the easier it will be to prove guilty knowledge. The surrounding circumstances are relevant and what the defendant said or did before or after the act may go to prove his guilty mind: at [34]-[36]; *BP*; *SW* [2006] NSWCCA 172; *C (A Minor) v DPP* [1996] AC 1; *CRH* (CCA (NSW), 18 December 1996, unrep)

On count 2, it was open to the judge to conclude beyond reasonable doubt *doli incapax* was rebutted: the applicant knew the complainant did not want to engage in the act, used force and put his hand over the complainant's mouth to stop him calling out; the complainant cried and told the applicant to stop; the applicant persisted and only ceased when an adult arrived; and told the complainant not to say anything: at [56], [71].

The judge did not err in finding "as a matter of logic" the applicant must be guilty of count 3: at [21]. The enquiry on each count is whether the applicant knew the act charged was seriously wrong. The same act was charged in relation to counts 2 and 3. The absence of surrounding circumstances in relation to count 2 (the complainant crying or being thrown down) from the circumstances of count 3 does not have the effect that the applicant did not know the act charged in count 3 was not seriously wrong: at [78].

However, the finding of guilt on count 4 was unreasonable. The same act was not involved. There was no direct touching of genitals. It is difficult to see how the acts involved in counts 2 and 3 could throw any light on whether the applicant thought what he did in respect to count 4 was seriously wrong. It was not open to find the presumption had been rebutted on count 4: at [79]-[80].

### ***Pre-trial ruling was not an interlocutory judgment or order - s 5F(3) Criminal Appeal Act***

In *A2; KM & Vaziri* [2015] NSWCCA 244 the trial judge made a pre-trial ruling as to the meaning of "mutilates" in s 45(1)(a) *Crimes Act* (female genital mutilation) and an indication that he would direct the jury accordingly. The CCA refused an application by the accused via s 5F(3) *Criminal Appeal Act* against the judge's ruling. The pre-trial ruling was not an "interlocutory judgment (or order)" that is amenable to appeal pursuant to s 5F(3): at [28], [30]. It did not determine the proceedings or an identifiable part of them and is not capable of being entered in the records of the court: *Steffan* (1993) 30 NSWLR 633 at 636. It lacks finality as it can be changed: *Bozatsis* (1997) 97 A Crim R 296 at 303. It was in the nature of a ruling on a question of law: *Cth v Mullane* (1961) 106 CLR 166 at 169: at [28].

***Manslaughter by an unlawful and dangerous act - death resulted from explosion during drug manufacturing operation - appreciable risk of serious injury - causation***

In *CLD* [2015] NSWCCA 114 the respondent was charged with unlawful and dangerous act manslaughter. While manufacturing pseudoephedrine in his shed, an explosion occurred eventually resulting in the victim's death. The trial judge found the evidence could not establish the essential elements of the offence and entered a verdict of acquittal. The CCA allowed the Crown appeal and quashed the verdict of acquittal. The Crown had to establish that a reasonable person in the position of the respondent would have realised there were multiple potential sources of ignition and the act carried with it an appreciable risk of serious injury: [33]-[35]; *Burns* (2012) 246 CLR 334. There was evidence as to many possible sources of ignition and it was open to the jury to determine one of those possibilities occurred and that the respondent was causally responsible for the death regardless of which of those possibilities operated: at [41]-[47]; *Royall* (1991) 172 CLR 378.

***Proposed witness for prosecution present at compulsory examinations – accusatorial process altered in a fundamental sense – dissemination of compulsorily acquired material to prosecution – permanent stay not necessitated***

In *Seller & McCarthy* [2015] NSWCCA 76; 89 NSWLR 155 the evidence of a witness, who was present at a compulsory examination conducted by the Australian Crime Commission, altered the accusatorial process inherent in a criminal trial in the fundamental sense described in *X7 v Australian Crime Commission* (2013) 248 CLR 92 and *Lee* (2014) 88 ALJR 65. Much of the prosecution's documentary case would be led through the witness' evidence who would be assisted in his task by having access to the compulsorily acquired material. An order in the nature of prohibition issued to prevent the witness from giving evidence at trial. The compulsorily acquired material had been unlawfully disseminated to the prosecution which had the effect of prejudicing a fair trial. However a permanent stay of proceedings was not necessitated. A new prosecution team had been appointed and the only potential witness privy to the material had been excluded from giving evidence. The mere fact of dissemination to persons not involved in the trial did not alter the accusatorial process to such an extent to warrant a stay.

***Provision of transcript of an examination under s 19 ASIC Act to prosecution***

In *OC* [2015] NSWCCA 212 the provision of the transcript of an examination under s 19 *Australian Securities and Investment Commission Act 2001 (Cth)* to the prosecution was said to fundamentally alter the accusatorial judicial process. However, ss 19 and 68 of the Act allow this so that the prosecution may be given access to the transcript of examination and can use it to formulate and prosecute charges: *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee* (2014) 88 ALJR 65.

Note: A special leave application will be made in this matter.

## **6. BAIL ACT 2013 CASES**

**Note:** See 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](http://www.publicdefenders.justice.nsw.gov.au/pdo/public_defenders_mostrecentpapers.html)

***Two stage process for ‘show cause’ offences – relevance of guilty verdict – practice of referring bail applications to Court of Appeal to cease***

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*), being a “show cause” offence under the *Bail Act*. He was released on bail. The DPP made a detention application pursuant to s 50 *Bail Act 2013*. The Court of Appeal granted the application and refused bail: at [11]-[13]. The Court of Appeal discussed the following matters.

There is a two stage process for the ‘show cause’ test

With 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 shown, the bail authority must then consider the “unacceptable risk” test in Div 2 of Pt 3 (s 18). The Act does not prescribe what must or might be considered in relation to the “show cause” test: at [20].

In many cases matters relevant to the ‘unacceptable risk test’ (s 18) will 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: at [24].

However, it is important the two tests not be conflated (referring to *M v R* [2015] NSWSC 138 at [7]-[8] where McCallum J had stated the "apparent simplicity of a two-stage approach is illusory"): at [25].

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

#### Jury verdict of guilty relevant

This case shows why it is important to bear in mind the two-stage approach. The verdict of guilty is relevant to the 'show cause' test but not to the 'unacceptable risk' test because it is not listed in s 18. Yet it is plainly germane to whether cause can be shown that continuing detention is unjustified, as the presumption of innocence, which operated in the offender's favour, has been rebutted by that verdict: at [26].

Matters raised by the respondent were not sufficient to show cause why detention was not justified, where he has been found guilty of a most serious offence and concedes he will receive a full-time custodial sentence: at [35].

#### Referral of bail applications from Supreme Court to Court of Appeal to cease

The practice of referring bail applications from the Supreme Court to the Court of Appeal should cease: at [13]. The *Bail Act* is clear that bail decisions made in the District Court will be the subject of further application in the Supreme Court (s 66); and then in the CCA (s 67): at [11].

### ***s 22 Bail Act - Application for bail to CCA pending appeal – special and exceptional circumstances***

In *El-Hilli and Melville* [2015] NSWCCA 146 the applicants, imprisoned for fraud offences, each filed a notice of appeal against conviction and sentence and were bail refused by the Supreme Court. They each made a release application to the CCA under 67(1)(e) *Bail Act 2013*. The CCA dismissed each application and refused bail.

A release application heard by the CCA pursuant to its jurisdiction under s 67 is a hearing de novo: at [14]; *Kugor* [2015] NSWCCA 14.

The CCA discussed the following matters.

#### s 22 Bail Act

s 22 "General limitation on 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].*

The CCA stated in relation to s 22: at [11]

(i) 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.



(ii) subject to s 22(1), the unacceptable risk test in Division 2 (ss 17-20A) applies.

The CCA noted that the present case did not involve a show cause offence, however, s 22 was engaged – this being an appeal from a conviction on indictment (s 22(1)). There are two stages in applying s 22: at [12]-[13]

(i) The applicant must demonstrate “special and exceptional circumstances” exist justifying bail. Then the Court must apply the “unacceptable risk test” by application of the list of matters in s 18.

(ii) 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.

“Special or exceptional circumstances”

s 30AA of the previous *Bail Act 1978* had a similar requirement and was considered in a number of cases: see at [17]-[26].

An applicant is not required to establish their appeal will “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 with other factors, the question is whether the proposed grounds of appeal are arguable or enjoy reasonable prospects of success: at [27]; s 18(1)(j) *Bail Act 2013*.

“Special or exceptional circumstances” may exist in a combination of factors. 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 non-parole periods). In each case the CCA concluded it was not satisfied there are special or exceptional circumstances justifying the grant of bail: at [63].

***DPP detention application s 50 Bail Act 2013 – show cause offence – relevance of police views - no weight given to police officer’s opinions***

In *DPP (NSW) v Mawad* [2015] NSWCCA 227 the DPP made a detention application to the CCA (s 50). The DPP sought to rely on a letter from the police investigating officer in which the officer expressed his view that the respondent could source firearms, that he would have a motive to do so against parties involved in the investigation and that he had criminal connections.

As to the relevance of police views, the CCA gave no weight to the police officer’s opinions - the opinion of a police officer that bail should be refused is a matter that is “unable to be considered” under s 18: at [34]-[35]; *JM* [2015] NSWSC 978. The rules of evidence do not apply under s 31 of the *Bail Act*, thus enabling a bail authority to receive material and give it such weight as it considers appropriate: at [38]. The police officer’s opinions can be considered “trustworthy”. However, just because this Court is not bound by the rules of evidence does not mean it must ignore policy and rationale underlying those rules. The absence of any factual detail setting out the basis for the assertions warrants not attributing any weight to them: at [39].

Due to the high risk of re-offending, the CCA granted the application and refused bail: at [48].

**STATISTICS.** The Judicial Commission Statistics for the Court of Criminal Appeal sentencing and Crown appeals are as follows.

**Table 1 — Severity Appeals (2000–2015)**

Year	Severity Appeals	Allowed	
	N	n	%
2000	313	127	40.6
2001	343	138	40.2
2002	331	148	44.7
2003	272	109	40.1
2004	285	131	46.0
2005	318	141	44.3
2006	259	106	40.9
2007	242	94	38.8
2008	216	83	38.4
2009	230	78	34.3
2010	216	84	38.9
2011	188	93	49.5
2012	168	65	38.7
2013	224	57	25.4
2014	191	61	31.9
2015*	208	74	35.6
	<b>4004</b>	<b>1589</b>	<b>39.7</b>
Source: Judicial Commission NSW Court of Criminal Appeal database			

**Table 2 — Crown Appeals (2000–2015)**

Year	Crown Appeals	Allowed	
	N	n	%
2000	84	42	50.0
2001	55	34	61.8
2002	80	49	61.3
2003	65	32	49.2
2004	101	52	51.5
2005	58	34	58.6
2006	76	47	61.8
2007	59	35	59.3
2008	62	32	51.6
2009	48	31	64.6
2010	69	49	71.0
2011	34	15	44.1
2012	32	12	37.5
2013	33	19	57.6
2014	55	36	65.5
2015*	26	11	42.3
	<b>937</b>	<b>530</b>	<b>56.6</b>

\*Please note figures for 2015 are approximate and not yet completely finalised.

## **ANNEXURE A - HIGH COURT CASES**

### **HIGH COURT CASES 2015**

#### **1. *CMB v R* [2015] HCA 9; (2015) 89 ALJR 407.** Appeal from NSW.

*Crown appeals - s 23 Crimes (Sentencing Procedure) Act 1999. Held: Appeal allowed.*

The High Court held that the NSW CCA (*CMB* [2014] NSWCCA 5) erred in stating the respondent bears the onus of demonstrating reasons justifying the dismissal of a Crown appeal in the exercise of discretion. On a Crown appeal, the onus is upon the Crown to, first, locate an appellable error in the sentencing judge's discretionary decision. Second, to negate any reason why the residual discretion of the Court not to interfere should be exercised: at [56].

In determining whether the sentences were manifestly inadequate where a lesser sentence is imposed to take into account an offender's assistance to authorities, the issue for the Court is not whether it regarded non-custodial sentences as "unreasonably disproportionate" (s23(3) *Crimes (Sentencing Procedure) Act*); but whether it was open to the sentencing judge to determine whether it was not. The CCA erred by failing to consider whether it was open to the judge to determine the sentences were not unreasonably disproportionate: at [78].

Note: On remittal to the NSW CCA, the Crown appeal was dismissed: *CMB* [2015] NSWCCA 166.

#### **2. *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 89 ALJR 475.** Appeal from NSW.

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

ICAC issued a summons based on an allegation that the first respondent, a 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 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 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].

#### **3. *Duncan v ICAC* [2015] HCA 32.** Appeal from NSW.

*Part 13 ICAC Act 1988. Held: Application dismissed.*

Following the High Court judgment in *ICAC v Cunneen* [2015] HCA 14, a new Part 13 of Schedule 4 was inserted into the *ICAC Act 1988* to uphold the validity of ICAC's findings made before the *Cunneen* judgment (*ICAC Amendment (Validation) Act 2015*). The High Court dismissed the Applicant's challenge to the validity of Part 13: at [12]-[15].

#### **4. *Lindsay v The Queen* [2015] HCA 16; (2015) 89 ALJR 518.** 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 that in 21st century Australia an ordinary man in the appellant's position would not have lost his self-control such as the appellant did (the objective limb of provocation). The trial judge's directions on provocation were inadequate, however, there was no miscarriage of justice: *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 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].

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 for the jury to assess the degree of outrage the appellant might have experienced and it was open for them to consider the sting of the provocation lay in the suggestion A was so lacking in integrity that he would have sex with the victim in the presence of his family in his own home for money: at [37].

Note: In NSW, this case is relevant only to an offence alleged to have occurred prior to the new partial defence of "extreme provocation" which commenced on 13 June 2014 and which specifically excludes non-violent sexual advances.

#### **5. *Smith v The Queen* [2015] HCA 27; (2015) 89 ALJR 698.** Appeal from Qld.

*Jury – voting patterns – not disclosed by trial judge – no procedural unfairness. Held: Appeal dismissed.*

There was no procedural unfairness where the trial judge did not disclose the voting pattern of the jury indicated in a jury note and where the jury subsequently found the appellant guilty by majority verdict. When conveying difficulty in reaching a verdict, juries should not reveal their votes or voting patterns. It would be a sensible measure for judges to give a direction to juries they should not reveal their voting patterns in favour of conviction or acquittal: at [32]. If information made available to a judge is *not* relevant to an issue before the court, nor regarded by the judge as relevant, then its non-disclosure to counsel cannot be a denial of procedural fairness: at [42]. Information as to votes or voting patterns prior to verdict was not relevant: at [6], [53]. *LLW v The Queen* (2012) 35 VR 372 and *HM v The Queen* (2013) 231 A Crim R 349 should not be followed.

#### **6. *Filippou v The Queen* [2015] HCA 29; (2015) 89 ALJR 776.** Appeal from NSW.

*Appeal from trial by judge alone - task of CCA - provocation – fact finding at sentence - judge not bound to adopt view favourable to appellant. Held: Appeal dismissed.*

At trial by judge alone, the appellant was convicted of two counts of murder. The appellant claimed one victim pulled out a gun, so he grabbed it to shoot at the victims. The Crown alleged it was the appellant who brought the gun. The trial judge found there was no provocation: at [41]. An appeal to the CCA was dismissed. The High Court dismissed the appeals against conviction and sentence.

#### Nature of Appeals from trial by judge alone:

The CCA is required to deal with an appeal from judge alone in three stages: (i) To determine whether the judge has erred in fact or law. (ii) If there is such an error, to decide whether the error, either alone or in conjunction with any other error or circumstance, is productive of a miscarriage of justice. (iii) If so, to ascertain whether, notwithstanding the error is productive of a miscarriage of justice, the Crown has established the error was not productive of a substantial miscarriage of justice: at [4].

The application of the three limbs of s 6(1) *Criminal Appeal Act* to a verdict of a judge alone is discussed at [9]-[15]. For the first limb, the question is whether, upon the evidence on which the judge acted, or upon which it was open to act, the judge's finding of guilt is "unreasonable" or "cannot be supported". For the second limb, the question is whether the judge has erred in law in the sense of a departure from trial according to law. Under the third limb, the question is whether for any other reason there has been a miscarriage of justice: at [9].

For an appeal against conviction under s 5 *Criminal Appeal Act*, a judge's finding of guilt is treated the same as a jury's finding of guilt. A judge's finding of guilt is not to be disturbed under the first limb of s 6(1) unless there is no or insufficient evidence to support the finding, or the finding is otherwise unreasonable, or the evidence was all the one way, or the judge has so misdirected himself or herself on a matter of law as to result in a miscarriage of justice: at [11]-[12].

The proviso is applicable to all three limbs of s 6(1). Even where error of the kind identified in any of the three limbs is established and amounts to a miscarriage of justice, the CCA may dismiss the appeal if it is satisfied that the error has not been productive of a substantial miscarriage of justice. "Substantial miscarriage of justice" means the possibility cannot be excluded beyond reasonable doubt the appellant has been denied a

chance of acquittal which was fairly open or there was a departure from a trial according to law that warrants that description. The proviso must be applied: at [15]; **Lindsay** (2015) 89 ALJR 518.

The obligation under s 133(3) "to take [a] warning into account" requires the particular warning be included in the judge's reasons for judgment. It is different in the case of directions other than warnings. Directions are principles of law within s 133(2) and therefore, in the case of trial by judge alone, must be applied. But it is sufficient if a judge's reasons show expressly or by implication they have been applied. This was done in this case: at [6], [52]-[53].

#### Provocation:

The test in s 23(2)(b) *Crimes Act* is not whether an ordinary person *would have acted as the appellant did* but whether the conduct of the deceased *could have induced an ordinary person* in the position of the appellant to have so far lost control as *to have formed the intent to kill or to inflict grievous bodily harm*: at [49]-[50], [60].

#### Fact finding at sentence:

Regarding whether the appellant or the victim brought the gun to scene, the judge was not bound to adopt the view of the facts most favourable to the appellant: at [5]. A sentencing judge must do their best to find the facts which determine the nature of the offending. It is sometimes not possible for a judge to ascertain everything relevant, especially where an offender does not offer evidence. Where that occurs, the judge must proceed on the basis of what is proved and leave to one side what is not proved to the requisite standard: *Weininger* (2003) 212 CLR 629. That accords with s 21A(1) *Crimes (Sentencing Procedure) Act* which states facts are to be taken into account only in so far as they are "known to the court" according to the principles of proof in *Olbrich* (1999) 199 CLR 270: at [70].

### **7. Police v Dunstall [2015] HCA 26; (2015) 89 ALJR 677. Appeal from NSW.**

*Common law unfairness discretion. Held: Appeal allowed.*

The respondent was charged with a drink driving offence on the basis of a breath analysis. His request for a blood sample was not able to be analysed due to an insufficient amount of blood. The Magistrate excluded evidence of the breath analysis holding that because the respondent had lost his only opportunity to challenge that evidence, its admission would result in an unfair trial. The High Court allowed the appeal, holding that the admission of the evidence did not render the trial unfair: at [47], [84].

Special leave was granted as the matter was said to raise the important question of whether there is a "general unfairness discretion" to exclude evidence. Neither party contested the existence of such a discretion. Accordingly, it was inappropriate in this case to determine the scope, if any, of such a discretion to exclude lawfully obtained, probative, non-confessional evidence unaffected by impropriety or risk of prejudice on the ground it would render a trial unfair: at [47]. Where prosecution evidence is sought to be excluded on the basis it would render a trial unfair, the remedy is to seek a permanent stay and not that evidence should be excluded in the exercise of a "general unfairness discretion": at [48].

### **8. The Queen v Beckett [2015] HCA 38; (2015) 90 ALJR 1. Appeal from NSW.**

*Pervert the course of justice – offence may apply to conduct committed before judicial proceedings commence. Held: Appeal allowed.*

An act done before the commencement of judicial proceedings may constitute an offence of pervert the course of justice (s 319 *Crimes Act*) where it is done with intent to frustrate or deflect the course of judicial proceedings that the accused contemplates may possibly be instituted: at [7]. Liability for the offence created by s 319 hinges on the intention to pervert the course of justice and not upon the perversion of a 'course of justice'. There is no reason to confine the provision's reach to conduct that is engaged in with the intention of perverting existing proceedings: at [36].

### **9. The Queen v Pham [2015] HCA 39; (2015) 90 ALJR 13. Appeal from Vic.**

*Federal offences – consistency – courts to have regard to current sentencing practices throughout Commonwealth - statistics and comparable cases - precedent and use of decisions of other intermediate appellate courts – drug importation - error to assess sentencing practices by statistical analysis of correlation between sentence and drug quantity. Held: Appeal allowed. Matter remitted to Court of Appeal.*

The VCA allowed the respondent's sentence appeal for import marketable quantity of heroin (s 307.2(1) *Criminal Code* (Cth)): *Pham* [2014] VSCA 204. Maxwell P used a Table of 32 sentencing decisions ranked according to drug quantity to conclude that sentences in Victoria are lower than in NSW, WA and Qld. The respondent was "reasonably entitled" to assume he would be sentenced according to Victorian practices. Osborn and Kyrou JJA took the Table into account in finding the sentence to be manifestly excessive.

The High Court allowed the DPP's (Cth) appeal on the following grounds:

(i) The VCA erred in determining the respondent be sentenced in accordance with sentencing practice in Victoria, rather than practices throughout the Commonwealth.

In sentencing for a federal offence, the need for consistency requires the court to have regard to sentencing practices across the country and to follow decisions of other intermediate appellate courts unless convinced they are plainly wrong: at [18], at [23], [27]; *Hili* (2010) 242 CLR 520; Pt IB *Crimes Act* 1914.

The following are established principles (footnotes omitted) at [28]:

- (1) Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.
- (2) The consistency that is sought is consistency in the application of the relevant legal principles.
- (3) Consistency in sentencing for federal offenders is to be achieved through the work of intermediate appellate courts.
- (4) Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form.
- (5) For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.
- (6) When considering the sufficiency of a sentence imposed on a federal offender at first instance, an intermediate appellate court should follow the decisions of other intermediate appellate courts unless convinced that there is a compelling reason not to do so.
- (7) Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.

A "sentence itself gives rise to no binding precedent". Where, however, decisions of other courts are referred to, intermediate appellate courts must have regard to decisions of other intermediate appellate courts in comparable cases as "yardsticks" that may serve to illustrate the possible range of sentences. A court must have regard to such a decision unless there is a compelling reason not to do so: at [29].

(ii) Error in statistical analysis. In relation to the Table, Maxwell P erred in assuming "courier" status was of uniform significance, and treating drug weight in each case as "the only variable factor affecting offence seriousness". This represented two departures from fundamental principle as if they were correct statements of principle indicative of error in the sentence passed below. These errors played some part in each of the other judges' conclusions: at [37].

#### **10. *Cth Australia v Fair Work Building Industry Inspectorate* [2015] HCA 46. Appeal from NSW.**

The High Court held that *Barbaro v The Queen* (2014) 253 CLR 58 does not apply to civil penalty proceedings, thereby allowing the parties in this case to make submissions regarding agreed penalties.

### **HIGH COURT CASES 2016**

#### **11. *GW v The Queen* [2016] HCA 6. Appeal from ACT..**

s 13 *Evidence Act* (ACT) – *Evidence Act* is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn. Held: Appeal allowed

The High Court considered s 13 *Evidence Act* (ACT) ("the Act") which is in virtually identical terms to s 13 *Evidence Act* 1995 (NSW). The Court held that the Act is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn: at [46], [56].

Under the Act, a person is not competent to give sworn evidence if the person does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence: s 13(3). A person who is competent to give evidence, but not sworn evidence, may give unsworn evidence provided the court tells the person of the importance of telling the truth and certain other matters: ss 13(4), (5).

GW was convicted of committing an act of indecency in the presence of his daughter, R, who was aged six years at the pre-trial hearing before the pre-trial judge. There was no issue as to R's competence to give evidence. There was an issue as to R's competence to give sworn evidence.

The pre-trial judge ruled he was not satisfied R had the capacity to give sworn evidence and ruled R's evidence be taken unsworn. At GW's trial, the trial judge declined defence counsel's request to direct the jury that R's evidence was unsworn because R did not understand the obligation to tell the truth.

Allowing GW's appeal, the ACT Court of Appeal held the pre-trial judge had reversed the statutory test by stating he was "*not satisfied* that [R] *has* the [requisite] capacity" when s 13(3) required satisfaction that R did not have that capacity. The Court of Appeal inferred the pre-trial judge wrongly treated competence to give unsworn evidence as the "default" position under the *Evidence Act*; and thus failed to apply s 13.

An appeal by the DPP to the High Court was allowed. The High Court held:

(i) The pre-trial judge's ruling under s 13(3) was open. It was necessary for the pre-trial judge to be affirmatively satisfied R did not have the requisite capacity before instructing her pursuant to s 13(5) and admitting her evidence unsworn: at [28]. The pre-trial judge's failure to express the conclusion in the terms of the statute did not support a finding he was not satisfied on the balance of probabilities R lacked the requisite capacity: at [31]. Whether the pre-trial judge was satisfied R lacked the capacity to give sworn evidence took into consideration all of the circumstances, including that R was a six-year-old child: at [31].

(ii) Directions concerning the unsworn evidence were not required under the *Evidence Act* or the common law. That R did not take an oath or make an affirmation before giving her evidence is not material to the assessment of whether R's evidence was truthful and reliable: at [54]. The Act does not treat unsworn evidence as of a kind that may be unreliable. There was no requirement under common law to take into account the differences between sworn and unsworn evidence in assessing the reliability of R's evidence: at [56].

***12. R v Independent Broad-based Anti-Corruption Commissioner [2016] HCA 8.*** Appeal from Victoria.  
Held: Appeal dismissed.

The High Court considered compulsory examinations into police misconduct under the Independent *Broad-based Anti-corruption Commission Act 2011* (Vic) (ss 120, 144). The appellants, both police officers, challenged the summons issued by the Independent Broad-based Anti-corruption Commission (IBAC) on the basis that the Act did not permit the compulsory examination of a person reasonably suspected of crime because the appellants had not been charged with an offence.

The High Court held the Act clearly intends that persons who may later be charged with an offence can be compulsorily examined and that the Act should not be construed in a way that would fetter the discharge of the functions of IBAC.

The rule that "an accused person cannot be required to testify to the commission of the offence charged" is a companion to the fundamental principle that the onus of proof rests upon the prosecution; thus the companion principle protects "a person charged with, but not yet tried for" a criminal offence: *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v NSW Crime Commission* (2013) 251 CLR 196. The companion principle is not engaged because the appellants have not been charged and there is no prosecution pending. The High Court rejected a submission that the principle be extended: at [48]. To apply the companion principle in anticipation of the commencement of criminal proceedings would fetter the exposure of a lack of probity within the police force, which is the object of the IBAC Act: at [51].

The Court further held that s 120, which empowers the IBAC to issue witness summonses to a "person", cannot be construed to not include "a person whom the IBAC suspects of having committed an offence": at [52], [74]-[77]. The privilege against self-incrimination to assist the IBAC to undertake a full and proper investigation is abrogated under s144. The appellants have a duty to account for their conduct in the course of their duties by reason of their membership of a disciplined police force. Where such a duty exists, it is not difficult to discern an intention to abrogate the privilege against self-incrimination where allegations of police misconduct are to be examined: at [56].

**13. IMM v The Queen [2016] HCA 14.** Appeal from NT.

ss 97(1)(b), 101 and 137 Evidence Act – *Shamouil* (2006) 66 NSWLR 228 approved - *Dupas* [2012] VSCA 328 disapproved. Held: Appeal allowed. Convictions quashed. New trial ordered.

The High Court considered ss 97(1)(b), 101 and 137 Evidence (National Uniform Legislation) Act (NT) which are in identical terms to the Evidence Act 1995 (NSW).

The Court approved the approach of the NSW CCA in *Shamouil* (2006) 66 NSWLR 228: that in determining the probative value of evidence for the purposes of ss 97(1)(b) and 137, a trial judge should assume the jury will accept the evidence and thus should not have regard to the credibility or reliability of the evidence: at [51]-[58]. The Court disapproved of the decision by the Victorian Court of Appeal in *Dupas* [2012] VSCA 328 which requires a judge to make a determination concerning reliability: at [52]-[54].

The appellant was convicted of indecent dealing with a child and sexual intercourse with a child under 16. At trial, the prosecution adduced "tendency evidence" that while the complainant and another girl gave the appellant a back massage, the appellant ran his hand up the complainant's leg.

Allowing the appeal, the Court (French CJ, Kiefel, Bell and Keane JJ jointly; Nettle and Gordon JJ, Gageler J agreeing with orders but for different reasons) held that the tendency evidence did not have significant probative value and was not admissible under s 97(1)(b): at [65], [75], [107]-[108]. In cases such as this, the probative value of tendency evidence lies in its capacity to support the credibility of a complainant's account. Evidence from a complainant to show an accused's sexual interest will generally have limited, if any, probative value. In cases where there is evidence from another source independent of the complainant, the requisite degree of probative value is more likely to be met. This does not mean that a complainant's unsupported evidence can never meet that test as there may be special features of the complainant's account of an uncharged incident which gives it significant probative value: at [62].

Complaint evidence by the complainant to others of the appellant's conduct was admissible. The complaint evidence was tendered to prove the acts charged and its probative value was not low. There is no reason to think the jury would apply it as tendency evidence, when they were directed otherwise: at [73]-[75].

**14. Mok v The Queen [2016] HCA 13.** Appeal from NSW CA.

s 89(4) Service and Execution of Process Act 1992 - creates federal offence of escape lawful custody – did not require proof appellant was an "inmate". Held: Appeal dismissed.

The High Court held that under s 89(4) Service and Execution of Process Act 1992 (Cth) (SEPA) the appellant could be found guilty of the offence of attempting to escape lawful custody under s 310D Crimes Act 1900 (NSW). SEPA provides for the execution of warrants throughout Australia authorising the apprehension of persons under State laws. Section 89(4) provides:

"The law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody, applies to a person being taken to the place of issue in compliance with an order ....."

After the appellant was sentenced for a matter in Victoria, an order was made under SEPA requiring the appellant be taken in custody to NSW for outstanding NSW offences. The appellant escaped while in custody at Tullamarine Airport but was re-arrested. Upon arrival in NSW, the appellant was charged under s 310D Crimes Act which is an offence for an "inmate" to escape or attempt to escape from lawful custody.

The High Court upheld the decision by the NSW Court of Appeal (*Mok v DPP (NSW)* (2015) 320 ALR 584) that, by s 89(4), a person may be guilty of the offence of escape contrary to s 310D even if that person is not an "inmate": at [42], [51], [57]-[59]. A State law made applicable by a federal law operates as federal law. Section 89(4) applied s 310D to the appellant as a federal law, s 310D being the law in force in NSW (the place of issue of the warrant) and being the law relating to the liability of a person who escapes from lawful custody: at [33], [51].



**15. *Zaburoni v The Queen* [2016] HCA 12.** Appeal from Qld..

s 317 *Criminal Code (Qld)* – unlawfully transmit disease with intent – proof of actual intention required. Held: Appeal allowed.

The appellant was convicted of unlawfully transmit disease with intent under s 317 *Criminal Code (Qld)*. The appellant had unprotected sex with his girlfriend over a 21 month period knowing he was HIV positive. The High Court held the evidence was not capable of establishing the appellant intended to transmit HIV. Section 317(b) requires proof of actual intent and intention requires there be a “directing of the mind, having a purpose or design”: at [7]-[8]. The prosecution was required to prove beyond reasonable doubt that when the appellant had unprotected sexual intercourse his object or purpose was to transmit HIV: at [19]. Awareness of the risk of conduct resulting in harm, without more, does not support an inference the person intended to produce the harm. Apart from this conduct there was no evidence supporting the inference the appellant had that intention: at [42]-[44].

**16. *Nguyen v The Queen* [2016] HCA 17.** Appeal from NSW CCA..

*De Simoni* (1981) 147 CLR 383 – principle not applicable – irrelevant when assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of murder – whether concurrent sentences appropriate. Held: Appeal dismissed.

The appellant pleaded guilty to manslaughter by excessive self-defence and wounding with intent to cause GBH. The appellant fired a non-fatal shot wounding the deceased, a police officer, who was executing a search warrant with other officers. Another officer then fired a shot at the appellant but accidentally killed the deceased. The Crown accepted it could not exclude as a reasonable possibility the appellant honestly believed the deceased was a robber posing as a police officer.

The NSW CCA allowed a Crown appeal holding that:

(i) The judge breached the *De Simoni* principle. The judge erred in her assessment of the objective gravity of the manslaughter offence by contrasting it with what would have been the gravity of the offence if the appellant had known the deceased was a police officer. The CCA reasoned that if the appellant had been aware the deceased was a police officer the offence would have been murder, not manslaughter. Thus the judge erred by taking into account the absence of a circumstance which, if present, would have warranted conviction for a more serious offence: at [51].

(ii) The judge erred in imposing concurrent sentences. The sentences should have been part-cumulative given there were two “distinct offences caused by different bullets causing very different consequences”. The sentences were manifestly inadequate. New sentences were imposed: at [52]-[53].

The High Court dismissed the appellant's appeal, holding that:

(i) The CCA was not correct in characterising the judge's comparison as a breach of *De Simoni*. *De Simoni* prohibits a judge taking into account, as an aggravating circumstance, a circumstance which would render the offence a different more serious offence. It says nothing about taking into account the absence of a circumstance which, if present, would render the offence a different offence. This is irrelevant to, and likely to distort, the assessment of objective gravity: [at 28]-[29, [60]. However, this was not a material error: at [43], [68].

(ii) Objective seriousness assessment. It is irrelevant in assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of murder. It is likely to result in an assessment of the relative gravity of the subject offence which ill-accords with its objective gravity relative to other cases of that kind. The comparison resulted in the judge concluding the objective gravity of the manslaughter ranked lower in the range of gravity of offences of manslaughter than in fact it did: at [43], [59]-[60].

(iii) Concurrent sentences may have been open depending on the manslaughter sentence, however the NSW CCA properly found the manslaughter sentence and total sentence were manifestly inadequate: at [43], [66]. It was appropriate to cumulate a small part of the wounding sentence on the manslaughter sentence. The offences were separate and distinct. Despite the commonality of the acts, the wounding with intent to cause GBH involved an element of intent which was absent from the manslaughter offence: at [39], [67].

## **High Court Judgment Reserved Cases**

***Betts v R [2015] HCATrans 328; [2016] HCATrans 82 (Appeal from [2015] NSWCCA 29).***

Re-sentencing following finding of error – *Kentwell* (2014) 252 CLR 601 - whether Court erred in failing to consider new evidence when considering re-sentence

***Miller v R [2015] HCATrans 296; (Appeal from [2015] SASCFC 53)***

***Smith v R [2016] HCATrans 16 (Appeal from [2015] SASCFC 53)***

***Presley v DPP (SA) [2016] HCATrans 17 (Appeal from [2015] SASCFC 53)***  
***[2016] HCATrans 106, 107***

*Criminal Law Consolidation Act 1935* (SA) ss 11, 24(1), 269 - Murder – Intention – Joint criminal enterprise or extended joint criminal enterprise – Intoxication – Whether appellant too intoxicated to form relevant intention for murder - leave also granted to extend the grounds of appeal to consider whether the doctrine known as "extended joint enterprise", enunciated in **McAuliffe v The Queen** (1995) 183 CLR 108, be reconsidered and revised or abandoned, in light of the decision of the Supreme Court of the United Kingdom in **R v Jogee** [2016] 2 WLR 681 (see below)

***Related English Cases - R v Jogee [2016] UKSC 8; Ruddock v The Queen (Jamaica) [2016] UKPC 7***

Accused convicted of murder on basis of extended joint criminal enterprise. Jury given standard direction that foresight of the possibility that the co-offender would commit the offence of murder was sufficient for the accused to be guilty of the murder: *Chan Wing-Siu v The Queen* [1985] 1 AC 168 and *Regina v Powell and English* [1999] 1 AC 1. Supreme Court of the United Kingdom ruled the court had 'taken a wrong turn' in deciding those cases by accepting a lower test for the mental element of the secondary party than the actual perpetrator of the offence, and departing from the 'well-established rule that the mental element required of a secondary party is an intention to assist or encourage the principal to commit the crime'. Correct test for mental element for extended joint criminal enterprise is intention to encourage or assist, and foresight as to the possibility that an offence may be committed is simply evidence of that intention.

## **High Court Special Leave Cases**

***Sio v R [2016] HCATrans 56 (Appeal from [2015] NSWCCA 42).***

Conviction appeal – whether conviction for armed robbery inconsistent with acquittal for constructive murder based on participation in a joint criminal enterprise to commit armed robbery.

Evidence – hearsay rule – accomplice made admission against interest in police interview – accomplice not available - whether trial judge required to take into account "demonstrable unreliability" of individual representations to determine whether interview "made in circumstance that made it likely the representation was reliable".

***Zefi; Jakaj; NH v DPP (SA) [2016] HCATrans 65, 84 (Appeal from [2015] SASCFC 139).***

Whether the Supreme Court of a State has an inherent jurisdiction to set aside perfected orders that there be a conviction or acquittal – whether open to the court to admit evidence of the 12 (former) jurors in relation to whether the jury had determined to return a verdict of not guilty of the charge of murder.

***Graham v R [2016] HCATrans 62 (Appeal from [2015] QCA 137).***

Whether trial judge failed to properly direct the jury as to the defence of self-defence under ss 271(1), 271(2) and 272(1) of the Criminal Code (Qld).

***The Queen v Baden Clay [2016] HCATrans 110 (Appeal from [2015] QCA 265)***

Respondent was convicted at trial of murdering his wife. On appeal the verdict of manslaughter was substituted for murder. Special leave granted to consider whether the appeal decision is inconsistent with **R v Ciantar** (2006) 16 VR 26, whether the evidence raised an inference that the respondent killed his wife with intent to do her grievous bodily harm or to kill her and whether evidence was capable of establishing motive relevant to the intention to kill.

## **ANNEXURE B - LEGISLATION**

### **LEGISLATION 2015**

#### **1. Bail Amendment Act 2014**

Commenced on 28.1.2015

The **Bail Act 2013** (which commenced on 20.5.2014) repealed the *Bail Act 1978* and abolished the previous system of presumptions in favour of or against the grant of bail. The **Bail Amendment Act 2014** commenced on 28.1.2015 and made substantial amendments to the *Bail Act 2013*. The 2014 Act applies to offences committed or alleged to have been committed, or charged, before the commencement of the amendment: Schedule 3, Pt 3, s 12. In brief, the 2014 Act makes the following amendments to the *Bail Act 2013*:

#### **Show cause offences**

s 16A: "Show cause requirement". A bail authority making a bail decision for a "show cause offence" must refuse bail unless the accused shows cause why detention is not justified: s 16A(1). If the accused person does show cause, the bail authority must still make a bail decision in accordance with Division 2 – "Unacceptable Risk test – All Offences": s 16A(2).

s 16B: "Show cause offences". There are over 900 offences to which the "show cause requirement" applies. They include offences punishable by life imprisonment, child sexual assault, serious personal violence, certain drug, firearms or prohibited weapons offences, serious indictable offences, serious offences committed while on bail, parole or supervision order.

#### **"Unacceptable Risk Test – All offences**

s 17: Assessment of bail concerns. A bail authority must assess bail concerns before making a bail decision. A "bail concern" is a concern the accused 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.

s 18: Matters to be considered as part of assessment. The bail authority must consider only the matters listed in s 18. They include the accused's background, criminal history, circumstances and community ties, nature and seriousness of the offence, strength of prosecution case.

s 19: Refusal of bail - unacceptable risk. A bail authority must refuse bail if the bail authority is satisfied there is an unacceptable risk, for example, the accused 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: ss 19 (1), (2). If the offence is a show cause offence, the fact the accused has shown cause that detention is not justified is not relevant to the determination of whether or not there is an unacceptable risk: s 19(3).

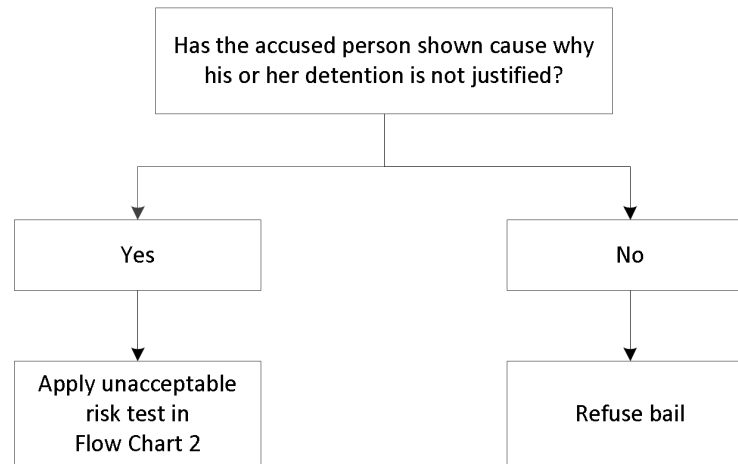
s 20: Accused to be released if there are no unacceptable risks.

#### **Where appeal pending**

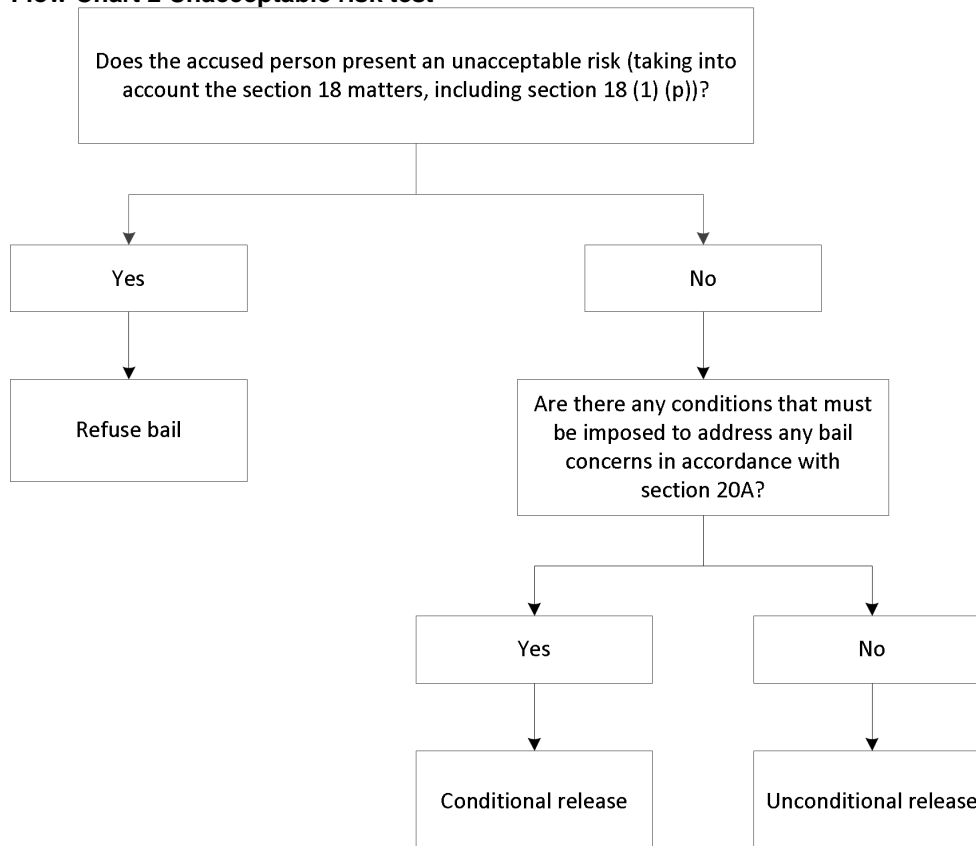
s 22: General limitation on court's power to release. Under s 22(1) a court is not to grant bail or dispense with bail, unless it is established that special or exceptional circumstances exist, for an offence for which an appeal is pending in the CCA or High Court against conviction or sentence on indictment. Under the 2014 amendments, if the offence is a show cause offence, the requirement that the accused establish that special or exceptional circumstances exist that justify a decision to grant bail or dispense with bail applies instead of the requirement the accused show cause why detention is not justified: s 22(2).

## Section 16: Flow Charts

**Flow Chart 1 Show cause requirement**



**Flow Chart 2 Unacceptable risk test**



## **2. Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014**

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. Some of the provisions are:

### *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.

*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.

### *Part 4B 'Giving evidence by domestic violence complainants'*

*s 289F Complainant may give evidence in chief in form of recording.* Complainant who gives evidence in the form of a recorded statement must be available for cross-examination and re-examination.

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

*s 289I Admissibility of recorded evidence.* Hearsay rule and opinion rule (in *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.

*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.

*ss 289L – 289M make provision for service and access.* Copy of recorded statement must be served on defence. Where accused 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).

## **3. Independent Commission Against Corruption Amendment (Validation) Act 2015**

Commenced 6 May 2015.

New Part 13 of Schedule 4 into the *Independent Commission Against Corruption 1988* validates previous actions taken by the Independent Commission Against Corruption prior to the High Court decision of *ICAC v Cunneen [2015] HCA 14* on 15 April 2015. A challenge to the validity of the Act was dismissed by the High Court: *Duncan v ICAC [2015] HCA 32*.

## **4. Crimes Legislation (Child Sex Offences) Act 2015**

Commenced on 29 June 2015. The amendments apply to offences committed on or after the commencement date.

*New s 66A - Sexual Intercourse with Child Under 10 years, maximum penalty Life.* The basic and aggravated offences of 'sexual intercourse with a child under 10' under ss 66A(1) and 66A(2) were repealed and replaced with one offence under a new s 66A. Section 66A now carries a maximum penalty of life imprisonment. The standard non-parole period of 15 years continues to apply.

*Creation of Standard Non Parole Periods for certain offences.* The Act introduced SNPPs for 13 child sexual offences in the *Crimes Act*:

s 66B (attempt, or assault with intent, to have sexual intercourse with a child under 10 years)	10 years
s 66C (1) (sexual intercourse with a child 10–14 years)	7 years
s 66C (2) (aggravated sexual intercourse with a child 10–14 years)	9 years
s 66C (4) (aggravated sexual intercourse with a child 14–16 years)	5 years
s 66EB (2) (procure a child under 14 years for unlawful sexual activity)	6 years
s 66EB (2) (procure a child 14–16 years for unlawful sexual activity)	5 years
s 66EB (2A) (meet a child under 14 years following grooming)	6 years
s 66EB (2A) (meet a child 14–16 years following grooming)	5 years
s 66EB (3) (groom a child under 14 years for unlawful sexual activity)	5 years
s 66EB (3) (groom a child 14–16 years for unlawful sexual activity)	4 years
s 91D (1) (induce a child under 14 years to participate in child prostitution)	6 years
s 91E (1) (obtain benefit from child prostitution, child under 14 years)	6 years
s 91G (1) (use a child under 14 years for child abuse material purposes)	6 years

#### **5. Crimes Legislation Amendment (Penalty Unit) Bill 2015 (Cth)**

Commenced on 31 July 2015.

Commonwealth penalty units are increased from \$170 to \$180 with indexation every three years according to the Consumer Price Index.

#### **6. Crimes (Sentencing Procedure) Amendment (Firearms Offences) Act 2015**

Commenced on 21 August 2015. The amendments apply to offences committed on or after the commencement date.

*Creation of standard non-parole periods for certain Firearm offences.* SNPPs are created for these offences under the *Crimes Act 1900*:

Discharge firearm with intent to cause grievous bodily harm (s 33A(1) – SNPP 9 years

Discharge firearm with intent to resist arrest or detention (s 33A(2) – SNPP 9 years

Fire firearm at dwelling-house or other building with reckless disregard for safety of any person (s 93GA(1) – SNPP 5 years

Fire firearm, during public disorder, at dwelling-house or other building with reckless disregard for safety of any person (s 93GA(1A) – SNPP 6 years

Fire firearm, in course of an organised criminal activity, at dwelling-house or other building with reckless disregard for safety of any person (s 93GA(1B) – SNPP 6 years

*Increase of standard non-parole periods for certain Firearm offences.* The SNPP for two offences are increased:

Unauthorised possession or use of firearms (s 7 *Firearms Act 1996*) – SNPP increased from 3 years to 4 years

Unauthorised possession or use of prohibited weapon (s 7 *Weapons Prohibition Act 1998*) – SNPP increased from 3 years to 5 years

## **7. Drug Misuse and Trafficking (Methylamphetamine) Regulation 2015**

Commenced on 1 September 2015.

The Regulation amends the *Drug Misuse and Trafficking Act* 1985 Schedule 1 so that the threshold of methylamphetamine ("ice") required for a large commercial quantity is reduced from 1 kilogram to 500 grams. This means that persons convicted of manufacturing or supplying more than 500 grams of ice are now liable to life imprisonment instead of the 20 years maximum penalty which previously applied.

## **8. Firearms and Weapons Prohibition Legislation Amendment Act 2015**

Commenced on 24 November 2015.

*Maximum penalties under Firearms Act increased from 10 to 14 years imprisonment for these offences:*

- Supply, acquire, possess or using an unregistered firearm – s 36(1)
- Acquiring firearm without licence or permit, where firearm is a pistol or prohibited firearm – s 50
- Acquiring firearm part that relates to any kind of pistol or prohibited firearm without licence or permit – s 50AA(2)
- Supplying, or knowingly taking part in supply of, a firearm part that relates to a pistol or prohibited firearm – s 51BA(2)
- Shortening a firearm, possess or supply shortened firearm without permit – s 62(1)
- Converting firearms – s 63
- Provide false or misleading information in an application under the Act – s 70

*s 51F Firearms Act; s 25B Weapons Prohibition Act – New offences of Possession of digital blueprints for manufacture of firearms and weapons on 3D printer.* Maximum penalty 14 years. Defences are innocent production, dissemination or possession, public benefit and approved research: s 51G *Firearms Act*; s 25C *Weapons Prohibition Act*.

*s 51H Firearms Act - Use, supply and acquisition of stolen firearms or firearm parts.* New s 51H makes it an offence to use, supply, acquire or possess a stolen firearm or firearm part, or give possession to another - maximum penalty 14 years. It is a defence if the defendant did not know, and could not reasonably be expected to have known, the firearm or firearm part was stolen: s 51H(2).

*s 66 Firearms Act - Defacing and altering firearms.* A new s 66 applies all numbers, letters and identification on any firearm part; and extends not only to possession but also to use, supply and acquisition of defaced firearms or firearm parts. Maximum penalty increased from 5 to 14 years imprisonment. It is a defence if the defendant did not know, and could not reasonably be expected to have known, the firearm or firearm part was defaced: s 66(2).

*Sections 10(3) and 30(10) Firearms Act - Spent convictions may be considered in firearms licence and permit applications.* These new provisions provide that s 12 *Criminal Records Act* 1991 does not apply to applications for firearms licences and permits. This means the Commissioner of Police may consider a spent conviction, along with other matters, in determining whether a person is fit and proper to be granted a firearms licence or permit.

## **9. Crimes Amendment (Off-road Fatal Accidents) Act 2015**

Commenced on 24 November 2015.

These amendments were made in response to the deaths of two teenagers run over by a car whilst asleep in a paddock which was private property. Police powers to arrest a driver for alcohol and drug testing following a fatal motor accident were previously limited to accidents that occur on a "road" - which generally did not include private property. The amendments provide for police testing for alcohol and drug use in off-road accidents.

*Road Transport Act 2013 Sch 3, cl 12 "Power to arrest persons involved in fatal accidents for blood and urine tests". A new definition of "accident" is an accident on a road involving a motor vehicle, other vehicle, or horse; or an accident not on a road involving a motor vehicle.*

*s 52AA Crimes Act 1900 - "Dangerous driving: procedural matters". The definition of "road" is deleted from s 52AA(7). The phrase "occurring at a place that is not a road" is deleted from ss 52AA(2) and (3A).*

## **10. Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015 (Cth)**

Commenced on 27 November 2015.

The main amendments to the *Crimes Act 1914* (Cth) include:

New s 16A(2)(ja) - General deterrence is a sentencing consideration to be taken into account in sentencing for a federal offence.

New s 16AC 'Reduction for cooperation with law enforcement agencies' is largely similar to the repealed s 21E that it replaced. The court's power to reduce a sentence for undertaking to assist authorities is extended to any form of sentencing 'order'. The DPP's right to appeal a reduced sentence or order may be made at any time, including where an offender's sentence has expired.

s 19AB 'Where court must fix non-parole period' – A court no longer has the option to make a recognisance release order where the sentence is longer than 3 years.

New s 19AHA Correction of sentencing errors – Enables courts to correct Commonwealth sentencing orders which contain technical errors, defects of form or ambiguity. Courts previously used State and Territory legislation.

Amends Part 9.1 Serious Drug Offences *Criminal Code* (Cth):

Fault elements for attempt offences: s 300.5 extended to attempt offences (prosecution not required to prove person knew or reckless as to the particular identity of the substance). s 300.6 inserted so that for an offence of attempting to commit an offence against Part 9.1, the fault element is recklessness applicable to the physical element of a person's conduct.

'Intent to manufacture' element removed from precursor offences: The prosecution no longer required to prove person imported or exported the precursor with the intention of using it to manufacture a controlled drug, or with belief that another person would use it to manufacture a controlled drug: ss 307.11 – 13.

## **LEGISLATION 2016**

### **1. Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015**

This Pilot Scheme commenced operation on 31 March 2016 for a period of 3 years. (The legislation commenced on 5.11.2015).

The Act inserts Part 29 (clauses 81-94) in Schedule 2 of the ***Criminal Procedure Act*** to:

- . allow evidence of children in "prescribed sexual offences" cases in the District Court to be pre-recorded in the absence of a jury
- . provide for such evidence to be given with the assistance of a "Children's Champion" (or "witness intermediary").

Application (cl 83). Part 29 applies to proceedings before the Court sitting at a "prescribed place" in relation to a "prescribed sexual offence" (whenever committed):-

- (a) on or after the commencement of Part 29, or
- (b) before the commencement of Part 29 but only if the matter has not been listed for trial before that commencement.

Part 29 applies at any stage of such a proceeding, including an appeal or rehearing.



Definitions (cl 82. “prescribed places” means: (a) Newcastle, (b) Downing Centre, Sydney, (c) such other places as may be prescribed by the regulations.

Pilot Scheme main provisions

Cl 84 Pre-recorded evidence hearing.

- . There is a presumption that (unless District Court orders to the contrary) certain evidence by complainants under 16 years will be given in the form of a recording made at a pre-recorded evidence hearing: cl 84(1). Court can order evidence of a child over 16 can also be given this way: cl 84(2).
- . Court must be satisfied it is in the interests of justice to do so before making order under cl 84: cl 84(4). Major factors to be considered are court facilities and wishes and circumstances of the witness: cl 84(5).

Cl 85 Timing and other aspects

- . The pre-recorded evidence hearing to be held in the absence of the jury; and as soon as practicable after listed date for accused's first court appearance, but not before pre-trial disclosure by prosecution: cl 85(1), (3).
- . At the hearing, witness may give evidence in chief as provided by s 306U and other evidence by CCTV or other prescribed technology: cl 85(2).
- . The pre-recorded evidence is to be subsequently viewed by the Court in the presence of the jury: cl 85(4).

Cl 86 Access

- . The accused person and his or her Australian legal practitioner are to be given reasonable access to the recording: cl 86

Cl 88-90 Children's Champions (or “witness intermediary”)

- . A children's champion is to communicate and explain (a) to the witness, questions put to the witness, and (b) to any person asking such a question, the answers given by the witness; and to explain such questions or answers to enable them to be understood by the witness or person in question: cl 88.
- . A panel of suitable persons to be appointed as children's champions is to be established by Victims Services, Department of Justice. A person is to have qualifications in psychology, social work, speech pathology or occupational therapy: cl 89.

Cl 91 Warnings

- . Court must (a) inform jury it is standard procedure to give evidence in that way or to use a children's champion, and (b) warn jury not to draw adverse inference or to give evidence greater or lesser weight: cl 91

**2. Limitation Amendment (Child Abuse) Act 2016**

Commenced on 17.3.2016

The Act amends the *Limitation Act 1969* to remove limitation periods applicable to civil damages actions for child abuse victims. The Act is in response to recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse, recognising there may be many reasons for delay in victims seeking redress for child sexual abuse.

The Act makes the following reforms:

- . *Limitation periods no longer apply to child abuse actions.* Section 6A removes the previous limitation periods (of between three and 12 years) for commencing an action for damages relating to death or personal injury resulting from “child abuse”: ss 6A(1)-(3). The amendments extend to causes of action under the *Compensation to Relatives Act 1897* and those that survive death for the benefit of the person's estate under the *Law Reform (Miscellaneous Provisions) Act 1944*: s 6A(5).
- . *Retrospective operation.* Section 6A has retrospective effect meaning that no limitation period will apply to such claims regardless of when the child abuse occurred: s 9, Pt 3, Sch 5 *Limitation Act*. Circumstances in which an action on a previously barred cause of action may be brought and powers exercisable by courts in such cases are outlined: s 10, Pt 3, Sch 5.

### **3. Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016**

Commenced on 16.5.2016.

*New Pt 2AA inserted into Terrorism (Police Powers) Act 2002 (NSW):*

Part 2AA authorises arrest, detention and questioning of person suspected of being involved in a recent or imminent terrorist act for purposes of assisting in responding to or preventing the terrorist act: s 25A.

A person under 14 years of age cannot be arrested or detained: s 25F.

Police officers may arrest, without warrant, a terrorism suspect for the purpose of investigative detention if:  
(i) The terrorist act occurred in the last 28 days, or the police officer has reasonable grounds to suspect the terrorist act could occur in the next 14 days; and (ii) is satisfied the investigative detention will substantially assist in responding to or preventing the terrorist act: s 25E.

An arrest must be discontinued in certain circumstances: s 25E(5). Whether detention should be continued must be reviewed as soon as practicable after arrest, and every 12 hours after arrest, by senior police officer not involved in the investigation: ss 25D, 25E(6).

Procedures and safeguards are outlined: ss 25G, 25N-O.

*Maximum period of detention 14 days:* The maximum period of investigative detention of a terrorism suspect is 4 days and can be extended by detention warrant: s 25H(1). Total maximum period cannot exceed 14 days from date the suspect was arrested: s 25H(2).

An 'eligible Judge' (Judge of Supreme Court authorised to issue a covert search warrant under Pt 3) may extend detention period beyond initial 4 day period in increments of up to 7 days: ss 25D, 25I. The Judge is not to issue a detention warrant unless satisfied of certain matters outlined in s 25I(5).

Judge determining application must disqualify themselves from presiding over any subsequent trial of the person in relation to the same matters: s 25I(8).

Procedures for making applications for detention warrants and issuing warrants are set out: s 25J.  
Police officers may monitor contact a terrorism suspect has with any person while in detention, other than their legal representative: s 25L.

An officer who applies for detention warrant may request Judge to direct terrorism suspect is not to contact a specified person while under investigative detention: s 25M(1). The direction may prohibit contact with a specified legal representative: s 25M(3).

*Section 310L Crimes Act 1900 (NSW):*

Section 310J *Crimes Act* makes it an offence to be a member of a terrorist organisation. The Amending Act amends s 310L so that the sunset date until which membership of a terrorist organisation is an offence is extended from 13 September 2016 to 13 September 2019.

## **ANNEXURE C - SUPREME COURT**

### **SUPREME COURT CASES 2015**

#### ***Manslaughter by unlawful and dangerous act - accused's moderate intellectual disability attributed to reasonable person***

In **Thomas** [2015] NSWSC 537 RA Hulme J held that the accused's intellectual disability could be attributed to the reasonable person test for manslaughter, that is, whether a reasonable person in the position of the accused would have realised or appreciated the act was dangerous. RA Hulme J found the accused not guilty of manslaughter (and guilty of the alternative charge of recklessly cause GBH).

The accused's intellectual capacity was assessed as below the capacity of 99.9 per cent of the population: at [49]. 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, 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 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 the elderly victim to the side of the face at least once would expose her to a risk of serious injury: at [71].

Note: The Criminal Trials Bench Book has been updated to incorporate *Thomas* at [5-950].

#### ***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.

#### ***Costs – summary of principles***

In **Moore** [2015] NSWSC 1263 Hamill J set out propositions in relation to an application for costs under s 3 *Costs in Criminal Cases Act 1967* (NSW).

[5] The section requires the decision maker to assume that the hypothetical prosecutor had knowledge of "evidence of all the relevant facts" at the time of the institution of the proceedings. The question is whether, in the light of that retrospectively obtained knowledge, "it would not have been reasonable to institute the proceedings."

[6] A number of propositions can be gleaned from the cases: –

1. The provisions represent a “middle course” between two extremes: *Allerton v DPP* at 161-162, citing the second reading speech introducing the provision. One extreme is the common law and English position where costs were granted in criminal cases only in exceptional circumstances: *Attorney-General of Queensland v Holland* (1912) 15 CLR 46 at 49. The other extreme is where costs almost automatically follow the event: *Latoudis v Casey* (1990) 170 CLR 534.
2. The provisions are intended “to create an environment in which earlier rigid resistance to the reimbursement of costs incurred by an acquitted defendant was diminished”: *R v Manley* at [74] (Simpson J).
3. The provisions allow the Court to relieve a person who has been acquitted (or discharged following the withdrawal of proceedings by the DPP) of the financial burden of defending themselves in criminal proceedings without casting any criticism on police or prosecutors. Because of the retrospective wisdom implicit in s 3(1)(a), the provisions “when applied judicially permit courts to make orders in appropriate cases without any innuendo arising from the making, or the refusal to make such orders that would be critical either of the Prosecutor or the accused”: see *Allerton v DPP* at 560 – 561.
4. The prosecution cannot resist a certificate on the basis of some “ill-defined community interest in bringing a particular accused, or kind of matter, before the courts”: see *R v Manley* at 206-207 (per Wood CJ at CL); see also *R v Pavey* at 401.
5. “It is not sufficient to establish the issue of unreasonableness in favour of an applicant for a certificate that, in the end, the question for the jury depended upon word against word; in a majority of such cases, it would be quite reasonable for the prosecution to allow those matters to be decided by the jury; it would be different where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit”: *Mordaunt* at [36].
6. A decision to prosecute is not “reasonable” simply because there was a prima facie case, or because there were reasonable prospects of a conviction, or because a magistrate committed the matter for trial: *R v Warwick Ian MacFarlane* cited with approval in *R v Fejsa* 255.
7. The applicant’s silence is not a disentitling factor under s 3 (1)(b). In other words, the failure of an applicant to participate in a recorded interview is not a matter that “contributed, or might have contributed, to the institution or continuation of the proceedings”: see *R v Manley* at [74] – [76]; *R v Dunne*; *R v Pike and others* [2010] NSWDC 224 at [12].

[7]. See, generally, the summary of propositions as to the application of the provision in *Mordaunt* at [36] (McColl JA).”

### **Contempt – sentencing principles**

In *In the Matter of Steven Smith (No.2)* [2015] NSWSC 1141 Wilson J set out the sentencing principles for contempt at [36]-[43]:

*Supreme Court Rules* 1970 Part 55, r13 provide for sentences including a fine or imprisonment. Rule 13 is a declaratory rather than an exhaustive statement of the penalties that may be imposed.

There are three different categories of contempt - technical, wilful, and contumacious. The least serious is technical contempt. The most serious is contumacious contempt which encompasses acts of wilful and intentional defiance of the court’s authority, such that the proper administration of justice is diminished.

There is no “tariff” for an offence of contempt.

The *Crimes (Sentencing Procedure) Act* 1999 applies.

*Objective Gravity*: Assessment of the objective gravity of an offence of contempt were set out by Dunford J in *Wood v Staunton* (No 5) (1996) 86 A Crim R 183 at 185, by reference to ten specific factors:

1. The seriousness of the contempt proved
2. Whether the contemnor was aware of the consequences to himself of what he did
3. The actual consequences of the contempt on the relevant trial or inquiry
4. Whether the contempt was committed in the context of serious crime
5. The reason for the contempt
6. Whether the contemnor has received any benefit by indicating an intention to give evidence

7. Whether there has been any apology or public expression of contrition
8. The character and antecedents of the contemnor
9. General and personal deterrence
10. Denunciation of the contempt."

A further factor of whether the contempt was motivated by fear of harm has been referred to; and can be effectively dealt with under item 5, the reason for the contempt.

### ***Contempt – no opportunity to be heard on referral from Local Court to Supreme Court – denial of procedural fairness***

In ***Prothonotary of the Supreme Court NSW v Dangerfield*** [2015] NSWSC 1895 Adams J held that the magistrate erred in automatically referring the defendant to the Supreme Court for contempt for refusal to answer questions in court. The Magistrate ought to have heard the defendant on the matter of referral and thus procedural fairness was denied. The Magistrate warned the defendant of the potential consequences for refusing to answer questions and gave her an opportunity to obtain legal advice. However, he did not ask whether she wished to particular submissions: at [4]. A judge is under an obligation to allow an alleged contemnor an opportunity to show why he should not refer a matter: *Registrar of Court of Appeal v Manian (No 1)* (1991) 25 NSWLR 459: at [12].

### ***Female genital mutilation – ‘mutilates’***

In ***A2; KM; Vaziri (No 2)*** [2015] NSWSC 1221 Johnson J, in a pre-trial ruling, held that he would direct the jury that “mutilates” (in s 45 *Crimes Act* ‘female genital mutilation’) means physical injury to any extent to the female genital organs, which is done for non-medical reasons for the purposes of s.45. A nick or cut to the genitalia (including pricking or piercing of the clitoris) for the purposes of FGM is capable of falling within the concept of mutilation in s.45. Johnson J further discussed the meaning of ‘clitoris’ for the purposes of s 45.

Note: An application to appeal to the CCA pursuant to s5F(3) Criminal Appeal Act was refused: ***A2; KM; Vaziri*** [2015] NSWCCA 244.)

## **SUPREME COURT CASES 2016**

### ***DPP v Lazzam [2016] NSWSC 145***

*Brief of evidence served outside time set by direction made by Magistrate - Magistrate erred in not admitting evidence and dismissing charges - non-compliance with direction did not constitute non-compliance under s 188(1) Criminal Procedure Act 1986 - order dismissing proceedings set aside*

Sections 183, 187 and 188 in Ch 4, Pt 2, Div 2 *Criminal Procedure Act 1986* set out the requirements for service of a brief of evidence in summary matters and gives Magistrates powers to make orders if service requirements are not complied with.

A Magistrate dismissed charges on the basis that the brief of evidence was served outside the time set by her direction. Adamson J allowed the DPP’s appeal holding that the Magistrate, erred in law by considering herself bound to reject evidence by s 188 *Criminal Procedure Act 1986* which did not, in terms, apply. The Magistrate’s orders were set aside and the matter remitted for determination.

Adamson J set out how s 188 operates and how the discretion in s 188(2) (where applicable) ought to be exercised: at [29]-[38].

s 188(1) requires the court to refuse to admit evidence if, in relation to the evidence, “this Division or any rules made under this Division have not been complied with by the prosecutor”.

s 188 is only concerned with non-compliance by a prosecutor with a provision of Division 2. There is a significant difference between a statutory provision, a rule, a Practice Note and a direction. No other non-compliance engages s 188.

If any relevant non-compliance with such a provision or rule can be identified, the Magistrate is obliged under s 188(2), to ask whether the accused consents to dispensation with the requirements of s 188(1); and, if so, the Magistrate is obliged to dispense with the requirements of s 188(1) "on such terms and conditions as appear just and reasonable". If the accused does not consent, the Magistrate is obliged to consider whether the requirements ought be dispensed with and, if so, grant such dispensation "on such terms and conditions as appear just and reasonable".

The discretion conferred by s 188(2) is a broad one and must be exercised judicially.

The requirement to serve the police brief is a fundamental aspect of the administration of criminal justice. A defendant is entitled to have adequate notice of all the evidence. It is important that a prosecution not be required to be conducted on incomplete evidence (as in the present case).

A balance is commonly struck by a court extending the time within which a brief is to be served and adjourning the hearing so as not to compromise the defendant's opportunity to make forensic decisions, such as whether to plead guilty or not guilty: *DPP v West* (2000) 48 NSWLR 647.

In this case, had there been any relevant non-compliance (to engage s 188(1)), the following factors would have been relevant to the exercise of the discretion in s 188(2):

1. Whether there was any prejudice to the defendants; and, if so, whether it could be cured or ameliorated: for example, on conditions that included an adjournment (in the present case, no prejudice was identified; and no adjournment sought);
2. The reason for any non-compliance (in the present case, lack of police resources; absence of relevant police officers; the Christmas break; need to canvass the public);
3. The probative value of the evidence and its importance of the evidence to the proof of the offences charged (in the present case, crucial to the proof of the charges, as illustrated by the fact that its rejection deprived the prosecutor of proof of identification and resulted in an acquittal on that basis alone) ;
4. The public interest in determination of criminal proceedings by reference to probative, (otherwise) admissible evidence (which, in the present case, was subverted by the rejection of the evidence); and
5. The public interest in finality and avoiding delays in proceedings (in the present case, relatively slight delay).

## **ANNEXURE D – STOP PRESS: NSW CCA 2016 UPDATE**

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- 1. Sentence Appeal Cases 2016**
  - 2. Conviction Appeal Cases 2016**
  - 3. Bail Act Cases 2016**
- 

### **1. NSW CCA SENTENCE CASES 2016**

#### **MITIGATING FACTORS**

##### ***Aboriginal offender – Bugmy (2013) 249 CLR 571 - disadvantaged background – consideration of factor not optional***

In **Ingrey** [2016] NSWCCA 31 the applicant, who was of Aboriginal background, was sentenced for armed robbery. The background history was that his extended family were involved in a criminal milieu and the applicant was exposed to that influence from a young age. The sentencing judge disregarded these matters on sentence.

The CCA referred to what the High Court said in **Bugmy** (2013) 249 CLR 571 at [40] that “*the circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.*” (emphasis added).

Hoeben CJ at CL (Hall and Fullerton JJ agreeing) stated that a consideration of this factor was not optional:

*“[35] My understanding of that statement is that it refers to the ultimate effect of that factor. The plurality were not saying that a consideration of this factor was optional. What the plurality clearly had in mind was that even when that factor is taken into account, there may be countervailing factors (such as the protection of the community) which might reduce or eliminate its effect. In other words, this factor where it is present should be taken into account in the exercise of the sentencing discretion. That is something which his Honour did not do.”*

The CCA held that the sentencing judge did not do so in this case and allowed the applicant’s appeal on the basis that the applicant’s social disadvantage was not adequately taken into account: at [36]-[37].

#### **PROCEDURAL FAIRNESS**

##### ***Fact finding – refusal by judge to view CCTV footage***

In **Mulligan** [2016] NSWCCA 47 the accused was sentenced for an assault offence. It was a denial of procedural fairness for the sentencing judge to refuse to view CCTV material tendered by the Crown where part of the Crown submissions were based on the CCTV material and not taken from the tendered agreed facts.

First, the accused’s oral evidence raised the suggestion that he was provoked by what the victim said to him based upon a version of a conversation not included in the agreed facts. To the extent that the CCTV material potentially informed the suggestion the accused might have been provoked, the Crown was entitled to call in aid of a submission to rebut it. Secondly, the judge was critical of the Crown’s submissions because they appeared to go beyond the agreed facts, even though the agreed facts specifically mentioned the CCTV material. It was unfair to the Crown to

adopt the position that the Crown's submissions were inaccurate if the judge was not at the same time prepared to permit the Crown to produce the very material that would arguably have justified those submissions: at [20]-[21].

## PROCEDURE

### ***s 166 Criminal Procedure Act 1986 – “back-up”/ related summary offences may be included in aggregate sentence imposed in District or Supreme Court***

In **Price** [2016] NSWCCA 50 it was not an error to include in an aggregate sentence the “back-up” or summary related offences which were committed from the Local Court to the District Court under s 166 *Criminal Procedure Act*. There is nothing in the applicable legislation prohibiting the incorporation of Local Court offences within aggregate sentences imposed in the District Court or the Supreme Court: at [73]-[79].

## PARTICULAR OFFENCES

### ***s 33(1)(a) Crimes Act - Wound with intent to cause grievous bodily harm - not an error to take into account that wound potentially fatal***

In **Kiernan** [2016] NSWCCA 12 it was not an error to take into account that the wound was potentially fatal in sentencing for ‘wound with intent to cause grievous bodily harm’ under s 33(1)(a) *Crimes Act*.

The CCA said that although offences of this kind are result based, it is also clear the manner in which the wound was inflicted, the reason for its infliction and circumstances of the wounding are relevant when assessing the seriousness of the offence: at [41]; *McCullough* [2009] NSWCCA 94.

While the applicant is to be sentenced for what did occur and not for what might have occurred, it is a relevant factor that the deeper of the two wounds to the victim’s neck could have been fatal. It is not without significance that when the applicant left the victim he believed he was dead: at [42]-[44].

A cut to the throat may inflict the same or similar physical harm as a cut to the leg, however a sentencing judge is entitled to treat the former as far more serious than the latter. Section 21A(2)(ib) of the *Crimes (Sentencing Procedure) Act* specifies it is an aggravating factor that “the offence involved a grave risk of death to another person or persons”: at [46]; *Dennis* [2015] NSWCCA 297.

### ***Domestic violence – general deterrence***

In **Eftithimiadis (No 2)** [2016] NSWCCA 9 the CCA stated that in assessing the significance of general deterrence when sentencing for an offence arising in a domestic setting, Price J said at [86]:

*“All too often partners in a domestic relationship resort to violence. The community cannot tolerate violence in any domestic setting, but the community’s abhorrence of a crime intended to secure the custody of a young child by the murder of the mother needs to be expressed in the sentence to deter persons who might be like-minded to commit such a crime.”*



## SENTENCE APPEALS

### ***Fresh evidence – Facebook photographs of victim not fresh evidence – pre-requisites for admission of fresh evidence***

In *Bajouri* [2016] NSWCCA 20 the applicant was sentenced for ‘intentionally causing grievous bodily harm’ (s 33(1)(b) *Crimes Act*). A Victim Impact Statement at sentence outlined the victim’s injuries, ongoing pain and impact on work and sport. The applicant submitted there was a miscarriage of justice due to ‘fresh evidence’ of Facebook photographs of the victim trail bike riding and jet skiing 10 months after the offence.

The CCA dismissed the appeal. The material did not constitute ‘fresh evidence’. In *Goodwin* (1990) 51 A Crim R 328 at 330 Hunt J outlined the pre-requisites for the admission of fresh evidence:

“What must be established is:

- (1) that the additional material sought to be put before this Court is of such significance that the sentencing judge may have regarded it as having a real bearing upon his decision;
- (2) that, although its existence may have been known to the applicant, its significance was not realised by him at the time; and
- (3) that its existence was not made known to the applicant’s legal advisors at the time of those sentencing proceedings.”

The CCA noted recent authorities have taken the first pre-requisite stipulated in *Goodwin* as having a more restrictive effect. In *Fordham* (1997) 98 A Crim R 359 Howie AJ said at 377 – 378: “Generally before fresh or new evidence will be received ..., it must be shown that the sentencing of the appellant in the absence of that evidence resulted in a miscarriage of justice.” In *Bland* (2014) A Crim R 51 Johnson J held (applying *Fordham*) that “even if the evidence is fresh, it ought not be received by the Court unless it affects the outcome of the case”: at [49]-[50].

The CCA held irrespective of whether the first pre-requisite in *Goodwin* should be applied or some stricter criterion, the Facebook images would not qualify as fresh evidence: at [51].

That the victim was able to ride a jet ski and a trail bike after the assault did not contradict his Victim Impact Statement. He said he was unable to work and rarely left his house for “several months” but did not assert he had been unable to return to outdoor activities. His statement was more qualified and consistent with him being able to do so: at [46].

## AGGREGATE SENTENCES

### ***Using indicative sentences to determine error – old sexual offences – relationship between head sentence and non-parole period – guilty plea discount – abuse of trust***

In *Henderson* [2016] NSWCCA 8 the applicant was sentenced for historic child sexual offences against his niece, nephew and second cousin between 1961 and 1978/9. An aggregate sentence was imposed. Although there is no appeal against indicative sentences this is one of those cases where the indicative sentences make clear that an error occurred in the reasoning process leading to the imposition of the aggregate sentence. In this case the judge erred in several ways: failing to have regard to the sentencing practice at the time regarding the relationship between the head sentence and the non-parole period – determining the 25% discount for a plea of guilty did not apply to old offence - taking into account s 21A(2)(k) “Abused a position of trust or authority in relation to the victim” as an aggravating factor - there was no abuse of a position of trust or authority as envisaged under the sub-section where the applicant took advantage of the familial relationship and his age to gain access to his victims: *Suleman* [2009] NSWCCA 70 - imposing a

head sentence in most cases considerably above that which would be appropriate: *Magnuson* [2013] NSWCCA 50; *MJR* (2002) 54 NSWLR 368.

### ***Discount for guilty plea – indicative sentences***

In *Bao* [2016] NSWCCA 16 the judge erred in applying a combined discount for pleas of guilty for drug offences to the aggregate sentence. The applicant was entitled to 25% discount for his early plea to one offence and a lesser discount for a late plea to another offence. The judge erroneously applied a 17% discount to the total aggregate sentence. The correct procedure was to apply the appropriate discount to each of the indicative sentences.

## **2. NSW CCA CONVICTION APPEALS 2016**

### ***“Grievous bodily harm” – meaning - conviction quashed***

In *Swan* [2016] NSWCCA 79 the appellant was convicted of cause grievous bodily harm in company (s 35(1) *Crimes Act*). The CCA (Garling J; RA Hulme J agreeing; Wilson J dissenting) quashed his conviction on the basis that the injuries suffered by the victim did not constitute “grievous bodily harm” and the verdict was unreasonable.

The Crown case was that the victim had sustained grievous bodily harm by a fracture to the transverse process of the L3 vertebra. The treating doctor called by the Crown gave evidence the injury was “very minor”, would not be permanent, and that there was nothing which would suggest the victim would not make a full recovery: at [48]-[50].

Garling J at [71] stated that the following principles apply with respect to the phrase “*grievous bodily harm*”:

1. It is to be interpreted according to its natural and ordinary meaning;
2. On its natural and ordinary meaning, the phrase means not just serious bodily injury, but *really* serious bodily injury;
3. there is no bright-line by which an injury can be classified as really serious bodily injury; it is always a question of fact and degree;
4. not every injury is capable of amounting to grievous bodily harm;
5. only the injury itself and its direct physical effects, not its personal, social and economic consequences, can be taken into account in deciding whether an injury amounts to really serious bodily injury: *AM* [2012] NSWCCA 203; *Haoui* [2008] NSWCCA 209; *Overall* (1993) 71 A Crim R 170.

A fracture to a bone part of a lumbar vertebra can amount to grievous bodily harm. However, features of this case against this conclusion include: there was no displacement, no operative or other treatment required, no permanent injury, a short period in hospital and released without plan for further treatment, and doctor described injury as minor: at [74].

The injury fails to amount to “*serious bodily injury*”, let alone “*really serious bodily injury*”. Whilst the question of whether an injury amounts to “*really serious bodily injury*” is one of fact and degree, and for the jury’s assessment, that does not mean that all injuries will properly be assessed as really serious, or that this Court has no role to play in determining whether the jury’s verdict is unreasonable: at [76].

### ***Appeal against directed verdicts of acquittal for constructive murder and manslaughter allowed – whether act causing death was “malicious” within s 18(2)(a) Crimes Act – “malicious” meaning***

Section 18 *Crimes Act* defines the offence of murder and manslaughter. Section 18(2)(a) states:

“(2)(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.”

In *IL* [2016] NSWCCA 51 the respondent was charged with constructive murder and, alternatively, manslaughter. The CCA allowed the Crown appeal against directed verdicts of acquittal for both offences. The CCA further discussed the term “malicious” in s 18(2)(a).

*Verdicts of acquittal set aside*

The victim died in a house fire allegedly caused by the ignition of a ring burner used for drug manufacture. The Crown case was that the respondent engaged in a joint criminal enterprise with the victim to manufacture a large commercial quantity of methylamphetamine and was equally responsible for the act of ignition. (Manufacture of a large commercial quantity of prohibited drug is punishable by life imprisonment and therefore a foundational crime for constructive murder). In relation to manslaughter, the Crown relied also on joint criminal enterprise in that the act causing death (ignition of the burner) was unlawful and dangerous. The Crown relied on joint criminal enterprise as it could not point to any specific act or event which caused the ignition of the burner. At the close of the Crown case, the trial judge directed the jury to return verdicts of not guilty for both murder and manslaughter.

Simpson JA (RA Hulme J and Bellew J agreeing) allowed the appeal and quashed the verdicts of acquittal on both charges. A new trial was ordered.

In relation to murder, it was not necessary to show the respondent contemplated injury or death of the victim. Joint criminal enterprise principles applied to the foundational crime of drug manufacture, thus the question was therefore whether the ignition of the ring burner was within the scope of that enterprise or contemplated by the participants: [60] - [64]. As to manslaughter, it was only necessary to show the ignition of the burner was an incident within the contemplation of the respondent in her participation of the drug manufacture. It was not necessary to show the respondent and the victim acted together in lighting the burner: at [70].

*“Malicious” in s 18(2)(a) Crimes Act*

The respondent also submitted that on no view of the meaning of “malicious” in s 18(2)(a) *Crimes Act* could it be said that the act that caused the victim’s death was “malicious”; and therefore it would be futile for this Court to order a new trial: at [75].

The CCA noted the matter was complicated by the fact that when s 18 was enacted in 1901, the *Crimes Act* contained s 5 which defined “maliciously”. Section 5 was repealed in 2008 and a question thus arose as to whether “malicious” in s 18(2)(a) since 2008 has a meaning different from that which it had prior to 2008: at [86].

The CCA held that although the definition of “maliciously” in s 5 was repealed in 2008, its effect in relation to charges of murder is preserved by Clause 65 in Schedule 11 (“Savings and Transitional Provisions”). Clause 65 was inserted by the amending Act in 2008: at [87]-[88]. Clause 65 states:

“The repeal of section 5 .... does not affect the operation of any provision of this Act (including a repealed provision) that refers to ‘malicious’ or ‘maliciously’ or of any indictment or charge in which malice is by law an ingredient of the crime” :at [82]-[86].

Thus “malicious” in s 18(2)(a) is to be read and interpreted as though s 5 had not been repealed: at [88].

As to what “malicious” means in s 18(2)(a), the CCA stated that the purpose of s 5 was to adopt and then extend the ordinary understanding of “malice”: at [92]. Section 5 stated:

“Every act done of malice ... and without lawful cause or excuse ... shall be taken to have been done maliciously.”

Section 5 further declared that certain acts done without malice shall nevertheless be taken to have been done maliciously. Those acts are:

- acts done with indifference to human life or suffering (and without lawful cause or excuse);
- acts done with intent to injure either a person or a corporate body (in property or otherwise) (and without lawful cause or excuse) (although it is difficult to see how an act done with intent to injure could be seen as other than malicious);
- acts done recklessly or wantonly.

The effect of s 5 is to declare that acts done with a variety of states of mind (other than those that come within the ordinary understanding of “malice”) are to be taken to have been done maliciously: at [92]; *Mraz* (1995) 93 CLR 493; *Coleman* (1990) 19 NSWLR 467.

The CCA held that in this case, it would be open to a jury to conclude the ignition of the ring burner was done recklessly - an act done recklessly is expressly within s 5. The expert evidence at trial clearly showed a dangerous chemical operation was undertaken in unsuitable premises: at [95].

The CCA stated if the Court was wrong in concluding that clause 65 in Schedule 11 preserves, for the purposes of s 18(2)(a), the application of s 5, then “malicious” must be given its conventional legal meaning. “Malice” and its counterparts are to be given a broad meaning and are well able to encompass a dangerous act undertaken in the course of illegal drug manufacturing in inadequate premises: at [98]-[102]; *Safwan* (1986) 8 NSWLR 97.

The CCA thus concluded that whether “malicious” in s 18(2)(a) is to be interpreted in the light of s 5, or absent that light, the respondent’s submission must fail: at [103].

### ***Affray – elements – conviction quashed***

In *Mann* [2016] NSWCCA 10 the appellant was convicted of affray. The CCA quashed his conviction and entered an acquittal.

The Crown case was that the appellant was present during a fight between two men at a park and that he had shot the victim; in the alternative, that he was a participant in a joint criminal enterprise to engage in an affray.

The CCA held the verdict was unreasonable and cannot be supported by the evidence. The evidence fell well short of proving encouragement of the participants in the fight, or the readiness to assist, necessary to establish the appellant’s involvement in the offence, whether through pre-concert or as principal in the second degree. It could establish no more than that he was a spectator. Even accepting the appellant attended the park with the others, absent the evidence that the appellant shot the victim, the evidence is silent as to where he was or what he did at the time of the fight: at [28]; *Phan* (2001) 53 NSWLR 480; *Chishimba & Ors* [2010] NSWCCA 228; *Donnelly* [2001] NSWCCA 394.

## **3. BAIL ACT CASES 2016**

### ***Multiple bail applications – s 74 Bail Act 2013***

Section 74 *Bail Act 2013* states that a court that refuses bail is to refuse to hear subsequent applications in respect of the same offence unless there are grounds for a further release

application. Grounds for a further release application include: relevant material information that was not presented in the previous application (s 74(3)(b)) or circumstances have changed since the previous application (s 74(3)(c)).

In **BNS** [2016] NSWSC 350 the applicant had been bail refused in relation to drug offences. His fiancée had offered a surety of \$50,000. In this second bail application, the applicant said that his mother was offering surety of \$1M and submitted this satisfied s 74.

Garling J allowed the hearing of further release application under s 74 finding that the change in the identity of surety and the sum offered was “material” information: at [46]. However, the application for bail was dismissed: at [64].

Garling J noted that making of submissions by a legal representative different in quality or quantity from an earlier application by another legal representative, does not fall within the terms of s 74. Submissions are not information, nor do they constitute a change of circumstances relevant to the grant of bail. The purpose of s 74 is not to give an applicant the right to a second hearing of a bail application simply because a lawyer thinks they have a more persuasive argument than on an earlier occasion: at [42]-[44].

Under s 74 a court is first required to refuse to hear a further release application unless particular grounds are established. Change in surety and the amount are not always regarded as a change of circumstances or as material information relevant to the grant of bail. It is always a question of fact and degree. A court needs to assess, in the context of the seriousness of the charge and all of the other circumstances relevant to a bail application, whether a change in the identity of a surety and the sum being offered are “material”: at [45]-[46].

### ***Show cause offence – matters which have been found to or may satisfy ‘show cause’ requirement***

In **McAndrew** [2016] NSWCCA 58 the applicant was charged with armed robbery, which is a “show cause” offence under s 16A *Bail Act 2013*. An authority making a bail decision for a show cause offence must refuse bail unless the accused shows cause as to why their detention is not justified: s 16A.

The CCA refused the bail application. The applicant’s personal circumstances of his partner expecting a child, his grandmother’s death, mother’s ill-health and intention to plead not guilty were not sufficient to show cause why his continued detention is not justified: at [6]-[7], [10].

The CCA noted that the Act does not contain an exhaustive or inclusive definition of what an applicant needs to establish in order to show cause. The Court referred to several case examples (at [8]):

- . *Kangas* [2015] NSWSC 1294 (McCallum J): opportunity to enter residential rehabilitation relevant to a show cause requirement.
- . *Boyd* [2015] NSWSC 1065 (Hamill J): combination of factors could operate to satisfy the show cause requirement including prospect of a very lengthy period on remand before trial.
- . *Mawad* [2015] NSWSC 1237 (Hamill J): applicant having children with severe disabilities in need of special care (hearing impairment and autism spectrum disorder) was sufficient in combination with other matters to satisfy show cause requirement.
- . *McCormack* [2015] NSWCCA 221: show cause requirement satisfied by not certain accused would be sentenced to full time custody, being a man of 65 years of age with no prior history of violent offending and with ill- health.

Further, some of the factors listed in s 18 of the Act are relevant to the task of determining whether an applicant has shown cause (at [9]):

- . Length of time that an accused is likely to spend in custody if bail is refused.
- . Need for the accused to be free to prepare for their appearance in court or to obtain legal advice.
- . Prospect applicant suffering from a life threatening or even only a significant medical condition that could not adequately be managed in correctional facility.