# SENTENCING CHECKLIST

JUDGE DINA YEHIA SC

Last updated December 2020

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# 1. ABORIGINAL AND TORRES STRAIT ISLANDER OFFENDERS

The following are extracts from key decisions which provide guidance for courts sentencing Aboriginal and Torres Strait Islander offenders

## ***Bugmy v The Queen* [2013] 249 CLR 571**

French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ said at [36]:

> [36] There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.

## ***Munda v Western Australia* (2013) 249 CLR 600**

French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ said at [53]:

> [53] Mitigating factors must be given appropriate weight, but they must not be allowed 'to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence.' It would be contrary to the principle stated by Brennan J in Neal to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in Neal to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.

The reference to the "principle stated by Brennan J" is a reference to what his Honour said in ***Neal v The Queen* (1982) 149 CLR 305** at 326:

> The same sentencing principles are to be applied ... in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.

The Court in ***Munda*** at [51] cited with approval the following passage from the judgment of Wood J in ***R v Fernando* (1992) 76 A Crim R 58**:

> [63] In sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

### *Kennedy v R* [2010] NSWCCA 260 per Simpson J:

> [50] In ***Fernando***, Wood J set out a series of sentencing propositions that have too often been taken to have been designed specifically for Aboriginal offenders. So to approach that decision is to misunderstand Wood J's intention.
>
> [51] Indeed, Wood J stated this expressly. Proposition (A) and (B) read:
>
>> "(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.
>>
>> (B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender."
>
> [52] That the ***Fernando*** propositions were intended to apply generally was stated in ***R v Hickey*** (NSWCCA, 27 September 1994, unreported) and re-stated by Wood J in ***R v Morgan*** [2003] NSWCCA 230; 57 NSWLR 533 at [20] and [21].
>
> [53] Properly understood, ***Fernando*** is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime. Particularly relevant, in the circumstances of that case (and this) is the impact of alcohol addiction or dependence.

The plurality in ***Bugmy*** at [37] commended the observations of Simpson J in ***Kennedy*** at [53]. The plurality also stated:

> [37] An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.

After referring to the judgment of Wood J in ***Fernando*** (see below under DEPRIVED BACKGROUND), the plurality said:

> [40] Of course, not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence. However, Wood J was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. 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.
>
> …
>
> [43] … The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains

> relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
>
> [44] Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision.

### *Kentwell (No 2)* [2015] NSWCCA 96

The applicant was sentenced for sexual and violence offences. He 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 ***R v Lewis*** **[2014] NSWSC 1127**). A person who has suffered extreme social exclusion on account of race is likely to engage in self-defeating behaviours. Such circumstances 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 in this case was substantial: at [94].

> [86] There are two aspects to the statement of approach by the sentencing judge that require comment. First, it is not "Aboriginality" that is relevant to sentence as a mitigating factor. That which is relevant is the personal circumstances of the appellant to which his Aboriginal descent may be relevant.
>
> [87] Secondly, as Wood J in Fernando, Simpson J in Kennedy and the High Court in Bugmy, all make clear the factors adumbrated by Wood J are a non-exclusive set of factors, derived from previous judgments and learned papers. Fundamentally, they describe circumstances of social deprivation, violence and the like that ameliorate the moral culpability of an offender and allow the Court to understand the circumstances that gave rise to the criminal offending. Those circumstances include reasons for an offender's recourse to violence and anti-social behaviour.
>
> [88] In Fernando, the circumstance that was stressed was a family environment of alcohol abuse and violence. That is not a circumstance that pertains to the appellant. The appellant was, as has been set out, adopted by non-Aboriginal family and was denied knowledge of his culture and was denied an environment that supported him as Baarkindgi.
>
> [89] In R v Lewis [2014] NSWSC 1127, I dealt with the sentencing of a person of Aboriginal descent who had been adopted by Caucasian parents and the social exclusion and discrimination occasioned by that factor or as a result of it. Not every person in that situation will suffer in the same way. Mr Lewis did. The appellant did. During the course of the sentencing of Mr Lewis, I said:
>
> > "[37] The offender (or more accurately his counsel) seeks to rely on the principles summarised by the Court … in R v Fernando (1992) 76 A Crim R

> 58. See the High Court judgment in R v Bugmy [2013] HCA 37 ; (2013) 249 CLR 571 at [18] and [36]–[43]. This is not a traditional Fernando case. Those principles are well known and I will not now repeat them. They largely deal with persons, whether Aboriginal or otherwise, from a deprived background where abuse of alcohol and physical abuse are accepted norms of conduct.
>
> [38] The offender's exposure to such an environment really results, as earlier stated, from his attempt to find a peer group arising from his exclusion from social groups at school and in his neighbourhood. It does not reflect his home environment. Nevertheless, there are analogies."

[90] I proceeded in Lewis to rely upon studies in the United States of America relating to the effect on behaviour of social exclusion and discrimination. It is unnecessary to reiterate those comments or refer in detail again to the studies.

[91] Those studies disclose, somewhat counter-intuitively, that social exclusion from the prevailing group has a direct impact and causes high levels of aggression, self-defeating behaviours, and reduced pro-social contributions to society as a whole, poor performance in intellectual spheres and impaired self-regulation. While intuitively, for those who have not themselves suffered such extreme social exclusion, the response to exclusion would be greater efforts to secure acceptance, the above studies make clear that the opposite occurs.

[92] Thus, a person, such as the appellant, who has suffered extreme social exclusion on account of his race, even from the family who had adopted him, is likely to engage in self-defeating behaviours and suffer the effects to which earlier reference has been made. This is how the appellant has been affected.

[93] Circumstances such as that are akin to a systemic background of deprivation and are a background of a kind that may compromise the person's capacity to mature and to learn from experience: Bugmy at [41] and [43]. As a consequence, this background of social exclusion will, on the studies to which detailed reference has been made in Lewis, explain an "offender's recourse to violence…such that the offender's moral culpability for the inability to control that impulse may be substantially reduced": Bugmy at [44].

[94] The studies by Professor Baumeister, reference to which is contained in the judgment in Lewis, make clear that such extreme social exclusion will likely result in anti-social behaviour and most likely result in criminal offending. However, in each case, there must be evidence to suggest the application of these principles and the effect of the exclusion. In this case, the evidence in relation to the appellant of that factor is substantial.

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]).

### ***Churnside v The State of Western Australia* [2016] WASCA 146**

[1] The gross over-representation of Aboriginal people in the criminal justice system of Australia has attracted the attention of courts, governments, the legal profession and the international and domestic community, the latter including, of course, the Aboriginal community, for many years. The objective of reducing the number of

Aboriginal people in Australia's prisons was the focus of many of the recommendations made in the final report of the Royal Commission into Aboriginal Deaths in Custody. Regrettably, despite the efforts of governments at national, State and Territory level since those recommendations were made in 1991, the disproportionate over-representation of Aboriginal people in Australia's prisons has increased, rather than decreased

…

[3] The Aboriginality of an offender is not, of itself, a characteristic which is relevant to the sentencing process. However, the fact that an offender has experienced a traumatic childhood, deprivation and social disadvantage is relevant to the sentencing process, and it is the long experience of the courts of this State that Aboriginal offenders are over-represented amongst those who have suffered such life experiences. Similarly, although foetal alcohol spectrum disorder, which this appellant suffers, is not a condition which is in any way peculiar to Aboriginal people, such limited evidence as there is suggests that Aboriginal people are over-represented amongst those who suffer from this condition

….

[5] The courts are not in a position to address the social disadvantage in remote Aboriginal communities which cultivates the offending behaviour that produces unacceptably high rates of Aboriginal imprisonment. Nor do the courts control the allocation of government funding which may seek to address that social disadvantage. The challenges facing even well-resourced programs are not to be under-estimated. There will be cases where the seriousness of the offences or the pattern of offending committed by persons in the appellant's position is such as to demand the imposition of a term of imprisonment to be immediately served. Ultimately, community protection may require the removal of an offender from the community.

[6] However, the present case is not one which, having regard to the nature of the offence and the circumstances of the offender, required the imposition of an immediate term of imprisonment. The appellant's cognitive deficits, which are no fault of his, limit the deterrent effect of imprisonment, both at a general and personal level. The community protection which his imprisonment offers is entirely short-term, as time spent in custody will do nothing to address the prospect of the appellant resuming a cycle of offending and imprisonment on release. Further, the appellant is still a very young man for whom the specialist reports indicate hope for rehabilitation if support can be provided in the community…

[7] The circumstances of this case demonstrate that the courts of this State must make every possible effort and take every step consistent with the interests of justice to engage the services of governmental and non-governmental agencies to assist offenders to change their living circumstances and behaviour in a way which will reduce the risk of reoffending, particularly in relation to offenders who suffer from cognitive deficits of the kind associated with foetal alcohol spectrum disorder. Without those efforts being made, the repetitive cycle of offending followed by ineffective punishment is likely to continue indefinitely to the detriment of both the relevant offender and to the safety of the community. The circumstances of this case also demonstrate the practical difficulties of providing appropriate support and assistance to offenders who reside in regional and remote parts of our State. As Aboriginal people are over-represented amongst those who have suffered childhood trauma, deprivation and social disadvantage, and amongst those who suffer foetal alcohol spectrum disorder, and amongst those who reside in regional and remote Western Australia, assiduous effort by the courts of this State to engage and facilitate whatever support and services may be available to offenders with these characteristics is an essential component of any effective strategy to reduce disproportionate Aboriginal imprisonment.

# 2. DEPRIVED BACKGROUND – *BUGMY* PRINCIPLES

**Note**: There is no requirement that a causal link be established between an offender's deprived background and the commission of the offence(s) for which they are to be sentenced in order for the principles espoused in *Bugmy* regarding the relevance of such a background of deprivation to be enlivened. See, eg, ***Dungay v R*** **[2020] NSWCCA 209** per N Adams J (Bell P and Davies J agreeing); ***Judge v R*** **[2018] NSWCCA 203** per White JA; ***Perkins v R*** **[2018] NSWCCA 62** per Fullerton J and White JA, all cited below.

## *R v Fernando* (1992) 76 A Crim R 58 per Wood J at 62–63

As I read those papers and decisions they support the following propositions:

(A) The same sentencing principles are to be applied in every case irrespective of the identity of a Particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.

(B) The relevance of the aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into accounts as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within aboriginal communities, and the grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

(F) That in sentencing persons of aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little

> experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.
>
> (H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.

### ***R v Millwood*** **[2012] NSWCCA 2 per Simpson J**

Justice Simpson explained the relevance of evidence of an offender's background of deprivation:

> [69] … I am not prepared to accept that an offender who has had the starting life the respondent had bears equal moral responsibility with one who has had what might be termed a normal or advantaged upbringing. Common sense and common humanity dictate that such a person will have fewer emotional resources to guide his or her behavioural decisions. I should not be taken as implying that such a person bears no moral responsibility, but I consider that the DPP's submission significantly underestimates the impact of a dysfunctional childhood. Indeed, it sits uneasily with the immediately preceding acknowledgement that his upbringing has been tragic and dysfunctional. That his background is relevant consideration affording some of a limited mitigation is entirely consistent with the approach taken by Justice Wood in *Fernando*, a decision which has repeatedly been followed in this Court. If that were not so there would be no purpose in sentencing courts receiving, as they invariably do, evidence concerning the personal background of offenders.

### ***Bugmy v The Queen*** **[2013] 249 CLR 571 per French CJ, Hayne, Gummow, Kiefel, Bell and Keane JJ**

> [43] … The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
>
> [44] Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision.

### ***Munda v Western Australia*** **(2013) 249 CLR 600**

The High Court acknowledged that general deterrence may have limited utility in some circumstances:

> [54] It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by

rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion. That having been said, there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.

### *Gardener v R* [2015] NSWCCA 170 per R A Hulme J (Price and Davies JJ agreeing)

[51] This case presented a number of difficult and conflicting issues. On the one hand there was a serious example of the offence of armed robbery committed by an offender who had just been released on parole for similar offences and who had an extensive criminal record. On the other hand, the offender had derived from a most unfortunate, deprived and dysfunctional background who had mental health and substance abuse problems and who had become institutionalised from a very early age

…

[55] True it is that the judge said that "there is no clear causal connection established between the offender's issues and the commission of the offences". But I have earlier referred (at [36]) to her acceptance that the applicant's intellectual and psychological problems rendered him less able to exercise the judgment and self-discipline that other people might exercise. This was recognition by her Honour that there were factors relating to the mental condition of the applicant that were relevant to his commission of the offences.

[56] This was an approach that was well open to her Honour in her assessment of the evidence that was before her.

### *Ingrey v R* [2016] NSWCCA 31 per Hoeben CJ at CL (Adams and Fullerton JJ agreeing)

[34] It is true, as the Crown submitted, that in *Bugmy v The Queen* the plurality said:

> "40 … 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)

[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

…

> [39] It follows that although the applicant's background was marked by exposure to regular criminal activity, it was not of the kind (regrettably found all too often in such cases) where the abuse of alcohol and alcohol-fuelled violence were endemic. The applicant's background was considerably better than that described in *Bugmy*, Fernando and a number of similar cases which have come before the courts. Nevertheless, the applicant's exposure to crime at an early age would still have "compromise[d] the person's capacity to mature and learn from experience" (*Bugmy* at [43]).

### *Kelly v R* [2016] NSWCCA 246

Per Rothman J (Hoeben CJ at CL and R A Hulme J agreeing):

> [46] The Court is thus required to re-sentence. As the Crown correctly notes, the provisions of s 21A(5AA) of the *Crimes (Sentencing Procedure) Act 1999*precluded the use self-induced intoxication of an offender at the time of an offence as a mitigating factor in determining the appropriate sentence.
>
> [47] Even before the introduction of that relatively new sub-section, the intoxication by alcohol or drugs ordinarily did not mitigate the penalty to be imposed on a particular offender: *Bourke v R* [2010] NSWCCA 22; 199 A Crim R 38 at [26].
>
> [48] Nevertheless, as McClellan CJ at CL in *Bourke* said, that ordinary rule does not apply where the intoxication is the result of an addiction and the original addiction did not involve a free choice. His Honour's comments were that offenders could not expect reductions in sentence merely on account of the offence being committed while the offender was intoxicated.
>
> [49] The Crown submits that the effect of s 21A(5AA) of the *Crimes (Sentencing Procedure) Act* 1999 is also "to abolish" that part of *R v Fernando* (1992) 76 A Crim R 58 that the High Court approved in *Bugmy v The Queen* [2013] HCA 37; (2013) 249 CLR 571. I do not agree with that last mentioned submission.
>
> [50] The effect of *Fernando* and of *Bugmy* is to recognise that, in certain communities to which the circumstances in *Fernando* and *Bugmy* applied, the abuse of alcohol and drugs is so prevalent and accompanied by violence that the intoxication no longer fits the description of being "self-induced". In that way, the intoxication fits the description to which McClellan CJ at CL referred in *Bourke*.

### *Taysavang v R; Lee v R* [2017] NSWCCA 146

The Court of Criminal Appeal sought to limit the application of the *Bugmy* principles to cases where the relevant offending was planned:

> [41] This Court was referred to *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37 and *Ingrey v R* [2016] NSWCCA 31. In *Bugmy v The Queen* following statement of principle was made:
>
>> [44] ... An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

[42] It was sought to extend this principle so as to impute a reduction in moral culpability for the offence of drug supply which is under consideration here. As her Honour found, the offence involved planning and organisation rather than impulsivity. There was nothing in the evidence to suggest that frustration on the part of Mr Taysavang gave rise to unconsidered action on his part. It was not an offence of a kind that could sensibly be regarded as flowing from dysfunctional tendencies subconsciously absorbed from experience within the offender's family in early childhood.

[43] Contrary to the appellant's submission her Honour's finding that he "knew full well what he was doing" was a cogent reason for not finding any reduction in moral culpability upon this principle. The material before her Honour did not suggest that the care Mr Taysavang had received from his parents up to the age of 5 or from his grandparents over the next 9 years was in any way deficient or that it had predisposed him to impulsive wrongdoing, in the way contemplated by the decision in *Bugmy v The Queen.*

### ***Ohanian v R* [2017] NSWCCA 268 per Hamill J (Gleeson JA and Rothman J agreeing)**

[21] The part of the judgment that is challenged on appeal is where his Honour said:

> "I do, however, find that the offender came from a family background which on his account was dysfunctional during a sensitive time of his upbringing. Factors of that nature do not exhaust themselves, although the fact of the matter is their force in a mature man who has had ample opportunity to address his difficulties that may be diminished by reasons of that factor."

[22] I accept the applicant's submission that the suggestion by the sentencing Judge that this factor was "diminished" because he was "a mature man" who had "ample opportunity to address his difficulties" is contrary to the law as explained by the High Court in *Bugmy v The Queen.*

…

[25] There is no relevant difference between the approach taken by the Court of Criminal Appeal in *R v Bugmy* and the approach taken by the sentencing Judge in the present case. In each instance, the court took into account the dysfunctional background but held that its impact on the sentencing exercise was "diminished" by the passage of time because (in *Bugmy*) there was a lengthy history of offending and (in this case) the applicant had "ample opportunity to address his difficulties."

[26] The respondent attempted to distinguish this case from *Bugmy* on two bases. First, it was submitted that the Court of Criminal Appeal in *Bugmy* "effectively [reduced] it to the point that it had no weight whereas in [the present case] the sentencing Judge was in fact still giving it weight." However, this submission cannot be accepted given that "Hoeben JA said that consideration of the appellant's background of social deprivation remained a matter of relevance which could properly be taken into account in sentencing".

[27] The second basis upon which the respondent sought to distinguish *Bugmy* was that the present case involved "planning and organisation". Reliance was placed on certain observations by this Court in *Taysavang v R; Lee v R.* However, it was not on this basis that the sentencing Judge in the present case "diminished" the significance of the applicant's dysfunctional background. Rather, it was on the basis that he had "ample opportunity" to address his problems. Further, while the offence involved a degree of planning, there was little evidence of the extent of that planning. Finally, the offence was committed in the context of Mr Ohanian's involvement in the

drug culture, which was at the very heart of his dysfunctional upbringing. He was introduced to drugs at a tender age by his stepfather and was exposed to drug use and the criminal milieu surrounding drugs throughout his formative years.

## *R v Nabalarua; R v Quinlan* [2017] NSWDC 328 per DCJ Yehia SC

[131] The High Court in *Bugmy v The Queen* (2013) 249 CLR 571, dealt, amongst other things, with the specific offending conduct involved in that case. In reference to that specific conduct the High Court made the statement referred by the Court of Criminal Appeal in *Taysavang*

[132] However, to rely solely on this portion of the judgment (*Bugmy* at [44]) ignores other important passages of the same judgment.

[133] At paragraph 42, the Court, in referring to the submissions of the Director of Public Prosecutions on the appeal, said:

> "the Director acknowledges that the effects of profound deprivation do not diminish over time and he submits that they are to be given full weight in the determination of the appropriate sentence **in every case**" (emphasis added).

[134] Furthermore, the High Court held that the Director's concession should be accepted. The Court went on to say:

> "The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending".

[135] The principle enunciated by the High Court in *Bugmy* cannot be limited in the way contended for by the Crown in this case. To so limit the application of principle is arguably to err in the same way the Court of Criminal Appeal did when it upheld the Crown's inadequacy appeal in *Bugmy.*

[136] The High Court did not limit the application of principle to offences that are wholly impulsive. Indeed, recognition that a background of deprivation may compromise a person's capacity to mature and to learn from experience may be as relevant to offending conduct that involves some planning as it is in cases of offences born of frustration or anger. All depends upon the circumstances of the individual case.

[137] The plurality in *Bugmy* were not saying that a consideration of an offender's childhood of deprivation and disadvantage was optional: (see *Ingrey v R*[2016] NSWCCA 31 at [35]). What the plurality clearly had in mind was that there may be countervailing factors (such as specific deterrence or the protection of the community) which may reduce the weight to be given to a background of disadvantage or deprivation.

[138] In *R v Millwood* [2012] NSWCCA 2, Simpson J said:

> "I am not prepared to accept that an offender who has the start in life that the respondent had bears equal moral responsibility with one who has had what might be termed a 'normal' or 'advantaged' upbringing. Common sense

> and common humanity dictate that such a person will have fewer emotional resources to guide his (or her) behavioural decisions."

[139] This is not to say that such a person bears no moral responsibility. It is simply to say that an offender's dysfunctional childhood is one of the many factors to be taken into account in assessing that person's moral culpability and determining the appropriate penalty.

[146] But to submit that evidence of childhood deprivation and disadvantage has no or little bearing on an assessment of moral culpability where an offence involves planning is inconsistent with the statement of principle in *Bugmy*. I reject the Crown's submission that the principle enunciated by the High Court in *Bugmy* is to be shackled or diluted in the way contended for.

### *Perkins v R* [2018] NSWCCA 62

Hoeben CJ at CL stated at [42]:

> On my reading of *Bugmy v R* it is not sufficient to simply establish some elements of a deprived upbringing and/or the presence of domestic violence unless there is evidence or it can be properly inferred that such exposure "may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced."

However, the plurality held at [77]:

> Nor did the plurality say that if such a background of deprivation is established it will only be a mitigating factor if a causal link between the background of deprivation and the offence is established. Gageler J said (at [56]) that "The weight to be afforded to the effects of social deprivation in an offender's youth and background is in each case a matter for individual assessment."

Further, Fullerton J at [100] stated:

> White JA noted at [77], the plurality in *Bugmy* did not say that deprivation will only be a mitigating factor lessening the moral culpability of the offender if it is causally linked to the offending but, rather, to adopt the approach of Gageler J at [56], the effects of social deprivation and its weight in the sentencing exercise is a matter for individual assessment.
>
> [102] While the weight of the applicant's life experience in a violent household with a drunk man in the overall assessment of his subjective circumstances might not ultimately be significant in the sentencing result, for the reasons outlined above, it was an error for the sentencing judge to discount it as irrelevant because there was no evidence of it being causally related to his offending.

### *Judge v R* [2018] NSWCCA 203

White JA held that a causal connection is not required; the effects of social deprivation and its weight in sentencing are a matter for individual assessment:

> [30] In Perkins v R [2018] NSWCCA 62 I said:
>
>> [77] In *Bugmy* the High Court neither endorsed Mr Bugmy's submission (at 581) that no causal connection between the offender's aboriginality and the

> commission of the offence was needed, nor the submission of the Crown (at 579) that for systemic factors establishing profound social deprivation to diminish the moral blameworthiness of a particular offence, they must be causally linked. The plurality (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) said that if an offender seeks to rely on his or her background of deprivation in mitigation of sentence, he or she needs to point to material tending to establish that background (at [41]), but did not say that if such background of deprivation is established it will (as distinct from may) be a mitigating factor. Nor did the plurality say that if such a background of deprivation is established it will only be a mitigating factor if a causal link between the background of deprivation and the offence is established. Gageler J said (at [56]) that 'The weight to be afforded to the effects of social deprivation in an offender's youth and background is in each case a matter for individual assessment.'
>
> [78] The plurality's reference to the decision in *R v Engert* (1995) 84 A Crim R 67 is consistent with their Honours' also declining to lay down a prescriptive rule to govern the exercise of the sentencing discretion. In Engert Gleeson CJ said (at 68):
>
> > [W]hat is called for is the making of a discretionary decision in the light of the circumstances of the individual case and in the light of the purposes to be served by the sentencing exercise...
>
> [80] Establishing a connection between a background of social deprivation or profound social deprivation and the offending is likely to reduce the offender's moral culpability. In some cases that causal link may be inferred (*R v Millwood* [2012] NSWCCA 2 at [69]).

Fullerton J agreed at [100]:

> ... the plurality in *Bugmy* did not say that deprivation will only be a mitigating factor lessening the moral culpability of the offender if it is causally linked to the offending but, rather, to adopt the approach of Gageler J at [56], the effects of social deprivation and its weight in the sentencing exercise is a matter for individual assessment.
>
> There was no error in the primary judge's finding that Mr Judge's dysfunctional background did not explain his criminality on the night of the offence. In so finding, the primary judge did not discount Mr Judge's background as irrelevant to the sentencing discretion. Rather, he declined to make a finding of a causal relationship between the background of social deprivation and the offending. Once his Honour rejected the contrary opinion of Ms Wakely, as his Honour was entitled to do, there was no error in that approach.

## ***Riley v R*** **[2019] NSWCCA 92 per Davis J (MacFarlan JA and R A Hulme J agreeing)**

> [37] Making all due allowance for the fact that the Remarks on Sentence were delivered ex tempore, it is difficult to resist the conclusion that his Honour's remarks (at [31] above) are inconsistent with what was said in *Bugmy* at [44]. His Honour first notes the relevance of the *Bugmy* principle, but then appears to qualify it when suggesting that the applicant had time to overcome her background, with the result that her background provides "some mitigation". It may be accepted that what his Honour said is perhaps ambiguous, but the last two sentences of the passage suggest that "full weight" was not given to the applicant's background, as *Bugmy* requires. Similar remarks made in this Court in *Bugmy* [2012] NSWCCA 223 at [50] resulted in the High Court upholding the offender's appeal in that case.

## *Wood v R* [2019] NSWCCA 309 per Hoeben CJ at CL

> [120] While the applicant's upbringing involved exposure to violence and drug and alcohol abuse, it falls short of the "profound childhood deprivation" discussed in *Bugmy*. Ms Duffy noted that the applicant's father had stopped drinking and using drugs by the time the applicant was 12 years old. At primary school, the applicant was good at reading and maths and he completed the equivalent of year 10 with a different teaching approach that helped him achieve his certificate and this led to employment opportunities and an apprenticeship.
>
> [121] Nevertheless, although the applicant's childhood circumstances were not as bad as those of the offender *Bugmy*, it was certainly a matter which could and should be taken into account by way of mitigation of the applicant's offending. It provided, at least in part, some explanation for the applicant's excessive alcohol consumption and his ready resort to violence.

## *Hoskins v R* [2020] NSWCCA 18 per R A Hulme J

> [78] The applicant's disadvantaged and dysfunctional background operated in two ways in his favour. First, it provided some explanation for his decision to flee the scene immediately after the impact. The Crown's submission that self-interest and self-preservation were key factors may be accepted. However, it was also the case that the applicant's moral culpability was reduced in comparison to a person who had not experienced the substantial trauma of his upbringing. Secondly, the applicant had achieved considerable success in leading an otherwise stable and prosocial life (aside from his traffic record) despite his background. This amply supported the primary judge's findings as to his good prospects of rehabilitation and unlikelihood of reoffending.

## *Nabalarua v R* [2020] NSWCCA 68 per Beech-Jones J (Simpson AJA and N Adams J agreeing)

The relevance of an offender's deprived background goes to both the head sentence <u>and</u> the non-parole period imposed.

> [47] … At the end of the passage the sentencing judge stated the correct principle, namely, that subjective sentences affect "a sentence" that is imposed; ie, both the head sentence and the non-parole period. Further, the balance of the judgment addresses the applicant's subjective circumstances, including those referable to *Bugmy*, in some detail. Nothing in those passages suggests that her Honour considered that material was only relevant to the length of the non-parole period.

## *Kliendienst v R* [2020] NSWCCA 98 per N Adams J (Simpson AJA and Rothman J agreeing)

> [60] In *Bugmy*, French CJ, Hayne, Gummow, Kiefel, Bell and Keane JJ observed the following at [44] (footnote omitted):
>
> > "Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the

> conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender." (Emphasis added.)

[61] The evidence before the sentencing judge included the following:

(1) The applicant's anger difficulties are "likely to be associated with his exposure to violence and trauma in his early life";

(2) The fact that the applicant was fearful of his father "limited his opportunities to develop appropriate emotion regulation and interpersonal skills, and he instead developed a pattern of anger and mistrust";

(4) The applicant's exposure to violence and drug abuse throughout his childhood "likely normalised these behaviours for him";

(3) The applicant, in adulthood, endorsed "some ongoing indicators of trauma response such as difficulty trusting others, reckless behaviours (such as substance use), emotional dysregulation (such as suicidal ideation) and difficulties with anger (as part of an exaggerated "fight" or "flight" response); and

(5) The applicant's depression, anxiety and anger difficulties appear to be a function of a complex trauma response to a persistent lack of safety throughout his early life.

[62] It was common ground that no submission was put to the sentencing judge to the effect that the applicant's moral culpability could be "substantially reduced" because of his childhood exposure to extreme violence and alcohol abuse which might explain his "recourse to violence when frustrated". This is despite the fact that there was uncontested evidence of the applicant's deprived up-bringing and expert evidence concerning his anger management difficulties.

[63] The Crown relied upon the principles to be derived from *Zreika v R* (2012) 223 A Crim R 460 ("*Zreika*") in this regard. As Johnson J observed at [81] in *Zreika*, in sentencing appeals to this Court:

> "….the Court is reviewing the exercise of a discretionary judgment and not rehearing a plea of mitigation. It is not the occasion for the revision and reformulation of the case presented below. The Court will not lightly entertain arguments that could have been put, but were not advanced on the plea, and will have an even greater reluctance to entertain arguments that seek to resile from concessions made below or are a contradiction of submissions previously made."

[64] Johnson J went on to observe at [82]:

> "In rare circumstances, a factor which may operate in mitigation of penalty (and which appears clearly from the material before the sentencing Judge) may have been overlooked by defence counsel and the sentencing Judge. In such a case, this Court may be invited to have regard to it, often in circumstances where the Crown will accept that the relevant material raised a factor which should unequivocally operate in the offender's favour on sentence. As Warren CJ said in *Bayram v R* at [29],it may 'render a serious injustice' if an offender was not able to correct the error in such a case. This approach reflects the primacy of the rule that appeal grounds should relate to arguments put, and decisions made, at first instance. At the same time, criminal appellate courts should be able to correct a miscarriage of justice,

> or serious injustice, in the clear and rare cases where the relevant matter has not been relied upon at first instance.”

[65] These principles are well established but they do not mean that this Court will never entertain a ground of appeal contending failure to have regard to a mitigating factor that was not specifically addressed at sentence. That this is so can be seen in the decision of McCallum J (as her Honour then was) (with whom Beazley P and Davies J agreed) in *Griffin* at [36]-[38].

[66] In Griffin it was put for the first time in this Court that the sentencing judge had failed to have regard to the offender’s mental health. The Crown relied upon *Zreika* to argue that such a ground could not be raised for the first time in this Court. Her Honour observed at [36]:

> “While counsel’s failure to address the issue in any helpful way was unfortunate and may go some way to explaining how the process may have miscarried, I do not think the observations made in *Zreika* should preclude the Court from entertaining the present ground. The ultimate question in sentence appeals is whether the applicant was sentenced according to law. That issue is not necessarily determined, as an issue raised in a civil appeal might be, by the answer to the question whether the point was taken in the court below.”

[67] It is to be accepted that the facts in *Griffin* differed in significant respects to the present case. In that decision the applicant’s mental condition was not given any particular consideration by the sentencing judge, whereas it is common ground that in the present matter the sentencing judge clearly referred to the applicant’s childhood and the unchallenged evidence in the extracts I have set out above. But it seems to me that the fact that the applicant’s counsel did not expressly raise the Bugmy approach does not mean that there was no error in the failure to consider it given the uncontested material before the Court. Nor do I consider that the approach taken in Griffin is inapplicable to a case such as this applicant’s. That is, I do not accept the Crown submission that this Court ought to decline to entertain this ground because the applicant has not made out a case of profound deprivation of the kind observed in Griffin or, for that matter, *Bugmy*.

[68] His Honour provided detailed reasons in this matter and made numerous references to the applicant’s difficult and violent upbringing, but the fact remains that there is no mention of the principles in *Bugmy*, nor to the question of the applicant’s moral culpability in the sentencing reasons. Contrary to the submission of the Crown, this case could be considered a classic *Bugmy* case where the “sins of the father” have resulted in the applicant turning to violence when frustrated. His inability to control that impulse reduces his moral culpability. Although it was not squarely put to his Honour that the *Bugmy* principles were relevant, they are nonetheless applicable when there is uncontested evidence that the factual basis for raising them is present.

### *Dungay v R* [[2020] NSWCCA 209]() per N Adams J (Bell P and Davies J agreeing)

The Court held that no causal link is required to enliven the *Bugmy* principles:

[152] The fact that a causal link may not be needed in order to have regard to *Bugmy* factors was endorsed in *R v Irwin* [2019] NSWCCA 133. Walton J noted at [116] that:

> “…The social deprivation and abuse suffered by the respondent was recognised by Mr Borkowski and Dr Furst and contributed to their diagnoses of the psychological conditions suffered by the respondent. It was

> unnecessary in those circumstances to require, as a necessary condition to permit mitigation of sentence, a causal link between that background and the offending. I accept, with respect, the observations of White JA in Perkins as to the significance of a background of social deprivation to sentencing."

[153] Having regard to these principles, it seems to me that although the effects of childhood deprivation are to be given full weight in every sentencing decision, that does not mean that moral culpability must be reduced in every case. Full weight can be given to such a childhood in other ways as part of the process of instinctive synthesis.

## *Prince v R* [2020] NSWCCA 268

The Court confirmed the principle that an offender's background of deprivation may be relevant to a reduction of moral culpability and the weight to be given to general deterrence: see [36]-[40].

## *R v Turnbull* [2020] NSWSC 1785

[44] In her oral submissions, Ms Manuell SC referred to the lack of support and the failure of the system to intervene at critical stages in Ms Turnbull's life:

> "There has been very little support given to the offender. So that by the age of 14 years or 15 when she has her first child she just returns to Gilgandra, even though she is underage, pregnant at 14 and without any resources provided to her at all. That has continued.
>
> The Court provided or imposed conditions of conditional liberty, rehabilitation, those kinds of matters, counselling, drug rehabilitation. The alienation that the offender must have felt by that stage it was in many ways too little too late. She, of course, would have been a perfect candidate for the Walama Court, if such a court were available to her in Tamworth or in Gilgandra or Coonamble or even Dubbo. But there was never that intensive supervision from any government agency at a time when she needed it."

[45] I accept these submissions. There appears to have been a failure in the system to intervene at critical stages of Ms Turnbull's life. Ms Turnbull is an abandoned and vulnerable Aboriginal offender who has appeared in the lower courts on many occasions. It is difficult to escape the conclusion that intensive and culturally appropriate intervention and supervision, of the kind that a focussed and dedicated court would have provided, may have assisted the offender during her most difficult times and broken the cycle of violence, abuse and offending.

**Note:** The ***Bugmy* Bar Book** webpage provides free, accessible and fully referenced summaries collating authoritative research on experiences of various forms of socioeconomic disadvantage and deprivation. The purpose of this resource is to assist practitioners and courts in the preparation and presentation of evidence to establish the application of the *Bugmy* principles in sentencing and s 32 proceedings.

**https://www.publicdefenders.nsw.gov.au/barbook/**

**Available chapters include:**

- FASD
- exposure to domestic and family violence
- incarceration of parents and caregivers
- interrupted school attendance and suspension
- out-of-home care
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- Aboriginal and Torres Strait Islander Stolen Generations and descendants
- cultural dispossession
- social exclusion
- acquired brain injury
- hearing impairment
- homelessness
- unemployment
- low socioeconomic status.

# 3. OTHER SUBJECTIVE FACTORS

## ADDICTION

### *R v Henry* [1999] NSWCCA 111; (1999) 46 NSWLR 346; (1999) 106 A Crim R 149

[273] In my view the relevant principles are as follows:

(a) the need to acquire funds to support a drug habit, even a severe habit, is not an excuse to commit an armed robbery or any similar offence, and of itself is not a matter of mitigation;

(b) however the fact that an offence is motivated by such a need may be taken into account as a factor relevant to the objective criminality of the offence in so far as it may throw light on matters such as:

(i) the impulsivity of the offence and the extent of any planning for it; (cf Bouchard (1996) 84 A Crim R 499 at 501-2); and Nolan (1988) VSCA 135 (2 December 1998);

(ii) the existence or non existence of any alternative reason that may have operated in aggravation of the offence, eg that it was motivated to fund some other serious criminal venture or to support a campaign of terrorism;

(iii) **the state of mind or capacity of the offender to exercise judgment**, eg if he or she was in the grips of an extreme state of withdrawal of the kind that may have led to a frank disorder of thought processes or to the act being other than a willed act;

(c) **It may also be relevant as a subjective circumstance**, in so far as the origin or extent of the addiction, and any attempts to overcome it, might:

(i) impact upon the prospects of recidivism/rehabilitation, in which respect it may on occasions prove to be a two-edged sword (eg Lewis Court of Criminal Appeal New South Wales 1 July 1992);

(ii) suggest that the addiction was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, for example where it arose as the result of the medical prescription of potentially addictive drugs following injury, illness, or surgery (cf Hodge Court of Criminal Appeal New South Wales 2 November 1993; and Talbot); or where it occurred at a very young age, or in a person whose mental or intellectual capacity was impaired, so that their ability to exercise appropriate judgment or choice was incomplete;

(iii) justify special consideration in the case of offenders judged to be at the "cross roads": Osenkowski(19882) 5 A Crim R 394.

[274] To go further, and to accept the fact of drug addiction as a mitigating factor generally, would not be justified in principle.

Simpson J agreed with Wood CJ at CL on this issue and added some observations of her own:

> [336] It is a mistake, in my opinion, to regard drug addiction as a starting point. It is an end point, or a point on the way to the end, of a process. Where the process begins may vary in individual cases but it does not necessarily begin when a person decides to use a prohibited substance. It probably has its origins well before the date of the first use of drugs. In the worst, or least forgivable, cases it may have its origins in arrogance, in an antipathetical attitude to the laws of society, or in weakness of character. In other cases, I have no doubt, it has its origins in social disadvantage, poverty, emotional, financial, or social deprivation, poor educational achievement, unemployment, and the despair and loss of self-worth that can result from these circumstances or any combination of them. In this court one sometimes sees cases in which drug taking stems from sexual assault or exploitation, sometimes committed when the person who turns to drugs, and who comes before the court, is very young, and sometimes the precipitating events have occurred many years before. Drug addiction is not always the disease; it is, as often as not, a symptom of social disease.
>
> …
>
> [344] Where circumstances such as those I have mentioned (or others equally deserving of compassion) have been the foundation for the drug addiction, and part of the causal chain leading to the commission of crime, then it would be appropriate, in my view, for the rehabilitative aspects of sentencing to assume a more significant role than might otherwise be the case. In an appropriate case, rehabilitation might outweigh other sentencing factors. In order for those circumstances to provide a reason for reduction of sentence, however, there would need to be strong evidence of real progress towards actual rehabilitation. I would not wish to be understood to be saying other than that leniency of the kind to which I refer depends heavily upon demonstrated (as distinct from theoretical) rehabilitative prospects.

### ***Leigh Brown v R* [2014] NSWCCA 335 per Hidden J:**

> [28] These observations are apposite to the present case. True it is, as the Crown prosecutor in this court pointed out, that the applicant stood for sentence for a persistent course of criminal activity, against the background of an unfavourable criminal history. Further offences were taken into account when he was sentenced for both of the principal offences. Nevertheless, there was force in the submissions of counsel appearing for him in the sentence proceedings that he was "a classic product" of his childhood and, at the time of sentence, was "at a cross-roads."
>
> [29] It does not appear from his remarks on sentence that his Honour approached the matter in this way. This is a case in which the applicant was entitled to a measure of leniency for the reasons articulated by Simpson J in the passage from her judgment in Henry which I have quoted in [27] above. Equally, it is a case in which, to adopt her Honour's words in the passage last cited, it was "appropriate...for the rehabilitative aspects of sentencing to assume a more significant role than might otherwise be the case." There was also "strong evidence of real progress towards actual rehabilitation." That said, while I myself might assess his prospects of rehabilitation as better than "somewhat guarded", it is important that a sentence be structured so as to afford him the opportunity of a lengthy period of conditional liberty, subject to supervision and the sanction of parole. To that end, like his Honour, I would find special circumstances.
>
> [30] While taking these matters into account, it remains necessary to pass a sentence which adequately reflects the applicant's criminality. **However, the non-parole period, while also meeting the need for an appropriate measure of**

**punishment and retribution, must recognise the progress he has made towards defeating his drug addiction and encourage him to remain on that rehabilitative path.** The balance of term I propose would provide for a lengthy period of supervision and maintain the sanction of parole for a further period thereafter.

R S Hulme AJ added:

[36] For someone who was in the applicant's situation, his achievements are remarkable. They lessen greatly the weight needing to be given to personal deterrence, rehabilitation and the protection of the community in determining the length of the applicant's non parole period. No doubt his reform has its own rewards but it enables the Court also to provide some reward.

### *Dang v R* [2013] NSWCCA 246

Per Basten JA at [23]–[30]:

[23] First, the most detailed discussion in the authorities in this State is to be found in the guideline judgment of **R v Henry** [1999] NSWCCA 111; 46 NSWLR 346 at [174]-[204] (Spigelman CJ), [215]-[277] (Wood CJ at CL, RS Hulme J agreeing) and [335]-[356] (Simpson J). The significance of addiction as a factor affecting the deterrent operation of a sentence may be different in a case of manufacturing a drug for private use, as compared with offences of armed robbery where the proceeds of crime are destined to feed the addiction.

[24] Secondly, if addiction is an explanation (in part) for criminal behaviour, it is necessary to identify why it is not "in part" an excuse, though not a justification. Thirdly, the distinction involves ideas of moral culpability, which invites a question as to the extent to which a sentencing court is required to assess levels of moral culpability.

[25] In this context, "moral culpability" engages two broad considerations, namely harm to others and freedom of the offender to choose another course. The law recognises the inappropriateness of convicting a person unable to distinguish right from wrong and, indeed, a person who is unable adequately to understand the process of a plea and trial. Further, even where the criminal law has run its course, the law recognises the relevance of mental illness in diminishing culpability for the purpose of assessing an appropriate sentence. But the distinction between mental illness and mental health is not a bright line, nor is the assessment of moral culpability based on freedom of choice transparent. One problem is that the assessment of a factor such as addiction to "ice" is largely beyond the capacity of the Court, at least on the evidence available on this case.

[26] Furthermore, "moral culpability" implies a choice between courses of conduct, some of which are criminal, others of which are not. The classification of that which is criminal and that which is not is a matter for the legislature and is not entirely dependent upon a calculus of harm to others, or even the cost of treatment, borne by the economy as a whole. It is also a matter for the legislature to indicate, by prescription of penalties, the seriousness of contravention.

…

[28] Within the parameters fixed by the legislature, the exercise of discretion by the court will reflect various purposes of the criminal law, including, perhaps primarily, general and personal deterrence. Punishment may involve an element of public retribution, although the role of the courts in that regard should be tempered so as to discriminate between expression of enduring values and the ill-considered emotive

> responses of the moment. Further, deterrence is not promoted by a sentence which is seen to be arbitrary, nor one which interferes with an expectation of rehabilitation. General deterrence is a large element of a condign punishment and will reflect a range of values. Drug use which causes limited harm to others should not attract as heavy a punishment as would actual supply to others…
>
> [29] The circumstance of addiction is also accepted as potentially relevant to moral culpability. A person in the grip of an addiction has less freedom of choice than would otherwise be the case. Moral culpability is a function of perceived freedom of choice. In Cicciarello v Regina [2009] NSWCCA 272 Allsop P, Fullerton and McCallum JJ noted at [15] that in Bowden at [55]-[60] "a distinction was drawn between selling drugs for commercial gain and for feeding a habit." The reasons continued at [17]:
>
>> "Whilst one should be careful about generalising in relation to such factors outside the circumstances of any particular case, here, quite clearly, when one understands the background of this young man and what he was doing, he was not selling for greed or for financial gain, he was selling to feed a drug habit that he had acquired. This does not detract from the fact that he committed a serious offence, but what it does mean is that it was an error, and an important one, to characterise this as selling for financial gain and thus to characterise it as an offence falling within the mid-range."

## *Toole v R; Toole v R* [2014] NSWCCA 318

The applicant contended that the sentencing judge had failed to give proper weight to the evidence of the applicant's mental health problems. Per Basten JA:

> [2] That raised questions, as Hulme AJ has noted, with respect to the strength of the evidence, the manner in which it was taken into account on sentencing and, objectively, its relevance as a factor in mitigation. I agree with that analysis. However, some caution must be exercised in dismissing the evidence as to the applicant's use of anabolic steroids and the consequences as being, in a lay person's terms, a drug addiction and therefore not a factor in mitigation.
>
> [3] A mental illness which is not "self-induced" is treated as a disability or, in morally neutral terms, a misfortune, which may be a material mitigating factor in sentencing. **However, to treat a drug addiction as a self-inflicted condition for which the offender must bear full moral responsibility is a less nuanced approach than the law requires**. To qualify the absolute position by reference to an exception based on "unusual circumstances" certainly reflects the possibility of consideration, although the circumstances are not identified.

## *Cicciarello v R* [2009] NSWCCA 272

> [17] Whilst one should be careful about generalising in relation to such factors outside the circumstances of any particular case, here, quite clearly, when one understands the background of this young man and what he was doing, he was not selling for greed or for financial gain, he was selling to feed a drug habit that he had acquired. This does not detract from the fact that he committed a serious offence, but what it does mean is that it was an error, and an important one, to characterise this as selling for financial gain and thus to characterise it as an offence falling within the mid-range. In our view, that latter conclusion must clearly have been affected by the finding of financial gain because no other basis in the facts could found such a conclusion.

# EXTRA-CURIAL PUNISHMENT

Where the conditions of bail have been onerous or stringent, a sentencing judge may determine that the time spent on bail should be taken into account upon sentence as a form of pre-sentence punishment: ***R v Cartwright* (1989) 17 NSWLR 243; *R v Fowler* (2003) 151 A Crim R 166; *R v Webb* (2004) 149 A Crim R167**.

### *Clinton v R* [2009] NSWCCA 276 per Howie J (Allsop P and Hislop J agreeing)

> [31] This Court has held that extra-curial punishment is a matter that can be taken into account in determining the appropriate sentence to be imposed upon an offender. It can be in the form of retribution meted out by members of the public or injuries suffered by the offender as a result of the commission of the offence: see *Silvano v R* [2008] NSWCCA 118; 184 A Crim R 593. The issue was most recently considered by this Court in *Whybrow v R* [2008] NSWCCA 270 where it was held that "multiple serious injuries" suffered by the applicant were relevant to an assessment of the sentence to be imposed upon him for three offences of dangerous driving causing death or grievous bodily harm arising from the motor vehicle accident in which he suffered the injuries.
>
> [32] However, when the injuries are inflicted by the victim against whom the offence is being committed, the court is entitled to take into account whether the act that caused the injuries was an unreasonable reaction by the victim to the acts of the offender and the degree of the injury inflicted: *Sharpe v R* [2006] NSWCCA 255 at [61] to [67], see also *Alameddine v R* [2006] NSWCCA 317. Another relevant factor may be the seriousness of the offending when compared with the punishment inflicted: see the discussion in *R v Davidson ex parte A-G (Qld)* [2009] QCA 283.

# FOREIGN NATIONALS

### *Moss v R* [2016] NSWCCA 242 per the Court

> [66] Some limited weight is to be given to the applicant's submission that incarceration is particularly onerous for him because he is a foreign national without family in Australia. However his ability to speak English fluently and to have telephone contact with his family overseas limits the impact of this consideration (compare R v Huang (2000) 113 A Crim R 386; [2000] NSWCCA 238 at [18]-[19] and see Yang v R [2007] NSWCCA 37 at [24]-[26]). The applicant complains that his telephone calls are timed and recorded. Whilst the position in this respect has not been suggested to be any different for other persons in custody, the applicant's reliance upon telephone calls is great because of the absence of persons able to visit him.

# GOOD CHARACTER

The good character of the offender is a matter that may be taken into account in mitigation of penalty: ***Ryan v The Queen*** **(2001) 206 CLR 267**; **s 21A(3)(f)** ***Crimes (Sentencing Procedure) Act 1999*** **(NSW)**

### *R v Gent* [2005] NSWCCA 370; 162 A Crim R per Johnson J (McClellan CJ at CL and Adams J agreeing)

> [49] It has been said that there is a certain ambiguity about the expression "good character" in the sentencing context. Sometimes, it refers only to an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving or including a history of previous good works and contribution to the community …

### *Ryan v The Queen* (2001) 206 CLR 267 per McHugh J

> [29] In the sentencing context … being of otherwise good character may in some circumstances suggest that the prisoner's actions in committing the offence for which he or she is being sentenced were "out of character" and that he or she is unlikely to re-offend. For that purpose, the absence of previous convictions is usually regarded as evidence of good character. On the other hand, many previous convictions suggest that the offence for which sentence is being passed was not an "uncharacteristic aberration".
>
> …
>
> [31] What makes a person of otherwise "good character" will necessarily vary according to the individual who stands for sentence. It is impossible to state a universal rule.

His Honour set out two logically distinct stages in the court's consideration of the element of prior good character:

1. It must determine whether the offender is of *otherwise good character*. In making this assessment, the sentencing judge must not consider the offences for which the offender is being sentenced; (at [23]) and

2. If the court determines that the offender is of otherwise good character, the sentencing judge is bound to take that fact into account. (at [25])

The Court held that it was an error for a sentencing judge to refuse to take into account an offender's 'unblemished character and reputation'. Kirby J observed:

> [102] The evidence of good conduct, or of matters which reveal redeeming features of the offender's character, tendered as relevant to sentencing will rarely, if ever, be discarded as immaterial to the sentencing function. The evidence may sometimes be disbelieved. It may sometimes be overridden by the objective seriousness of the offences or by countervailing evidence or by other considerations. But it is a mistake in sentencing to treat such evidence as irrelevant to the task at hand.

There are certain categories of offences where it has been held that limited weight may be given to good character. These include drug couriers, dangerous driving, child pornography offences and white collar crime. The list of categories is not closed: ***R v Gent* (2005) 162 A Crim R 29** at [61]. Possession of firearms is not one of those categories: ***Athos v R* [2013] NSWCCA 205**.

### *Veith v R* [2018] NSWCCA 284 (drug supply)

Issue raised regarding potential inconsistency of *Lam v R* with *Athos* and/or *Parente*

> [31] It is abundantly clear from the authorities that the circumstances of the offending are the key factors in determining the weight to be given to good behaviour, rather than the nature of the offence itself.
>
> [32] However her Honour's general remarks regarding character do not mean that she gave less weight to the applicant's prior good character simply because the offence was one of drug supply.
>
> [33] In stating that "good character is not unusual for people who find themselves in this position and carries less weight in relation to the supply of illicit drugs than they might in other types of offences", it may appear that the sentencing judge fell into error of the kind identified in Athos. However, her Honour made other findings that indicate she evaluated factors in the applicant's offending conduct, including expressing scepticism about the truthfulness of the applicant's assertion that the capsules were mainly for her own use. Her Honour also remarked on the number of capsules and their purity. This ground is not made out.
>
> [34] Counsel for the applicant raised a side issue regarding Lam v R [2014] NSWCCA 50 stating that to the extent that Lam v R at [32]-[33] stands for the proposition that an offender's good character is entitled to lesser weight where he or she is being sentenced in respect of supplying a prohibited drug on the ground that such offences require general deterrence to be emphasised, then that authority is wrong and ought not be followed.
>
> [35] That argument can be dealt with briefly. The observations of Davies J, (R A Hulme and Adamson JJ agreeing), in [33] of Lam need to be read in the context of the issues being considered in that appeal. There his Honour was dealing with the sentencing judge's observations in respect of an applicant who was involved in trafficking heroin and where there was evidence of the extent of his involvement in the organisation and in a number of instances of supply. In [32]-[33], his Honour was dealing with submissions made regarding both general deterrence and the degree of planning involved in the offending, as had been dealt with by this Court.
>
> [36] Considerations of planning and general deterrence are enshrined in s 21A of the Crimes (Sentencing Procedure) Act 1999 as factors to be taken into account in determining the appropriate sentence for an offence.
>
> [37] It was in this setting that his Honour said the following:
>
>> "[32] Nothing in the Remarks on Sentence in the present case suggests that no weight was given to the fact that the Applicant was a first time offender nor that she was not accorded some leniency for that fact.
>>
>> [33] As the ground of appeal makes clear, the complaint is one that less weight was accorded to one factor by the Sentencing Judge. The issue of what weight is to be given to factors is a matter peculiarly within the

> discretion of the Sentencing Judge: R v Baker [2000] NSWCCA 85 at [11]. The Sentencing Judge's statement that less weight is accorded to good character in relation to offences involving drug supply is well supported by authority. There is a variety of reasons for that approach including the importance of both general deterrence as well as planning in drug supply cases: Van Can Ha [2008] NSWCCA 141 at [43]; Sinkovich v R [2011] NSWCCA 90 at [53]."

[38] When considered in context, there is nothing in his Honour's judgment that requires restatement or revision by this Court.

### *Merhi v R* [[2019] NSWCCA 322]

[52] It may be that in some circumstances good character should be given less weight, particularly if the offender has used that good character to gain a position of trust so as to enable the offence to be committed. Having said that, a different situation arises in circumstances in which an offender has not obtained the position of trust with the specific purpose of committing the offence and has demonstrated prior good character over a long period whilst so employed.

[53] The applicant had no prior convictions. She had worked for ABF for a period of 17 years. Whilst she misused the information and knowledge that she had obtained whilst employed by ABF for the purposes of committing the offending, she had, up to the time of commission of the offences, an unblemished record.

## GOOD CHARACTER – CHILD SEXUAL OFFENCES

### *Section 21A(5A) Crimes (Sentencing Procedure) Act 1999*

(5A) **Special rules for child sexual offences** 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.

'Child sexual offence' is defined in s 21A(6).

### *AH v R* [[2015] NSWCCA 51]

*Victim was the daughter of applicant's de facto partner*: The CCA held that the sentencing judge erred in applying s 21A(5A). The applicant's good character played no part in his 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].

### ***R v Stoupe* [2015] NSWCCA 175**

*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].

### ***Quintero v R; Carvajal v R; Salazar v R* [2018] NSWCCA 190**

> [75] It is settled that an offender may be entitled to lenience, if otherwise of good character: *Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21. In that case the offender, a priest, had pleaded guilty to 14 sexual assault offences committed against young boys over a 20 year period, with 39 other offences taken into account on a Form 1. The sentencing judge had declined to take any account of the character evidence led by the offender from a number of witnesses. On appeal it had been concluded that he was not entitled to any leniency on account of that evidence.
>
> [76] It was concluded in Ryan that on sentencing, consideration must be given to evidence of a person's character, without consideration of the offences for which the offender is being sentenced: at [23]-[25]. What weight will be given to evidence of good character must, however, be determined in light of the other evidence which arises to be considered and the nature and circumstances of the offences for which an offender is being sentenced. This may mean that the offender's otherwise good character can only be a small factor to be weighed in the sentencing process: at [33]. But evidence of character that stands to an offender's credit, must be given some weight: at [110]. While in some cases character evidence is of less importance, complete refusal to attach any significance to it whatever, involves error: at [111]-[112].
>
> [78] In Bidgood v R [2016] NSWCCA 138 evidence of good character was also not given any weight on sentence, because of the offending for which the offender was being sentenced. This conclusion was also held to have involved error, given that offending over a period of no more than three months, did not have the effect of negativing good character.

# HARDSHIP TO THIRD PARTIES

The general principle is that hardship to family and dependents is an unavoidable consequence of a custodial sentence and, unless highly exceptional, it does not operate to mitigate the otherwise appropriate sentence: ***R v Edwards*** **(1996) 90 A Crim R 510**. Where exceptional hardship is established, it can be taken into account in shortening the term of the sentence and/or reducing the non-parole period.

### *Dipangkear v R* [2010] NSWCCA 156 at [34]:

> 34 The present situation of the law, relevant to the present appeal, may be briefly stated as follows: -
>
> > (a) Where all the features of the particular case point to the need to impose a custodial sentence but there is evidence of extreme hardship, a court may take into account the extraordinary features of the case in any one of three ways. It may suspend the sentence of imprisonment. Alternatively, the sentence may be shortened, or the non-parole period decreased.
> >
> > (b) Each case will, to a very great degree, depend upon its own facts involving an evaluation of the seriousness of the objective circumstances of the offence committed, the extent of the requirement for general and, perhaps, specific deterrence, and the nature and degree of the impact of the sentence upon the third person.

In the context of a State offence, Button J in ***Kremisis v R*** **[2016] NSWCCA 257** said that the approach taken by the sentencing judge in that case "was consonant" with the approach taken by the CCA over many years – namely, that before hardship to third parties could be taken into account, it must be exceptional.

However, in ***Carter v R*** **[2018] NSWCCA 138** McCallum J referred to the judgment of Beech-Jones J in *Zerafa* and observed:

> [66] His Honour noted at [116] that, although the limitations on considering hardship to third parties derived from Edwards are said to be the subject of "well settled principles" (citing FP v R [2012] NSWCCA 182 at [309] per R A Hulme J), they are sometimes stated in different terms. His Honour observed in that context that the decision in R v MacLeod [2013] NSWCCA 108 at [43] "leaves open the possibility that the 'otherwise appropriate sentence' is one in which hardship to third parties falling short of exceptional circumstances is considered as part of the process of 'instinctive syntheses', even if it cannot be considered as a 'distinct matter justifying any substantial modification of an otherwise appropriate penalty'"

### *R v Zerafa* [2013] NSWCCA 222; (2013) 235 A Crim R 265 per Beech-Jones J

> [113] In ***R v Edwards*** (1996) 90 A Crim R 510 at 516 Gleeson CJ described the following passage from the judgment of Wells J in ***R v Wirth*** (1976) 14 SASR 291 as the "most frequently cited Australian judgment on [the] subject" of the relevance of the impact of incarceration of an offender on third parties:
>
> > "The argument thus presented to us raises the following question: When (if ever), and to what extent (if at all), should the hardship caused, directly or

> indirectly, by a proposed sentence of imprisonment, to the family of, or to others closely associated with, the offender be taken into account by the Court in mitigation of that sentence?
>
> ... Hardship to spouse, family, and friends, is the tragic, but inevitable, consequence of almost every conviction and penalty recorded in a Criminal Court. ... It seems to me that courts would often do less than their clear duty - especially where the element of retribution, deterrence, or protection of society is the predominant consideration - if they allowed themselves to be *much influenced* by the hardship that prison sentences, which from all other points of view were justified, would be likely to cause to those near and dear to prisoners.
>
> But it has been often remarked that the strength of our law lies in the willingness of judges, when applying a principle, not to carry it past the point where a sense of mercy or of affronted common sense imperatively demands that they should draw back. So it is proper that I should here add that, in my opinion**, hardship likely to be caused by a sentence of imprisonment under consideration ought to be taken into account where the circumstances are highly exceptional, where it would be, in effect, inhuman to refuse to do so**. For example, if it were demonstrated to the satisfaction of the court that to send a man to prison would, without much doubt, drive his wife to suicide, it would be a steely-hearted judge who did not, however illogically, at least try to meet the situation by suitably framed orders as to penalty. But further than that, in my judgment, courts should not go." (emphasis added)

[114] Although Wells J warns against sentencing judges being "much influenced" by the hardship that would be occasioned to an offender's family by their incarceration, the principle stated by his Honour goes further. It only allows the hardship likely to be caused to families to be taken into account when the circumstances are "highly exceptional" (cf *R v Kertebani* [2010] NSWCCA 221 at [65]). On its face the principle stated by Wells J in *Wirth* does not permit hardship falling short of exceptional to be considered as a factor warranting any consideration as part of the process of "instinctive synthesis" undertaken in sentencing an offender (*Markarian v R* [2005] HCA 25; 228 CLR 357).

[115] *Edwards* was a Crown appeal against a sentence of periodic detention for manslaughter that was imposed because of the hardship the offender's full time custody would cause to a long term patient at an institution who was cared for by the offender. This sentence was set aside on the basis that those circumstances were not properly characterised as "exceptional" (at 516 and 517 per Gleeson CJ). The sentencing judge was found to have "deflect[ed] her[self] from imposing the sentence of full-time imprisonment which she plainly indicated she would otherwise have imposed" (at 518). Thus *Edwards* was a case in which the sentencing judge was found to have wrongly treated the impact on a third party as determinative of the type of sentence that was to be imposed.

[116] Although the limitations on considering hardship to third parties derived from *Edwards* are said to be the subject of "well settled principles" (*FP v R* [2012] NSWCCA 182 at [309] per R.A. Hulme J) they are sometimes stated in different terms. Thus, in *Hay v R* [2013] NSWCCA 22 at [49] *Edwards* was cited for the proposition that "[i]t is well established that the effect on family or others can be taken into account only in exceptional circumstances". That formulation reflects the statement of Wells J in *Wirth* (see also *Waugh (aka Willoughby) v R* [2010] NSWCCA 3 at [16] per Hidden J, McClellan CJ at CL and Simpson J agreeing). Recently, in *R v MacLeod* [2013] NSWCCA 108 at [43] the principle derived from *Edwards* was described as being that "it is only in exceptional circumstances that hardship to third parties can be taken into account in order to reduce an otherwise appropriate sentence". This formulation leaves open the possibility that the

"otherwise appropriate sentence" is one in which hardship to third parties falling short of exceptional circumstances is considered as part of the process of "instinctive synthesis", even if it cannot be considered as a "distinct matter justifying any substantial modification of an otherwise appropriate penalty" (*Dipangkear v R* [2010] NSWCCA 156 at [41] per Whealy J).

[117] This latter possibility has been explicitly recognised in cases discussing *Edwards* and applying the *Crimes (Sentencing Procedure) Act* 1999 ("*Sentencing Act*"). Thus, for example, in *R v Girard* [2004] NSWCCA 170 at [21] Hodgson JA, with whom Levine and Howie JJ agreed, stated:

> "In relation to the children, in my opinion this was not shown to be a case falling within the category of exceptional circumstances as discussed in *Edwards*. It is certainly a matter of concern, **and a matter that can be taken into account as one subjective circumstance in assessing the appropriate penalty, that innocent children will be adversely affected by the imprisonment of their parents**. However, in the absence of exceptional circumstances, this is not to be taken into account as a specific and particular matter resulting in a substantial reduction or elimination of a sentence of imprisonment." (emphasis added)

…

[140] This succession of cases has led to the adoption of a principle with little to commend it. If in other contexts Courts are bound to consider the impact of their orders on innocent third parties … why is the impact on children of any sentence under consideration to be excluded unless their hardship is only exceptional? The primary objects in sentencing of "retribution, deterrence [and the] protection of society" described by Wells J in Wirth can still be given effect to without requiring sentencing courts to divide the forms of hardship occasioned to an offender's family into those which meet the description “exceptional” and those which do not. The assessment of probable hardship to family members is a task that sentencing courts are perfectly able to undertake, and no doubt they do. In any event, the words of the section and the secondary materials indicate a clear policy choice on the part of the legislature on this topic.

## *HJ v R* [2014] NSWCCA 21 at [66]–[68]

[66] The relevance of an offender who stands for sentence being the mother of a young baby is undoubted. It is always a question of weight as to the impact which this factor has on the sentencing process.

[67] This Court has held that the fact that a person to be sentenced is the mother of young baby is a relevant factor to take into account: see *R v Togias* [2001] NSWCCA 522; (2001) 127 A Crim R 23. In that case, the applicant was standing for sentence about two months after her baby was born. That fact was well known to the sentencing Judge who had adjourned the proceedings on sentence to await the birth of the applicant's child. At [5] Spigelman CJ said with respect to an alleged failure by the sentencing Judge to deal with the matter appropriately because the sentencing Judge had imposed an order suspending the sentence of imprisonment, this:

> "Furthermore, the order suspending the sentence could not be justified on the basis that the respondent would be separated from her child for an unknown period. His Honour could, and should, have deferred sentencing until the respondent had been assessed, so that the Court knew whether or not there would be any separation."

[68] The Chief Justice went on to say, at [7]:

> "In an appropriate case, the inability of prison authorities to provide for detention in a humane manner will justify a court refusing to impose a custodial sentence. That was not shown to be the case here. His Honour was correct to conclude that the evidence from the Department of Corrective Services revealed a process that involved unacceptable delays so that the probable separation of mother and baby could be regarded as inhumane. However, his Honour failed to have regard to the fact that, by deferring by the sentencing task, he may have been able to ensure that, with the cooperation of authorities and subject to a positive assessment, there would be no such separation."

### *Carter v R* [2018] NSWCCA 138 per McCallum J

[54] …I do not think the family hardship in the present case can be classified as "exceptional" as that term has being applied in the authorities (whether too high a bar has been applied is a debate for another day). …

[68] In my respectful opinion, the sentencing judge in the present case was correct to acknowledge that, while a substantial reduction or elimination of a sentence of imprisonment on the grounds of hardship should be reserved for the exceptional case, hardship to innocent family members is a matter to which regard should be had as one of the relevant factors in "the general mix" in determining the appropriate sentence. For my part, with respect, I do not think the Court in *Kremisis* was bound be authority to hold otherwise. However, I also respectfully acknowledge that this is an issue which should properly be determined by the High Court or at least an enlarged bench of this Court.

### See also *Huynh v R* [2018] NSWCCA 237

### *Quintero v R; Carvajal v R; Salazar v R* [2018] NSWCCA 190

[100] In the case of evidence as to hardship to others, it is only where circumstances are "highly exceptional" and where it would be inhumane to refuse to do so, that hardship to others in sentencing can be taken into account: *R v Edwards* (1996) 90 A Crim R 510, where Gleeson CJ said at 515:

> "There is nothing unusual about a situation in which the sentencing of an offender to a term of imprisonment would impose hardship upon some other person. Indeed, as senior counsel for the respondent acknowledged in argument, it may be taken that sending a person to prison will more often than not cause hardship, sometimes serious hardship, and sometimes extreme hardship, to another person. It requires no imagination to understand why this is so. Sentencing judges and magistrates are routinely obliged, in the course of their duties, to sentence offenders who may be breadwinners of families, carers, paid or unpaid, of the disabled, parents of children, protectors of persons who are weak or vulnerable, employers upon whom workers depend for their livelihood, and many others, in a variety of circumstances bound to result in hardship to third parties if such an offender is sentenced to a term of full-time imprisonment."…

[135] Given the evidence as to the dire consequences of poverty and lack of family support from a young age in Bogota, established by the evidence received about Ms Salazar and Ms Carvajal's upbringing, that in Ms Quintero's case the depression from which she is suffering in custody must be considered, given what her young son faces, given his grandparent's ill health and his mother's incarceration in Australia. I consider that this evidence did establish an exceptional case in her situation of the kind discussed in *Edwards*.

# ILL HEALTH

### ***Sutton v R*** **[2016] NSWCCA 249 per Gleeson JA (Fagan and N Adams JJ agreeing)**

> [44] … it is only in a relatively rare case that ill-health will be a factor tending to mitigate punishment: *R v Smith* (1987) 44 SASR 587 at 589 (King CJ), referred to with approval in *R v Badanjak* [2004] NSWCCA 395 (***R v Badanjak***) at [9] (Wood CJ at CL, McClellan AJA and Smart AJ agreeing): *Anastasiou v R* [2010] NSWCCA 100 at [22]-[23] (Rothman J, McClellan CJ at CL and James J agreeing); *Leighton v R* [2010] NSWCCA 280 at [35]-[36] (Price J, Simpson J and Howie AJ agreeing).

# INSTITUTIONALISATION

### ***Jackson v R*** **[2010] NSWCCA 162 per *Fullerton J (McClellan CJ at CL and Simpson J agreeing)***

> [24] Authority for the proposition that a risk of institutionalisation is a basis for a finding of special circumstances emerges from a number of judgments of this Court. This much is clear from the list of authorities Ms Francis of counsel provided after the Court reserved its decision (*R v Lemene* [2001] NSWCCA 5; 118 A Crim R 131 at [66] – [67]; *R v Hooper* [2004] NSWCCA 10 at [62] – [63]; *R v Dorsett* [2002] NSWCCA 326 at [10] – [11]; *R v Gordon* [2004] NSWCCA 45 at [63]; *R v Taufua* [2001] NSWCCA 411 at [30] and [36]; *Watts v R* [2007] NSWCCA 153 at [6]; *R v Nykolyn* [1999] NSWCCA 39).

Fullerton J explained the approach taken by the Court in ***R v Lemene*** **[2001] NSWCCA 5** as follows:

> [25] … The adjustment in the statutory ratio was made in that case expressly to assist in the rehabilitation of the offender who had spent little time out of an institution over the course of his adult life having suffered social, educational, psychological and occupational disadvantages in his youth. Her honour's approach, however, underscores the fact that a risk of institutionalisation, even in the face of entrenched recidivism and serious reoffending, is a factor a sentencing court may regard as a sufficiently special circumstance to warrant an adjustment to the statutory ratio under s 44 of the *Crimes (Sentencing Procedure) Act*.

# INTOXICATION

Self-induced intoxication is not to be taken into account as a mitigating factor:

> **s 21A(5AA)** In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor."

However, intoxication may mitigate an offence because the offender has by reason of that intoxication acted 'out of character': ***Stanford v Regina*** **[2007] NSWCCA 73** at [53]-[55], applying ***R v Coleman*** **(1990) 47 A Crim R 306** at 327.

### *R v Loveridge* [2014] NSWCCA 120

> [220] … Although an offender's intoxication, whether by alcohol or drugs, could explain an offence, it ordinarily did not mitigate the penalty: *Bourke v R* [2010] NSWCCA 22; 199 A Crim R 38 at 44 [26]. Courts around Australia have consistently rejected the proposition that intoxication can mitigate the seriousness of an offence or reduce an offender's culpability. **Although an "out of character" exception has been acknowledged to exist, it has almost never been applied: *R v GWM* at [82]; ZZ v R [2013] NSWCCA 83 at [110].** The Respondent could not have called in aid the "out of character" exception. In truth, the Respondent's awareness of his aggression issues, in the context of alcohol use, meant that his intoxication was capable of operating adversely to him on sentence. (emphasis added)

### *Kelly v R* [2016] NSWCCA 246 per Rothman J (Hoeben CJ and Hulme J agreeing)

> [46] … As the Crown correctly notes, the provisions of s 21A(5AA) of the *Crimes (Sentencing Procedure) Act 1999* precluded the use self-induced intoxication of an offender at the time of an offence as a mitigating factor in determining the appropriate sentence.
>
> [47] Even before the introduction of that relatively new sub-section, the intoxication by alcohol or drugs ordinarily did not mitigate the penalty to be imposed on a particular offender: *Bourke v R* [2010] NSWCCA 22; 199 A Crim R 38 at [26].
>
> [48] Nevertheless, as McClellan CJ at CL in *Bourke* said, that ordinary rule does not apply where the intoxication is the result of an addiction and the original addiction did not involve a free choice. His Honour's comments were that offenders could not expect reductions in sentence merely on account of the offence being committed while the offender was intoxicated.
>
> [49] The Crown submits that the effect of s 21A(5AA) of the *Crimes (Sentencing Procedure) Act 1999* is also "to abolish" that part of *R v Fernando* (1992) 76 A Crim R 58 that the High Court approved in *Bugmy v The Queen* [2013] HCA 37; (2013) 249 CLR 571. I do not agree with that last mentioned submission.
>
> [50] The effect of *Fernando* and of *Bugmy* is to recognise that, in certain communities to which the circumstances in *Fernando* and *Bugmy* applied, the abuse of alcohol and drugs is so prevalent and accompanied by violence that the intoxication no longer fits the description of being "self-induced". In that way, the intoxication fits the description to which McClellan CJ at CL referred in Bourke.

# MENTAL ILLNESS / COGNITIVE IMPAIRMENT

**Note**: See also ***Dang v R*** **[2013] NSWCCA 246** referred to in the **ADDICTION** section, above, regarding moral culpability.

The principles to be applied when sentencing an offender suffering from a mental illness, intellectual handicap or other mental problem were succinctly summarised by McClellan CJ at CL in ***DPP (Cth) v De La Rosa*** **[2010] NSWCCA 194**; **(2010) 79 NSWLR 1**, at [177]. Omitting citations, they are:

> (1) Where the state of a person's mental health contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced. Consequently the need to denounce the crime may be reduced with a reduction in the sentence.
>
> (2) It may also have the consequence that an offender is an inappropriate vehicle for general deterrence resulting in a reduction in the sentence which would otherwise have been imposed.
>
> (3) It may mean that a custodial sentence may weigh more heavily on the person. Because the sentence will be more onerous for that person the length of the prison term or the conditions under which it is served may be reduced.
>
> (4) It may reduce or eliminate the significance of specific deterrence.
>
> (5) Conversely, it may be that because of a person's mental illness, they present more of a danger to the community. In those circumstances, considerations of specific deterrence may result in an increased sentence. Where a person has been diagnosed with an Antisocial Personality Disorder there may be a particular need to give consideration to the protection of the public.

On sentence, a court should be more concerned with the impact of the offender's impairment on the offence and the offender than with any medical, psychiatric or psychological classification: ***R v Verdins*** **[2007] VSCA 102** at [3]; ***DPP (Cth) v De La Rosa*** **[2010] NSWCCA 194** at [177]–[178]; ***R v Engert*** **(1995) 84 A Crim R 67**.

The reference to an offender not being "fully aware of the consequences of his or her actions" in **s 21(3)(j)** ***Crimes (Sentencing Procedure) Act 1999*** does not comprehend or encompass the extent to which cognitive or mental health impairment or mental abnormality (Veen v The Queen [No 2] (1988) 164 CLR 465) can be taken into account on sentence.

As with most sentencing principles, the principles and the objectives of sentencing point in different directions. In many cases the conflict between a requirement to take into account retribution or general deterrence or the impact on victims has a direct and counterproductive impact on those objectives which focus on rehabilitation and avoidance of recidivism or on the recognition by the courts that those with cognitive or mental health impairments require a particularly individualised approach.

A court is not obliged to average out important and competing considerations; sometimes one can be determinative: ***Regina v Hopkins*** **[2004] NSWCCA 105**.

Ultimately courts recognise that the purpose of sentencing is community protection and, to achieve that aim, impose sentences appropriate to the offender and the crimes conscious always of the need to ensure where possible the consistent and proper application of sentencing principles.

The necessary synthesis of features personal to the offender including their mental state is not taken into account in assessing the objective seriousness of the offence: ***Muldrock v The Queen*** **(2011) CLR 12**; ***Williams v R*** **[2012] NSWCCA 172**.

### *Barbieri v R* [2016] NSWCCA 295

Justice Simpson summarised the three ways in which an offender's mental illness may be taken into account on sentence:

> [53] Put shortly, that an offender suffers from a mental illness may be taken into account (in his/her favour) in any or all of three ways. It may be seen (where it is shown to be causally related to the commission of the offence) to reduce the moral culpability of the offender; it may indicate that the offender is an unsuitable vehicle for the application of the principle of general deterrence; and it may mean that a prison sentence will "weigh more heavily" on that offender than it would on others. These are well established principles and were spelled out in *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1; [2010] NSWCCA 194 at [177]. (In truth, the first and second of these state essentially the same proposition: see the analysis by Wood CJ at CL in *R v Henry* (1999) 46 NSWLR 346; [1999] NSWCCA 111 at [254]. The reason that general deterrence is accorded less weight is because the mental disorder reduces the offender's moral culpability. This, no doubt, was what the sentencing judge had in mind in [141] of the Remarks when he moved from his assessment of the applicant's moral culpability to the weight to be given to general deterrence.)
>
> [54] Conversely, by reason of a mental illness, an offender may present more of a danger to the community, which may, accordingly, call for greater emphasis on the principle of special deterrence.
>
> [55] Of course, much depends upon the nature and extent of the mental illness. Of particular importance in this case in relation to the assessment of moral culpability is the causal relationship (if any) of the applicant's mental disorder to the offending. Also of importance in this case is the likely progress in the future of the applicant's mental illness. It is therefore necessary to examine in more detail the psychiatric evidence.

### *Yun v R* [2017] NSWCCA 317 per Latham J and Bellew J

> [47] It is apparent that this Court has invariably determined since *Muldrock* (with the possible exception of *Badans* and *Subramaniam*) that an offender's mental condition at the time of the commission of the offence is a critical component of "moral culpability" which in turn affects the assessment of "objective seriousness". For these reasons, and in the absence of clear guidance from the High Court, the appellant's contention that an assessment of objective seriousness of a standard non-parole period offence, post *Muldrock,* precludes consideration of the offender's

> mental state, duress, provocation, and mental illness (where causally related to the commission of the offence) must be rejected.'

There are conflicting CCA decisions on the topic:

- ***Yang v R* [2012] NSWCCA 49 at [28]**
- ***GN v R* [2012] NSWCCA 96 at [12] & [18]**
- ***Stewart v R* [2012] NSWCCA 183 at [37]**
- ***Badans v R* [2012] NSWCCA 97 at [53]**
- ***R v Biddle* [2011] NSWSC 1262 at [88]**
- ***MDZ v R* [2011] NSWCCA 243 at [67]**
- ***R v Cotterill* [2012] NSWSC 89 at [30]**
- ***Ayshow v R* [2011] NSWCCA 240 at [39]**
- ***R v Fahda* [2012] NSWSC 114 at [50] & [38]**
- ***Yun v R* [2017] NSWCCA 317**

Judicial pragmatism seems to indicate that whatever the correct approach it matters little given the sentencing judge's duty to synthesise all relevant factors and only at the end of the process determine the sentence: ***Markarian v The Queen* (2005) 228 CLR 357** at [51] per McHugh J.

The court in ***Muldrock*** referred at [53] to the Victorian case of ***R v Mooney*** (Victorian Court of Appeal 21 June 1978, unreported) which discussed the retributive effect of a deterrent sentence inappropriate to the situation and to the needs of the community.

In ***BP v R*** **[2010] NSWCCA 159** at [4], Hodgson JA noted "*considerations of retribution direct attention to what the offender deserves*". See also ***Ryan v The Queen* (2001) 206 CLR 267**.

### *MDZ v Regina* [2011] NSWCCA 243 per Hall J (Tobias AJA and Johnson J agreeing)

> [67] In my opinion, in light of the High Court's judgment in ***Muldrock*** (supra), it is open to conclude that the mental condition of the applicant at the time of the offence may bear upon the objective seriousness of the offences: ***Muldrock*** (supra) at [27] and [29]. Certainly, in the present case, the sentencing judge, on the evidence, was required to expressly determine the moral culpability of the applicant in assessing the seriousness of the offences and in determining the appropriate sentences to be

> imposed in relation to them. In this case, the evidence required a finding that the applicant's moral culpability was reduced by his mental health issues.

### *Martin v R* [2015] NSWCCA 6 per Price J referring to *MDZ* at [63]:

> "It is evident from these opinions that the applicant's mental disorders may have contributed to his offending. Although a specific submission was not made by the applicant's counsel on this issue, the focus of the applicant's case on sentence was his mental health. In my respectful opinion, the judge was obliged to expressly make some assessment as to whether the applicant's moral culpability for the serious crimes that he committed was reduced by his mental condition. In assessing the objective seriousness of the offences, her Honour did not make any reference to the applicant's mental health and erred in not doing so."

In ***R v Wright* (1997) 93 A Crim R 48** at 50, Hunt CJ at CL noted that general deterrence should often be given little weight where an offender suffers a mental disorder or abnormality as they are not an appropriate medium for making an example to others. The moderation need not be great if the offender acts with knowledge of what they are doing and knowledge of the gravity of their actions – e.g. where they have chosen to disregard medical advice, (***Clay v R*** **[2007] NSWCCA 106** at [25]-[26], without good reason (***Carroll v R*** **[2012] NSWCCA 118** at [62].

Where offender's acquired brain injury was considered but not found to have a causal connection to the offending: see ***Aslan v R*** **[2014] NSWCCA 114** at [33]-[45]

### *Vossos v R* [2016] NSWCCA 262

> [57] In *Muldrock* the Court (at [53]) cited the principle that general deterrence should often by given very little weight in the case of an offender suffering from a mental disorder or abnormality because such offender is not an appropriate medium for making an example to others. Their Honours went on to say (at [54] citations omitted):
>
> > [54] The principle is well recognised. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community.
>
> …
>
> [59] Whether an offender's impaired intelligence is relevant to an assessment of moral culpability, and if not, whether it is relevant in some other way to the determination of an appropriate sentence, will depend upon the circumstances of the case. In *Aslan v R* [2014] NSWCCA 114 Simpson J (as her Honour then was) made reference (at [33]) to the principles governing the effect of an offender's mental illness on sentence:

"Over the years, the applicable principles have evolved. They were most recently re-stated by McClellan CJ at CL in *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194; 79 NSWLR 1 at [177]. They are as follows:

[Principle 1] Where the state of a person's mental health contributes to the commission of the offence in a material way, the offender's moral culpability *may* be reduced. Consequently the need to denounce the crime may be reduced with a reduction in the sentence ...

[Principle 2] It *may* also have the consequence that an offender is an inappropriate vehicle for general deterrence resulting in a reduction in the sentence which would otherwise have been imposed ...

[Principle 3] It *may mean* that a custodial sentence may weigh more heavily on the person. Because the sentence will be more onerous for that person the length of the prison term or the conditions under which it is served may be reduced ...

[Principle 4] It *may* reduce or eliminate the significance of specific deterrence ...

[Principle 5] Conversely, it *may be* that because of a person's mental illness, they present more of a danger to the community. In those circumstances, considerations of specific deterrence may result in an increased sentence ... Where a person has been diagnosed with an Antisocial Personality Disorder there may be a particular need to give consideration to the protection of the public ..." (emphasis in her Honour's judgment).

[60] Her Honour went on to say (commencing at [34]):

34. It will be observed that none of these principles is stated as absolute. What is recognised is the potential effect, in any given case, of a mental disability. **It does not follow that, because an offender suffers from some mental impairment or disability, his or her moral culpability is reduced** (principle 1); nor that he or she is an inappropriate vehicle for general deterrence (principle 2); nor that a custodial sentence will weigh more heavily upon him or her (principle 3); nor that the significance of specific deterrence is reduced or eliminated (principle 4). Nor, on the other hand, does it follow that a person with mental impairment is a danger to the community, indicating a need for community protection (principle 5). Too often, the mere fact of mental illness is advanced to this Court as necessarily calling for a more lenient sentence. What the principles spelled out by McClellan CJ at CL do is direct attention to considerations that experience has shown commonly arise in such cases. There is, however, no presumption. It remains necessary for the sentencing court to examine the relevant facts in order to determine whether, in the specific case, the mental condition has the consequence contended for.

35. A central question (but not the only question) is whether the mental illness or other condition had a causative role to play in the commission of the offence or offences for which the offender is to be sentenced. Counsel who appeared for the applicant accepted that this was the principal issue in this case. **If it is concluded that there was a causal connection, then the offender's moral culpability may be reduced (see principle 1)**. That connection **may** also warrant lesser attention being paid to the need for the sentence to reflect considerations of general deterrence (principle 2) (emphasis added in each case).

> [61] If an offender's moral culpability is to be reduced on the grounds of impaired intelligence, some causal connection between that impairment and the offending must be established …
>
> [62] In the absence of such causal connection, an offender's mental state may still be relevant on sentence in the various respects to which Simpson J referred.

See also ***Twaddell v R*** **[2019] NSWCCA 116**.

## MENTAL ILLNESS AND DANGEROUSNESS

Go first to ***Veen v The Queen [No 2]*** **(1988) 164 CLR 465** at [476].

***Potts v R*** **[2012] NSWCCA 229** reaffirmed protection of society from a potentially dangerous offender was a relevant matter which while it could not lead to a sentence disproportionate to the gravity of the offence could offset potentially mitigating factors.

But as Basten JA reminded us in ***R v Windle*** **[2012] NSWCCA 222** there is potential for 'unprincipled sentencing' under the guise of community protection particularly where the mental illness operated to reduce an offender's culpability; reinforcing the principle of proportionality. Basten JA's judgment recognised that the criminal law is not the appropriate mechanism for protecting society where the potential danger is as a result of a mental illness.

## MENTAL ILLNESS AND GENERAL DETERRENCE

### *R v Mueller* [2015] NSWCCA 292

> [39] The authorities make it clear that "general deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others" – ***Muldrock v The Queen*** [2011] HCA 39; 244 CLR 120 at [53] although that is not to suggest the topic of general or indeed personal deterrence is to be entirely disregarded – *Palijan v R* [2010] NSWCCA 142 at 27. However in this case the extent to which the Respondent's mental abnormality contributed to his offending and her Honour's conclusions as to the likelihood of the Respondent re-offending well justified her in taking the stance which she took.

### *Barbieri v R* [2016] NSWCCA 295

> [77] General deterrence can be seen to have been given prominence in the sentencing decision. That emerges from the (perfectly proper) emphasis given by the sentencing judge to the authorities concerning attacks on police officers, and the need for the community (through the courts) to recognise the valuable and necessary work police officers do. However, the importance of deterring attacks on

> police officers does not, and cannot, make suitable as a vehicle for general deterrence, an offender who is otherwise, and plainly, an unsuitable vehicle.
>
> [78] As I have mentioned above, an important aspect of the consideration of the weight that ought, in sentencing, be given to mental illness is the extent to which the mental illness had a causal relationship to the offence.

Regarding "secondary" or "derivative" mental illness: see ***Barbieri*** at [74]

> [74] It is difficult to discern any proper basis for differentiating, in the assessment of moral culpability, between causes of mental illness (with a possible exception where the mental illness is self-inflicted by reason of, for example, drug or alcohol use, a question on which I express no opinion). What is in question is the mental state of the offender at the time of the offending. That, in this case, the applicant's undoubted mental illness was, to use the Crown prosecutor's language, "derivative", or that of the sentencing judge, "secondary", can have no bearing on the extent to which it was relevant to the assessment of moral culpability. Similarly, the fact that, within a relatively short time of separation from Fiona Barbieri, the applicant recovered from the delusional condition and discarded his delusional beliefs says nothing of their existence at the time of the offences.
>
> [75] In my opinion it was an error to take into account, on the question of mental illness, these two considerations… It was wrong to conclude that the applicant's moral culpability was less than would otherwise be the case "but not to any substantial degree" because the condition was "secondary" and because the applicant had recovered. Indeed, the evidence of recovery pointed to more favourable treatment, because it minimised the need for the sentence to take into account specific deterrence. It was wrong to fail to reduce the weight given to general deterrence.

### ***Luque v R* [2017] NSWCCA 226**

Per Button J at [81]-[82]:

> In the portion of the remarks on sentence that I have extracted above, I consider that some of the negative propositions called upon the applicant to demonstrate more than the law of sentencing required. By that I mean, she did not need to demonstrate that her actions were beyond her control; nor that she had no independent capability of controlling them; nor that she had no understanding of what she was doing. Nor was it incumbent upon the applicant to show that her actions were "excused" on the basis that she had "no idea what she was doing".
>
> Contrary to the foregoing, the question was whether the applicant had established on the balance of probabilities that her actions were mitigated, on the basis that a mental illness or condition played a role of some significance in her offending.

Hamill J set out three points that a sentencing judge should consider when dealing with evidence of an offender's mental condition or intellectual impairment:

> [114] The first is that a sentencing Judge dealing with evidence of an offender's mental condition or intellectual impairment ought not to approach the task in an unduly technical or restrictive way. The issue to be determined is not the same as deciding the issue of causation in a civil case. The issue is whether the fact of the disorder mitigates the punishment that ought to be visited upon the offender. In one respect, this involves an assessment of whether the moral culpability of an offender is reduced because their mental condition contributed directly or indirectly to the commission of the offence. In other respects, the impact of an offender's mental condition is not conditional upon any link (causative or otherwise) between the

> condition and the offending. For example, the condition may mean that the offender is not an appropriate vehicle for a sentence containing a large component of general (or specific) deterrence. Further, incarceration may be more onerous as a result of an offender's difficulties. Those matters do not require the judge to find any link or connection between the condition and the commission of the crimes.
>
> [115] The second matter is that an offender who relies on evidence of psychiatric issues as a matter of mitigation is not setting out to establish a defence of mental illness or substantial impairment and is not required to prove that they did not understand what they were doing, or that they did not know that what they were doing was wrong. The part of the sentencing judgment cited by Button J at [63] comes perilously close to imposing such a burden on the applicant.
>
> [116] The third matter is that the circumspection with which a sentencing Judge may treat self-serving (hearsay) statements made by an offender to an expert witness ought not to equate to a devaluation of the opinion provided by the expert. Nor does that circumspection necessarily apply to the psychiatric history provided to the expert. That is particularly so where, as in this case, there is a substantial body of evidence to corroborate the history provided. As the judgment of Button J shows there was cogent evidence in various forms establishing both a sad history of mental health issues and a connection between that history and the applicant's criminal conduct.

***Ryan v Regina* [2017] NSWCCA 209**: A causal connection is necessary where the question is reduction in moral culpability. However, causal connection less significant if the issue is less weight to deterrence or more onerous conditions of custody.

***Cowan v R* [2015] NSWCCA 118**

There was considerable evidence before the sentencing judge regarding the applicant's mental disability. No specific submission as to the principles applicable in the sentencing of mentally ill offenders was made by counsel. CCA allowed the appeal, holding that the sentencing judge was obliged to consider the issue notwithstanding the absence of such a submission: 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 his mental health: at [40]; ***Martin v R* [2015] NSWCCA 6** at [53].

***R v Omar* [2015] NSWCCA 67**

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

This was a Crown appeal against a sentence for two counts of aggravated sexual assault and one count of armed robbery with wounding. The offences had taken place several years earlier. Evidence at sentence was that the respondent suffered mental illness at the time of the offences and had undergone total rehabilitation from drug use since the offending.

Dismissing the appeal, the CCA said the judge properly found the respondent's mental illness moderated the need for general deterrence. Further, the judge's finding that rehabilitation was total and complete meant that *specific* deterrence was of less significance than might otherwise have been: at [75]-[79]; *De La Rosa* at [177].

### *Firth v Regina* [2018] NSWCCA 144

Break and enter; when elderly occupant went to detain appellant he threatened her with a knife. At mid-range of gravity. Wilson J (Simpson AJA and Bellew J agreeing) found this was not an appropriate case for specific and general deterrence:

> [77] Where, as here, an offender's background has been so dysfunctional and deprived such that his or her capacity to exercise sound judgments is impaired, and the level of impairment is worsened by a mental illness or illnesses, it will often be the case that general deterrence will have a lesser role to play in arriving at the sentence to be imposed. There may, of course, be a need to give greater weight to the protection of the community in determining sentence. It is a question of balancing the competing features of the individual case to arrive at a fair sentence.
>
> [78] The aggregate sentence imposed upon the applicant suggests that her Honour may have overlooked the need to temper the application of the general deterrence principle, having regard to the conclusions she reached as to the disabilities and disadvantages under which the applicant has long laboured. That is particularly so when one considers that the sentence has been reduced by 10% to acknowledge the value of the pleas of guilty.

### *R v Skinner* [2018] NSWCCA 185

Offender suffered 'mild' intellectual impairment.

> [69] … The offences themselves, whilst serious given that the victims could not know that the firearm was a replica, were almost childish in intent and execution.
>
> …
>
> [72] Since the respondent's crimes involved the use of a firearm, albeit an imitation, it would ordinarily be very important for sentencing courts to send a clear message to others who might be tempted to use such lethal weapons by the imposition of stern sentences on offenders. That requirement had little or no application in this matter and the mitigating effect on the sentence to be involved might be assumed to be significant.

### *Griffin v R* [2018] NSWCCA 259

> [35] The reference to a "practical expectation" that factors relied upon in mitigation will be identified cannot be elevated to a principle subverting the entitlement of an offender to be sentenced according to law. I would not understand his Honour to have intended to express any such principle.
>
> [36] The submission put for the first time in the appellate court in Zreika was that the sentencing judge erred by failing to have regard to the possibility that the matter could have been prosecuted in the Local Court. As the Court unanimously held, that

is the kind of point which, if not expressly raised by counsel, may appropriately be put to one side by the sentencing judge. Abject disadvantage of the kind seen in this case, with all the psychological harm it produced, is in a different category. While counsel's failure to address the issue in any helpful way was unfortunate and may go some way to explaining how the process may have miscarried, I do not think the observations made in Zreika should preclude the Court from entertaining the present ground. The ultimate question in sentence appeals is whether the applicant was sentenced according to law. That issue is not necessarily determined, as an issue raised in a civil appeal might be, by the answer to the question whether the point was taken in the court below.

[37] In my respectful opinion, in circumstances where there was cogent evidence before the Court as to the applicant's mental condition, the sentencing judge was required to consider the significance of that evidence in assessing the applicant's moral culpability for the offence and in considering the objects of sentencing. That is consistent with the proper approach to sentencing described by McHugh J in Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25 at [51], as follows:

> "[T]he judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case."

[38] For those reasons, I do not think the fact that the issue was inadequately developed in submissions at first instance warrants our refusing to entertain the issue as a ground of appeal in this Court. Indeed, for this Court to refuse to have regard to the evidence of the applicant's mental state on that basis would perpetuate a serious injustice in the circumstances of this case: cf Zreika at [81].

…

[61] The applicant's personal background was also relevant to the weight to be given to deterrence. When his offending is viewed through the prism of the psychological impact of being a victim of child sexual abuse, it is difficult to see any role for general deterrence. As to specific deterrence and his prospects of rehabilitation, his criminal history and the evidence of his being easily led certainly pose challenges for his prospects of rehabilitation. However, the program he is now offered upon his release will provide intensive support of a kind he has not previously had available to him and, in my view, will go a considerable way to addressing that concern.

[62] The applicant's need for intense support and the availability of a community-based program specifically tailored to that end, which will undoubtedly be better adapted to securing his rehabilitation than time spent in prison, warrant a substantial adjustment to the statutory ratio of the non-parole period to the balance of term.

## *Tepania v R* [2018] NSWCCA 247

[112] In sentencing for an offence (whether or not a standard non-parole period offence), a court should make an assessment of the objective gravity of the offence applying general law principles, so that all factors which bear upon the seriousness of the offence should be taken into account (unless excluded by statute). Factors such as motive, provocation or non-exculpatory duress may be taken into account in this way. Regard may be had to factors personal to the offender that are causally connected with or materially contributed to the commission of the offences, including (if it be the case) a mental disorder or mental impairment. It was recognised at common law that motive or emotional stress which accounts for criminal conduct is always material to the consideration of an appropriate sentence: Neal v The Queen (1982) 149 CLR 305; [1982] HCA 55 at 324-325 (Brennan J). Motive for the commission of an offence is an important factor on sentence: Cheung v The Queen (2001) 209 CLR 1; [2001] HCA 67 at 55-56 [171]-[172] (Callinan J).

# PLEA OF GUILTY

**ss 21A(3)(k) and 22 of the *Crimes (Sentencing Procedure) Act 1999*** provide that a sentencing judge must take into account the fact that an offender has pleaded guilty. The discount for the utilitarian value of the plea is normally determined largely by the timing of the plea so that the earlier the plea the greater the discount.

***R v Borkowski* [2009] NSWCCA 102; (2009) 195 A Crim R 1** at [32]:

> 1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].
>
> 2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].
>
> 3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351 .
>
> 4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.
>
> 5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the "Ellis discount"; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186.
>
> 6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291
>
> 7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.
>
> 8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.
>
> 9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete* [2004] NSWCCA 448.
>
> 10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129
>
> 11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.
>
> 12. The amount of the discount does not depend upon the administrative

> arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

See also ***R v AB*** **[2011] NSW CCA 229** at [3], where Bathurst CJ, agreeing with the orders and reasons of Johnson J, said:

> [2] In par [33] of his judgment, Johnson J emphasises that, as a matter of general principle, the Court should state that the utilitarian value flowing from a plea of guilty is not a fixed element and is capable of erosion as a result of the manner in which the sentencing hearing is conducted. I agree. Whilst, as Spigelman CJ pointed out in *R v Thomson & Houlton* [2000] NSWCCA 309; (2000) 49 NSWLR 383 at [152], the primary consideration for the extent of a utilitarian discount was the timing of the plea this should not obscure the fact that there may be circumstances as Johnson J has pointed out where the utilitarian value may be eroded. Equally, there may be some exceptional circumstances in which it is appropriate to give a full utilitarian discount for a plea, notwithstanding the fact that it has not been entered at the earliest opportunity.
>
> [3] That is not to say that sentencing courts should not generally continue to follow the approach in *R v Borkowski* [2009] NSWCCA 102; (2009) A Crim R 1, but merely that **the principles have to be applied by reference to the particular circumstances in any case.** (emphasis added)

A plea of guilty should attract a lower penalty where:

1. The plea of guilty is a manifestation of remorse and/or contrition;
2. The plea of guilty has a utilitarian value to the efficiency of the criminal justice system; and
3. There is a particular value in avoiding the need for a hearing and the consequent need for the calling of witnesses, especially victims, to give evidence.

A plea of guilty also indicates an acceptance of responsibility by the offender and a willingness by the offender to facilitate the administration of justice.

***Siganto v The Queen*** **(1998) 194 CLR 656 per Gleeson CJ, Gummow, Hayne and Callinan JJ**

> [22] … a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case. …

### *R v Thomson; R v Houlton* [2000] NSWCCA 309; (2000) 115 A Crim R 104

The CCA promulgated a guideline judgment regarding the discount to be afforded to an offender who has pleaded guilty to an offence as follows:

> 1. A sentencing judge should specifically state that a plea of guilty has been taken into account;
>
> 2. A sentencing judge is encouraged to quantify the effect of the plea of guilty on the sentence;
>
> 3. The utilitarian value of the plea of guilty to the criminal justice system should generally be assessed in the range of 10 to 25% discount on sentence, dependent upon the timing of the plea; and
>
> 4. In some cases the plea of the guilty, in combination with other relevant factors, will change the nature of the penalty imposed.

There are other factors that mitigate the sentence. They are taken into account in the general synthesis to determine the appropriate sentence before the application of a discount. The mitigating factors include remorse.

In ***ES v R*** **[2014] NSWCCA 268** a combined discount of 40% was applied for a late plea and assistance.

### *Lehn v R* [2016] NSWCCA 255

> [61] …the sentencing judge expressly noted that the plea was entered at the earliest opportunity but he considered that a 20% discount was appropriate so as not to reduce the sentence below that which would reflect the Court's assessment of the objective gravity of the offence.
>
> [62] In that context, it must be emphasised that the grant of the utilitarian discount of 25% for a plea entered at the earliest possible opportunity is not mandatory. Section 22(1A) of the *Sentencing Procedure Act* provides that a lesser penalty imposed under that section must not be unreasonably disproportionate to the nature and gravity of the offence. Although it is well accepted, consistent with the guideline judgment in *R v Thomson; R v Houlton* (2000) 49 NSWLR 383; [2000] NSWCCA 309 (*Thomson*), that a utilitarian discount of 25% will generally be granted for a plea entered at the earliest possible opportunity, it remains a matter for the discretion of the sentencing judge: *Thomson* at [153]; see also *Marrow* at [39].
>
> …
>
> [137] There is no principle or rule of law, and there should be no expectation, that a plea of guilty entered at the earliest opportunity will always result in a discount on sentence of 25%. The conclusions of this Court in *Thomson* at [157] – [158] and [160(iv)] should not be overlooked.

## *R v Ellis* (1986) 6 NSWLR 603 – confessions of guilt

> Where it is unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable element of leniency should properly be extended by the sentencing judge. It is part of the policy of criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence … the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered by the law enforcement authorities, as well as guilt being established against the person concerned.

## *C v R* [2013] NSWCCA 81 – plea of guilty in Commonwealth matters

> [32] A sentencing court is obliged, pursuant to s 16A(2)(g) Crimes Act 1914 (Cth) to take into account that an offender has pleaded guilty. Although there is no requirement to reduce a federal offender's sentence because of the fact of a plea of guilty, it is accepted that the general principles set out in R v Thomson; R v Houlton apply and that the range of discount should be between 10 percent and 25 percent.
>
> [33] That having been said, it does not necessarily follow that the applicant would have received the maximum discount of 25 percent. As Simpson J (with whom Spigelman CJ and Harrison J agreed) said in **Tyler v Regina; Regina v Chalmers** [2007] NSWCCA 247; 173 A Crim R 458 at 114:
>
>> "[The sentencing judge] was called upon to sentence Tyler in accordance with the principles stated by the High Court in Cameron. This specifically excludes reference to the utilitarian value of the plea. Since the test is the willingness of the offender to facilitate the course of justice, one relevant consideration, at least in some cases, is the strength of the Crown case: this may cast some light upon the question whether the plea of guilty was truly motivated by a willingness to facilitate the course of justice, or, more pragmatically, for example, by recognition of the inevitable. Nor is there any requirement, in sentencing Commonwealth offenders, for quantification of a discount for the plea of guilty."

# PRIOR CONVICTIONS

An aggravating factor pursuant to **s 21A(2)(d)** ***Crimes (Sentencing) Procedure Act 1999***, however it does not increase the seriousness of an offence: "It does not aggravate the offence but is an aggravating factor in determining the appropriate sentence"***: R v McNaughton*** **(2006) 66 NSWLR 566.**

***Veen v The Queen [No 2]*** **(1988) 164 CLR 465 at 495**

> The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.

Although antecedent criminal history will not affect the objective seriousness of an offence and thus the upper boundary beyond which a sentence could not properly extend, it may be relevant to determining the appropriate sentence within that range, according to the weight placed on considerations such as personal deterrence and related criteria: ***Hillier v DPP*** **[2009] NSWCCA 312 per Basten JA (Johnson J agreeing)**

***Weininger v The Queen*** **(2003) 212 CLR 629 per Gleeson CJ, McHugh, Gummow and Hayne JJ** at [32]

> A person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life. Imposing a sentence heavier than otherwise would have been passed is not to sentence the first person again for offences of which he or she was earlier convicted or to sentence that offender for the offences admitted but not charged. It is to do no more than give effect to the well-established principle (in this case established by statute) that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed. Taking all aspects, both positive and negative, of an offender's known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration.

Also a mitigating factor pursuant to **s 21A(3)(e)** ***Crimes (Sentencing) Procedure Act 1999***

But N.B. s 21A(5AA) - 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.

## *Cramp v R* [2016] NSWCCA 305

[56] The applicant's antecedent criminal history was a relevant matter for consideration by his Honour. It cannot be given such weight as to lead to the imposition of a sentence disproportionate to the gravity of this offence: *R v McNaughton* (2006) 66 NSWLR 566; [2006] NSWCCA 242. Despite this, as the High Court (Mason CJ, Brennan, Dawson and Toohey JJ) observed in *Veen v The Queen [No 2]* (1988) 164 CLR 465; [1988] HCA 14 at 473:

> "It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. **The distinction in principle is clear between an extension merely by way of preventative detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible."**

[57] As the High Court went on to observe in *Veen v The Queen [No 2]* (at 477), the applicant's prior record is relevant:

> "… to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted."

# YOUTH (INCLUDING CHILDREN)

Section 6 of the ***Children (Criminal Proceedings) Act 1987*** sets out the principles that courts must take into account when dealing with children:

> (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
>
> (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
>
> (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
>
> (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
>
> (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,
>
> (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,
>
> (g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,
>
> (h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

In sentencing young offenders, retribution may be of less significance and considerations of rehabilitation may be of more significance – see, e.g.

- In ***R v GDP* (1991) 53 A Crim R 112**, the Court referred to the decision of ***R v Wilcox*** (15 August 1979, unreported), where Yeldham J remarked:

  > In the case of a youthful offender … considerations of punishment and of general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation.

- ***R v Govinden* (1999) 106 A Crim R 314** per Dunford J at [29]: "It is well recognized that in dealing with young offenders, questions of general deterrence are of less importance than in the case of older offenders and the rehabilitation of the offender is given a greater significance."

- ***R v Ponfield* (1999) 48 NSWLR 327** where Grove J remarked at [38]: "The prominence to be given to rehabilitation of the young in determining sentence is recognised to the point of being almost axiomatic".

- Allen J stated in ***R v Webster* (unreported NSWCCA 15 July 1991)** (the murder by a young man of a teenage girl):

  > The protection of the community does not involve simply the infliction of punishment appropriate to the objective gravity of the crime. There are other considerations as well – principally although by no means only, the

> deterrence of others…and the rehabilitation of the offender. The community have a real interest in rehabilitation. The interest to no small extent relates to its own protection...The community interest in respect to its own protection is greater where the offender is young and the chances of rehabilitation for almost all of the offender's adult life, unless he is crushed by the severity in sentence, is high.

- ***R v Farah* (unreported NSWCCA, 11 December 1998)** per Dunford J offenders in the context of an armed robbery offence:

> To send a young man of eighteen years to gaol in these circumstances where he has no previous convictions and where he might meet and be in regular contact with real or hardened criminals, could hardly assist in his rehabilitation and would almost certainly turn him out at the end of his sentence a worse person than when he went in.

### *Regina v LNT* [2005] NSWCCA 307 per Rothman J (Simpson and Johnson JJ agreeing)

> [31] In every case, it is a question of balancing deterrence, retribution and protection of the community, on the one hand, and rehabilitation, on the other. In the case of juvenile offenders, rehabilitation generally plays a far more significant role than it does in the case of mature adults. Of course, "where a youth conducts himself in the way an adult might conduct himself and commits a crime of considerable gravity" (R v Gordon (1994) 71 A Crim R 459 at 469), the youth can expect to be treated in the same way as an adult. But the fact that "a crime of considerable gravity" has been committed does not, in and of itself, necessitate a finding that the youth has conducted himself "in the way an adult might conduct himself" … Deterrence has a significant role to play, even with youth, especially persons approaching the age of 18, or older, but its role as one of the purposes of punishment (see s.3A Crimes (Sentencing Procedure) Act 1999) must be qualified by an assessment of the capacity of the younger offender to be rehabilitated and the importance of rehabilitation in the case of such offenders.

While offenders under 18 years of age are sentenced under a different regime (the *Children (Criminal Proceedings) Act 1987*), young people may not reach emotional maturity or impulse control until early to mid-twenties: ***BP v R*** **[2010] NSWCCA 159** at [5] per Hodgson JA; ***The Queen v Slade*** **[2005] NZCA 19; (2005) 2 NZLR 526** at [43]; ***R v Elliott; R v Blessington*** **[2006] NSWCCA 305; (2006) 68 NSWLR 1** at [127] per Kirby J; ***R v Hearne*** **[2001] NSWCCA 37; (2001) 124 A Crim R 451**.

### *KT v R* [2008] NSWCCA 51 per McClellan CJ at CL

> [22] The principles relevant to the sentencing of children have been discussed on many occasions. Both considerations of general deterrence and principles of retribution are, in most cases, of less significance than they would be when sentencing an adult for the same offence. In recognition of the capacity for young people to reform and mould their character to conform to society's norms, considerable emphasis is placed on the need to provide an opportunity for rehabilitation. These principles were considered in **R v GDP** (1991) 53 A Crim R 112 at 115-116 (NSWCCA), **R v E (a child)** (1993) 66 A Crim R 14 at 28 (WACCA) and **R v Adamson** (2002) 132 A Crim R 511; [2002] NSWCCA 349 at [30].

[23] The law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Accordingly, allowance will be made for an offender's youth and not just their biological age. (**R v Hearne** (2001) 124 A Crim R 451; [2001] NSWCCA 37 at [25]). The weight to be given to the fact of the offender's youth does not vary depending upon the seriousness of the offence (Hearne at [24]). Where the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the same offence was committed by an adult. (**Hearne** at [25]; **MS2 v The Queen** (2005) 158 A Crim R 93; [2005] NSWCCA 397 at [61]).

[24] Although accepted to be of less significance than when sentencing adults, considerations of general deterrence and retribution cannot be completely ignored when sentencing young offenders. There remains a significant public interest in deterring antisocial conduct. In **R v Pham & Ly** (1991) 55 A Crim R 128 Lee CJ at CL said (at 135):

> "It is true that courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes, particularly crimes involving physical violence to persons in their own homes. It is appropriate to refer to the decision of Williscroft (1975) VR 292 at 299, where the majority of the Full Court of Victoria expressed the view that, notwithstanding the enlightened approach that is now made to sentencing compared to earlier days, the concept of punishment ie coercive action is fundamental to correctional treatment in our society."

[25] The emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders, may be moderated when the young person has conducted him or herself in the way an adult might conduct him or herself and has committed a crime of violence or considerable gravity (**R v Bus**, unreported, NSWCCA, 3 November 1995, Hunt CJ at CL; **R v Tran** [1999] NSWCCA 109 at [9]-[10]; **R v TJP** [1999] NSWCCA 408 at [23]; R v LC [2001] NSWCCA 175 at [48]; **R v AEM Snr, KEM and MM** [2002] NSWCCA 58 at [96]-[98]; **R v Adamson** (2002) 132 A Crim R 511 at [31]; R v Voss [2003] NSWCCA 182 at [16]). In determining whether a young offender has engaged in "adult behaviour" (Voss at [14]), the court will look to various matters including the use of weapons, planning or pre-meditation, the existence of an extensive criminal history and the nature and circumstances of the offence (Adamson at [31]-[32]). Where some or all of these factors are present the need for rehabilitation of the offender may be diminished by the need to protect society.

[26] The weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity (**R v Hoang** [2003] NSWCCA 380 at [45]). A 'child-offender' of almost eighteen years of age cannot expect to be treated substantially differently from an offender who is just over eighteen years of age (**R v Bus**, unreported, NSWCCA, 3 November 1995; R v Voss [2003] NSWCCA 182 at [15]). However, the younger the offender, the greater the weight to be afforded to the element of youth (**Hearne** at [27]).

### *Miller v R* [2015] NSWCCA 86

Schmidt J reiterated the well-recognised principle that the capacity for young people to reform and mould their character to conform to society's norms is usually greater than that of an older offender. In the result, considerable emphasis has been placed

on the need to provide young offenders with the opportunity for rehabilitation. In that case, the appellant was 20 years old. Her Honour went on to say that it is also well settled that the law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Of course, the greater the objective gravity of an offence, the less likely it is that retribution and general deterrence will cede to the interests of rehabilitation.

### *Belvie v R* [2017] NSWCCA 36 citing *BP v R* [2010] NSWCCA 159

> [38] The principles in sentencing a child, as earlier stated, have been expressed on a number of occasions: see *R v AN* [2005] NSWCCA 239 (per Howie J, with whom James and Rothman JJ agreed); *R v LNT* [2005] NSWCCA 307; *MJ v R; KT v R* (2008) 182 A Crim R 571; [2008] NSWCCA 51 at [22] – [26];*CPD v R* [2010] NSWCCA 52; and ***BP v R* [2010] NSWCCA 159**. In the last-mentioned matter, Hodgson JA dealt extensively with the principles associated with the sentencing of a young offender, in the following passage:
>
>> "[3] The relevance of the youth of an offender to sentencing has been extensively discussed in many cases, including *KT v R* [2008] NSWCCA 51; (2008) 182 A Crim R 571 (referred to by Johnson J) and cases referred to in that case. I accept the principles stated in *KT* at [22] – [26] (quoted by Johnson J at par [74] of his judgment). However, I wish to make three points concerning these principles.
>>
>> [4] First, statements that, in relation to young offenders, principles of retribution may be of less significance and considerations of rehabilitation may be of more significance, may tend to obscure the point that even in relation to retribution the youth of an offender may be a mitigating circumstance. In my understanding, considerations of retribution direct attention to what the offender deserves; and in my opinion, where emotional immaturity or a young person's less-than-fully-developed capacity to control impulsive behaviour contributes to the offending, this may be seen as mitigating culpability and thus as reducing what is suggested by considerations of retribution: *see TM v R* [2008] NSWCCA 158 at [33] – [36].
>>
>> [5] Second, while I agree with the statements in *KT* at [26] that the weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity, and that a '*child offender*' of almost 18 years cannot expect to be treated substantially differently from an offender who is just over 18 years of age, it does not follow that the age of maturity is 18 (albeit that for certain purposes the law does draw a line there: *Children (Criminal Proceedings) Act 1987*). In my understanding, emotional maturity and impulse control develop progressively during adolescence and early adulthood, and may not be fully developed until the early to mid twenties: see *R v Slade* [2005] NZCA 19; [2005] 2 NZLR 526 at [43], quoted by Kirby J in *R v Elliott* [2006] NSWCCA 305; (2006) 68 NSWLR 1 at 27 [127]. As shown by *R v Hearne* [2001] NSWCCA 37; (2001) 124 A Crim R 451, youth may be a material factor in sentencing even a 19 year old for a most serious crime.
>>
>> [6] Third, I do not think courts should be over-ready to discount the relevance of an offender's youth on the basis that the offender has engaged in adult behaviour or acted as an adult. In the present case, the offence is a very serious one; but it did not involve significant planning or reflection, or any other indicia of mature decision-making. The applicant was 16 years old, and in my opinion the circumstances of the offence suggest rather that

> emotional immaturity and less-than-fully-developed capacity to control impulses were likely to be contributing factors.’

### *Paul Campbell (a pseudonym) v R* [2018] NSWCCA 87

At [20]–[32] Hamill J set out the legal principles relating to the criminal liability and punishment of children.

### *Clarke-Jeffries v R* [2019] NSWCCA 56

Bellew J (Simpson AJA and Campbell agreeing) summarised the principles that govern the sentencing of youthful offenders, citing ***KT v R* [2008] NSWCCA 51**:

> [49] The principles which govern the sentencing of youthful offenders are well known. They include the following:
>
> 1. considerations of general deterrence and principles of retribution are, in most cases, of less significance than they would be when sentencing an adult for the same offence;
> 2. in recognition of the capacity for young people to reform and mould their character to conform to society’s norms, considerable emphasis is placed on the need to provide an opportunity for rehabilitation;
> 3. the law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law;
> 4. allowance will be made for an offender’s youth, and not just his or her biological age; and
> 5. where the immaturity of an offender is a significant factor in the commission of an offence, the criminality involved will be less than if the same offence was committed by an adult.

### *Yildiz v R* [2020] NSWCCA 69 per Simpson AJA and N Adams J

> [2] The applicant was 18 years and 5 months at the time of the offence and had no prior convictions. The principles with respect to sentencing young offenders have been stated many times by this court: *KT v R* (2008) 182 A Crim R 571; [2008] NSWCCA 51; *BP v R* (2010) 201 A Crim R 379; [2010] NSWCCA 159. Recently, in *Howard v R* [2019] NSWCCA 109 Fullerton J (with whom Macfarlan JA agreed, Bellew J in dissent) observed at [13]:
>
> > ‘It is not necessary to restate the principles articulated in a succession of authorities governing the sentencing of youthful offenders referred to by Bellew J, save to emphasise that the law recognises the potential for the cognitive, emotional and/or physiological immaturity of a young person to contribute to their breach of the law. It is also well recognised that emotional maturity and impulse control develop progressively during adolescence and early adulthood and may not be developed until a person's mid-20’s’.”
>
> …
>
> [60] … chronological age is a pointer to maturity, but not decisive. On average, emotional maturity and mature executive functioning does not occur until the early 20s. In some cases, it occurs at a later chronological age than for other persons, but there is a significant difference between the brain maturity of an 18-year-old and a 21-year-old or, indeed, a 23-year-old (at which age most persons achieve full maturity).

# 4. MITIGATING FACTORS

## S 21A(3) CRIMES (SENTENCING PROCEDURE) ACT 1999

(3) **Mitigating factors** The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows—

(a) the injury, emotional harm, loss or damage caused by the offence was not substantial

(b) the offence was not part of a planned or organised criminal activity

(c) the offender was provoked by the victim

(d) the offender was acting under duress

(e) the offender does not have any record (or any significant record) of previous convictions – **see PRIOR CONVICTIONS**

(f) the offender was a person of good character – **see GOOD CHARACTER**

(g) the offender is unlikely to re-offend – see **REHABILIATION & LIKELIHOOD OF REOFFENDING**

(h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise – see **REHABILIATION & LIKELIHOOD OF REOFFENDING**

(i) the remorse shown by the offender for the offence, but only if:

(i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and

(ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both) – **see REMORSE**

(j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability [see MENTAL ILLNESS]

(k) a plea of guilty by the offender (as provided by section 22) – **see PLEA OF GUILTY**

(l) the degree of pre-trial disclosure by the defence (as provided by section 22A)

(m) assistance by the offender to law enforcement authorities (as provided by section 23) – **see ASSISTANCE TO AUTHORITIES**

# ASSISTANCE TO AUTHORITIES

### *LB v R* [2013] NSWCCA 70

Button J (Bathurst CJ and Hidden J agreeing) stated that where a discount is given for a guilty plea, past assistance and then future assistance, in most cases the court will be required to indicate the discount for all three to comply with s 23(4): at [44].

### *R v GD* [2013] NSWCCA 212

Following *LB*, Button J (Leeming JA and RA Hulme J agreeing) said that pursuant to s 23(4) a judge is now required to quantify the discounts for past and future assistance: at [19].

### *C v R* [2013] NSWCCA 81

Hoeben JA (Beech-Jones and Adams JJ agreeing) held it was an error by the sentencing judge to ignore the fact that the prisoner was serving his sentence in protection for his assistance to authorities. However in the absence of any further evidence, the weight to be given to that fact could only be modest: at [42]–[43].

> [41] The better view, in my opinion, is that an offender in the position of the applicant during a sentence hearing, if he or she wishes to gain some benefit in the sentencing process because of the conditions under which the sentence is likely to be served, should adduce evidence as to those conditions. If the Crown disputes that evidence, it can call its own evidence, otherwise the evidence of the offender should be given appropriate weight.

### *CM* [2013] NSWCCA 341 per R A Hulme J (Ward JA and Harrison J agreeing)

> [48] When there is a degree of accumulation of multiple sentences, I know of no authority (and none were cited) that requires the discount to individual sentences to be reflected with mathematical precision in the resulting overall term. Obviously, however, there is a need for some proportionality. I have come to the view that the judge should have discounted each of the sentences for the applicant's assistance to authorities. There was no reason not to. This should have had a bearing on the overall term, but only to a modest degree.

### *Hamzy v R* [2014] NSWCCA 223

> [72] It should be noted that s23(4) does not prescribe a method or manner in which the discounting is to be achieved. In **R v Gallagher** [1991] 23 NSWLR 220 Gleeson CJ (with whom Meagher JA and Hunt J agreed) said:
>
> > "It is essential to bear in mind that what is involved is not a rigid or mathematical exercise, to be governed by "tariffs" derived from other and different cases but, rather, one of a number of matters to be taken into account in a discretionary exercise that must display due sensitivity towards

> all the considerations of policy which govern sentencing as an aspect of the administration of justice."

Those remarks of Gleeson CJ are, of course, qualified by s23(4). Nevertheless, as Basten JA observed in R v Ehrlich v R [2012] NSWCCA 38 at [7] their "tenor is not diminished".

[73] As was further explained by Basten JA in Ehrlich at [11], such an approach is not erroneous because s23(4) "says nothing as to the manner in which the discounting is to be achieved. Indeed, on one view, the manner in which it is achieved is irrelevant: the selected reduction can be expressed in a number of different ways, none of which is prohibited." The real issue with respect to the allowance of a discount on two bases is to avoid double counting of a particular element.

[74] In most cases it is also not helpful to speak of a level of discount as being generally available. Such an approach makes assumptions about the matters to which the court must have regard in s23(2) and runs the risk of selective reliance on some authorities to the exclusion of others. In R v Z [2006] NSWCCA 342 Beazley JA said at [88]:

> "88 ... the focus should not be so much upon the precise numerical value of the discount but rather upon the question whether after all relevant matters have been taken into account, the sentence imposed is appropriate."

## *Z v R* [2014] NSWCCA 323

### Per McCallum J (Hoeben CJ and CL and Garling J agreeing)

[33] The applicant's submissions have persuaded me that the sentencing judge acted upon a wrong principle in that respect. His Honour was not constrained by the fact that the applicant had not pleaded guilty to stop at 25 per cent discount for assistance to authorities. The only constraint was that imposed by s 23(3) which, as has been observed by this Court, will not generally be met by allowing a combined discount of more than 50 per cent.

[34] In reaching this conclusion I intend no criticism of the sentencing judge, whose careful and anxious attention to this issue is manifest from the remarks on sentence. His Honour may have been concerned, as I have been, by the prospect of unequal justice. On the authority of *SZ*, it may appear at first glance that an offender who pleads not guilty but provides assistance of the highest order is eligible to have his penalty reduced by the same amount as an offender who provides assistance of the same high order but also pleads guilty at the earliest opportunity. That of course is an entirely hypothetical comparison. To the extent that there is at least a theoretical possibility of unequal justice being occasioned on that account, it is resolved by s 23(3). As explained by Howie J in *SZ*, that provision reflects the common law principle that there is "a bottom line beneath which a sentence cannot legitimately be set". It is recognised that the bottom line ordinarily sits at 50 per cent of the sentence that would have been imposed but for the discounts allowed by the statute. But it does not follow that the Act must be construed with an implied algorithm (flowing from the premise established by Thompson and Houlton) that a discount for assistance cannot exceed 25 per cent. To construe the Act with that level of mathematical rigidity would come close to punishing some offenders who offer assistance for not pleading guilty.

## *Isaac v R* [2012] NSWCCA 195

Per Garling J (Hoeben JA and Latham J agreeing):

> [46] The reasons which underpin the giving of the discount include:
>
> (a) it is in the public interest that criminals with information about the activities of other criminals with whom they are associated should be encouraged to give information to the police: R v Lowe (1977) 66 Cr App R 122; R v Perez-Vargas (1986) 6 NSWLR 559 at 562 per Street CJ with whom Hunt and Allen JJ agreed;
>
> (b) it is in the public interest that criminals should be persuaded not to trust one another and discounting the sentence of a person who provides such assistance facilitates such distrust: R v James and Sharman (1913) 9 Cr App R 142; R v Golding (1980) 24 SASR 161 at 162 per Wells J;
>
> (c) leniency through a discount for assistance to police marks, or rewards, the good inherent in the conduct of the provider of the assistance: Golding at 172-173 per Wells J;
>
> (d)a person who has provided assistance will often, but not always, whilst a prisoner, be confined for his or her own protection in much harsher conditions than the general prison population. Hardship may also be occasioned to a prisoner upon their release into the community: R v Cartwright (1989) 17 NSWLR 243 at 250 per Hunt and Badgery-Parker JJ; R v Gallagher (1991) 23 NSWLR 220 at 227 per Gleeson CJ; R v Sukkar [2006] NSWCCA 92; (2006) 172 A Crim R 151 at [55] per Latham J.
>
> [47] However, two cautionary matters need to be kept in mind. The first is that it is no longer regarded as axiomatic that a person who has provided assistance to authorities will serve the sentence under harsher and more onerous conditions when compared to an ordinary prisoner: R v Sukkar at [4]-[5] per Howie J; FS v R [2009] NSWCCA 301; (2009) 198 A Crim R 383 at [21] per Rothman J.
>
> [48] The second matter which calls for caution is that the application of a discount for assistance should not result in the imposition of a sentence which is so lenient that it would be: "... disproportionate to the objective gravity of a particular offence and the circumstances of a particular offender". Ss. 23 C(SP) Act 1999: R v Sukkar at [54] per Latham J.
>
> [49] In considering the assessment of a discount for assistance to authorities it is also necessary to keep in mind that there may be overlap with other mitigating factors, including a plea of guilty, and an expression of remorse or contrition, as these matters are often part of a "... complex of inter-related considerations": R v Gallagher at 228 per Gleeson CJ.

## *SL v R* [2015] NSWCCA 30

> [8] …Thus, in the present case, the discussion focused upon whether it was possible to exceed a discount of 50%. In my view, that approach is incorrect. The disproportion is to be assessed by undertaking a comparison between the proposed penalty as reduced for assistance to the authorities and the penalty which would otherwise have been imposed. For example, in a case where a person has pleaded guilty at the earliest opportunity and thus attracted a discount of 25% on that account, and a further 25% for assistance to authorities, the reduction to be assessed for proportionality is not the reduction from (say) a 10 year term to 5 years, but the reduction from 7.5 years (after reduction for a guilty plea) to 5 years. That follows from the language of the section itself: subs (1) refers to the court imposing "a lesser penalty than it would otherwise impose … having regard to the degree to

which the offender has assisted or undertaken to assist law enforcement authorities", while subs (3) refers to the "lesser penalty that is imposed under this section".

[9] …A similar exercise is required under s 22 with respect to a lesser penalty imposed on account of a plea of guilty. The statutory language makes clear that in each case these are separate exercises …

[12] As this reasoning suggests, the sentencing court will be mindful of the combined effect of the two discounts; nevertheless, even where a discount is required for a plea, the terms of s 23(3) should be separately applied with respect to the discount for assistance, as they are when there is no separate discount for a plea.

### *Whiley v R* [2014] NSWCCA 164 – where offender a victim of sexual abuse

Per Adams J (Bathurst CJ and Hoeben CJ at CL agreeing)

[35] Section 23(1) does not exclude offenders who were themselves the victims of earlier sexual abuse from obtaining a discount where they are prepared to assist authorities in the detection and investigation of such offences: RJT v R (2012) 218 A Crim R 490. It does not appear from the Senior Constable's statement that the applicant had agreed to give evidence against the perpetrator, although it is fair to observe that this appears to have been the officer's assumption. The clear public policy behind s 23(1) is to encourage persons to assist authorities where otherwise they might not do so. Sexual assault is an area in which many victims are, for a variety of reasons, somewhat reluctant to come forward, let alone to give evidence. However, in every case it is necessary to assess the significance of the assistance, given that the discount serves a utilitarian purpose.

### *Damoun v R* [2015] NSWCCA 109 – assistance resulted in shortening trial

Per Simpson J

[51] A willingness (unfulfilled for reasons not attributable to the offender) to facilitate the course of justice by cooperating with a view to shortening proceedings may, in appropriate circumstances, be a relevant sentencing consideration. It is not, however, a consideration that bears upon the selection of sentences in all cases. A sentencing judge is best placed to know how to deal with such an unfulfilled willingness. Here the sentencing judge was not obliged to place any weight upon the appellant’s offer. There was no error in the sentencing procedure.

### *R v Medd (a pseudonym)* [2016] NSWCCA 216 – excessive discount for assistance

[17] On the appeal the Crown has contended that the discount allowed was excessive. The Court has reviewed the confidential exhibits on sentence, D and F, which record the nature of the assistance provided. By reference to the criteria in s 23(2), the respondent’s assistance may be evaluated as very limited. Because he remains in custody and because any degree of assistance to authorities may expose him to retribution, it would be inappropriate to refer in detail in these reasons to the nature and extent of the information the respondent has disclosed or the evidence he is willing to give. It is sufficient to say that his disclosure has been partial, selective and far short of the full extent of the knowledge which the respondent must necessarily have gained, from his own involvement in relevant events. There is no

> indication that assistance provided by the respondent was significant to the furtherance of police investigations or that it contributed to the police being in a position to apprehend any additional offender.
>
> [18] Having regard to these considerations I accept that Crown submission that a 20% discount was excessive. The combined discount for the plea and assistance on count 1 was 45%. That is near to the figure of 50% which this Court has said should not normally be exceeded: *SZ v R* [2007] NSWCCA 19; (2007) 168 A Crim R 249 at [3], [53]; *AAT v R* [2011] NSWCCA 17 at [31]; *R v AZ* [2011] NSWCCA 43 at [94]; (2011) 205 A Crim R 222; *R v Holland* [2011] NSWCCA 65 at [42]; (2011) 205 A Crim R 429. The Court considers that an allowance of 10% for the limited assistance provided by the respondent would have been appropriate and that two thirds of this should be regarded as attributable to future assistance.

### *R v XX* [2017] NSWCCA 90

While s 23(2) specifies matters that must be taken into account, that does not necessarily mean that it is an exhaustive list of the matters to be considered: at [30]

> [31] In considering the scope of that provision, it must be remembered that the section confers a discretion and not an obligation on a sentencing judge to proffer a discount when assistance has been provided.

Assistance in not defined in s 23, however it excludes unwitting assistance but is not confined to assistance concerning offences of which the offender was the perpetrator [32]

Assistance for an offence not related to the current offence, even if the assistance was provided before arrest, does fall under s 23. However, the offence for which assistance was provided cannot be “wholly unrelated” to the current offence: at [34].

> [34] … The concept of “unrelated” in s 23(2)(i) should not be construed as a reference to “wholly unrelated” as otherwise this provision would not be engaged if the assistance was provided by the offender in relation to offences that are associated with, but not the same as, the offence for which they are being sentenced. Thus, s 23(2)(i) focuses attention on the degree of connection between the offences for which assistance has been provided and the offences for which the offender is being sentenced.

Nothing in s 23(1) suggests that the assistance referred to must have been provided after the offender was arrested: at [35].

> [35] … If the assistance was provided after the offender’s arrest on the subject offence, then there will be at least a bare temporal connection of some kind between the offence the subject of the assistance and the subject offence (although there may be an issue about the timeliness of the assistance: s 23(2)(e)). On the other hand, if the assistance was provided well before the commission of the subject offence or the arrest of the offender for the subject offence, then it will be that much harder to conclude that there is any connection between the two offences.

The factors in s 23(2) are not only relevant to an assessment of the level of discount that must be provided, they also must be considered as part of the assessment of whether any discount should be provided: at [61].

### *R v JD* [2018] NSWCCA 233 – double counting

[97] The Crown submitted that in circumstances where an offender received a discount for assistance to the authorities, and as a result needs protection in custody, it is an error to take this into account as a factor in finding special circumstances (R v S [2000] NSWCCA 13; 111 A Crim R 225 at [33]; R v Lee [2000] NSWCCA 392 at [80]). The Crown submitted that the discount for assistance already reflected the hardship likely to be suffered by the respondent due to the circumstances of his custody. This was one of the matters which is required to be taken into account pursuant to s 23(2)(g) of the Crimes (Sentencing Procedure) Act.

[98] For the reasons set out by the Crown, I am satisfied that there has been double counting in respect of the need for protection of the respondent because of his assistance to authorities. That is a matter relevant to the fixing of the non-parole periods in the indicative sentences.

### *R (Cth) v Madgwick* [2018] NSWCCA 268

[85] Importantly, it needs to be remembered that the exercise of the s 16AC(3) and (4) jurisdiction is not punitive. Rather, it involves correcting a miscarriage in the sentencing process because the basis for the reduction of the sentence by reason of the expectation of future co-operation has not been realised. In R v KS [2005] NSWCCA 87 Wood CJ at CL (with whom Tobias JA and Buddin J agreed) said:

> “19 The ability of the Crown to invoke this section is a very important part of the criminal justice system. Persons who give undertakings and who receive the benefit of those undertakings by way of a discounted sentence can, subject to exceptional circumstances, expect to have their sentences increased if they renege on their undertaking to give evidence. The departure from an undertaking of that kind is not to be regarded lightly and it will normally justify appellate intervention.”

[86] Here the co-operation was attending a conference, explaining aspects of a statement and identifying voices in some intercepted telephone conversations. The conference lasted approximately one hour. When the respondent refused to give evidence, the value of that assistance was almost entirely lost. The contents of his statement, and the identification of voices, was of no use to the prosecuting authorities without his evidence. Nevertheless, it cannot be said that the failure to co-operate with the undertaking has been “entire”.

# REMORSE

### *Butters v R* [2010] NSWCCA 1 per Fullerton J

> [16] … there is no statutory requirement that an offender give evidence before remorse can be taken into account in the calculation of sentence …
>
> [17] On a proper construction, s 21A(3)(i) requires an offender to provide evidence that he or she has accepted responsibility for his or her actions and has acknowledged any injury, loss or damage caused by his or her actions or any reparation for such injury, loss or damage (or both), as a statutory precondition to any reliance on remorse as a mitigating factor. The requirement to provide evidence before remorse can be relied upon does not equate with a requirement that an offender give evidence either of remorse generally or of the matters set out in the section.

### *Alvarez v R; Farache v R* [2011] NSWCCA 33 per Buddin J

> [66] It is important to emphasise that the court was not taken to any decision in which it has been authoritatively stated that an offender will only be entitled to the benefit of a finding of remorse in the event that he or she gives sworn evidence to that effect...Indeed it would be surprising if there was any such authority because it is readily apparent that an offender may, in some circumstances, demonstrate remorse by either words or conduct without giving sworn evidence...There are other types of conduct on the part of an offender which may well also be indicative of remorse".
>
> [67] It is important to emphasise that the court was not taken to any decision in which it has been authoritatively stated that an offender will only be entitled to the benefit of a finding of remorse in the event that he or she gives sworn evidence to that effect. Indeed it would be surprising if there was any such authority because it is readily apparent that an offender may, in some circumstances, demonstrate remorse by either words or conduct without giving sworn evidence …

### *Mariam v R; R v Mariam* [2013] NSWCCA 338 per Simpson J (Price and R A Hulme JJ agreeing)

> [64] … although it is well established that remorse may be taken into account as a mitigating factor in sentencing, some attention needs to be paid to the logic of doing so. Genuine remorse may be an indicator of the unlikelihood of further offending, in which case it may have significant relevance. If it is not indicative of that likelihood, I see little relevance in such evidence.

### *Stojanovski v R* [2013] NSWCCA 334 per Simpson J

> [41] In my opinion, remorse is to be seen as a mitigating factor because it is a concomitant of rehabilitation, meaning that future offending is unlikely or less likely …

A failure to express remorse does not disentitle an offender to a finding that his prospects of rehabilitation are good: ***BP v R*** [2010] NSWCCA 159 at [84] per Johnson J (Hodgson JA and Rothman J agreeing), citing ***Alseedi v R*** [2009] NSWCCA 185 at [65] and ***Ali v R*** [2010] NSWCCA 35 at [48].

***Mihelic v R* [2019] NSWCCA 2 per Rothman J (Hoeben CJ at CL and Price J agreeing)**

> [71] Further, a sentencing judge is entitled not to accept the evidence of an applicant to that effect. This case, however, is in a different category. First, there was no cross-examination of the offender/applicant as to his remorse. Secondly, the applicant had attempted to remove himself from the drug supply environment by disposing of his Blackberry, but was brought back into the environment by contact from the undercover operative.
>
> [72] Thirdly, the sentencing judge does not remark or express any opinion as to whether the applicant's expressions of remorse and contrition are or are not genuine or whether the applicant should be believed. Fourthly, the applicant indicates that he has been free of drugs in gaol and gives a rational basis for his remorse and his desire to be rehabilitated.
>
> [73] Ordinarily, even where the rules of evidence do not apply, it is an essential rule of fairness that, if it is to be said that a witness is not telling the truth or is mistaken as to a fact, that proposition should be the subject of cross-examination.

It is accepted that statements by the offender expressing his or her acceptance of responsibility, contrition and remorse for the commission of the offences to the expert witnesses may have reduced weight in circumstances where the offender has not given sworn evidence: **R v Qutami [2001] NSWCCA 353; 127 A Crim R 369; *R v Palu* (2002) 134 A Crim R 174.**

However, it is not mandatory that an offender give evidence in the proceedings for remorse to be taken into account: see, eg, ***AH v R* [2020] NSWCCA 279** per Fullerton J (Macfarlan JA and Button J agreeing) at [73]–[82].

# 5. AGGRAVATING FACTORS

## GENERAL PRINCIPLES AND DOUBLE-COUNTING

Where a judge is sentencing an offender for a number of matters and refers to generally to aggravating features which are elements of some of the offences (such as using weapons when there is an armed robbery count), error is established: ***Regina v Street*** **[2005] NSWCCA 139** at [32]–[34].

If an aggravating factor applies to some of the offences for which an offender is being sentenced, but not all of them, the sentencing judge must indicate which of the offences are ones in respect of which the aggravating factors are taken into account: ***Tadrosse*** **(2005) 65 NSWLR 740** at [22].

### *Mansour v R* [2011] NSWCCA 28 per Price J

> [46] It is well established that a factor should not be taken into account as an aggravating factor under s 21A(2), if it is either an element of the offence for which the offender is being sentenced or an inherent characteristic of that kind of offence: see for example Elyard v Regina [2006] NSWCCA 43; Ward v R [2007] NSWCCA 22; (2007) 168 A Crim R 545. A factor, which is an inherent characteristic of the kind of offence for which the offender is being sentenced, cannot be taken into account as an aggravating factor under s 21A(2), unless its nature or extent in the particular case is unusual. As Simpson J observed in Regina v Yildiz [2006] NSWCCA 97; (2006) 160 A Crim R 218 at [37]:
>
> > "...But this principle does not mean that the degree to which the 'inherent characteristic' exists in relation to a particular offence may not, where it exceeds the norm, be taken into account as an aggravating factor."
>
> …
>
> [47] It follows that the sentencing judge could not take into account this inherent characteristic as an aggravating factor unless its nature or extent went beyond what ordinarily might be expected.

### *Ta and Nguyen v R* [2011] NSWCCA 32 per James J

> [126] It has been established by a series of cases in this Court that a factor should not be taken into account as an aggravating factor to which additional regard can be had in sentencing, if it is either an element of the offence for which the offender is being sentenced or an inherent characteristic of that kind of offence. See for example *Elyard v R* (2006) NSWCCA 43. A factor which is an inherent characteristic of the kind of offence for which the offender is being sentenced can be taken into account as an aggravating factor to which additional regard can be had, only if its nature or extent in the particular case is unusual.

In respect of double-counting, see: ***Pearce v The Queen*** **[1998] HCA 57; (1998) 194 CLR 610**; ***Portolesi v R*** **[2012] NSWCCA 157**

# S 21A(2) CRIMES (SENTENCING PROCEDURE) ACT 1999

(2) **Aggravating factors** The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows --

(a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work

(b) the offence involved the actual or threatened use of violence

Actual violence is not an aggravating factor in relation to a robbery offence due to it being an element of the offence: ***Aslett v R*** [2006] NSWCCA 49. Threatened use of violence is not necessarily an element and can be taken into account in assessing seriousness: ***Hamze v R*** [2006] NSWCCA 36; ***R v Dougan*** **(2006) 160 A Crim R 135**

(c) the offence involved the actual or threatened use of a weapon

(ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent

(cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance

(d) the offender has a record of previous convictions – **see PRIOR CONVICTIONS**

(e) the offence was committed in company

(ea) the offence was committed in the presence of a child under 18 years of age

CCA found it was an error to take into account the "generalised presence" of a child: ***McLaughlin v R*** [2013] NSWCCA 152. Strict proof is required: ***Gore v R; Hunter v R*** [2010] NSWCCA 330; **(2010) 208 A Crim R 353**

(eb) the offence was committed in the home of the victim or any other person – **see OFFENCE COMMITTED IN HOME OF VICTIM**

(f) the offence involved gratuitous cruelty,

(g) the injury, emotional harm, loss or damage caused by the offence was substantial – **see VICTIMS**

(h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),

(i) the offence was committed without regard for public safety,

(ia) the actions of the offender were a risk to national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004 of the Commonwealth),

(ib) the offence involved a grave risk of death to another person or persons,

(j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,

(k) the offender abused a position of trust or authority in relation to the victim,

(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant) – **see** **VULNERABLE VICTIMS**

(m) the offence involved multiple victims or a series of criminal acts

Applies if there are multiple victims of a single offence. Directed towards offences that themselves encompass a series of criminal acts – it is not directed towards offences that take their place as one of a series of criminal acts. The distinction is important, and was drawn in ***R v Tadrosse*** **[2005] NSWCCA 145; (2005) 65 NSWLR 740** at [28]– [29]: ***Magnuson v R*** **[2013] NSWCCA 50** at [56]

(n) the offence was part of a planned or organised criminal activity – **see** **PLANNING**

(o) the offence was committed for financial gain – **see** **OFFENCE COMMITTED FOR FINANCIAL GAIN**

(p) without limiting paragraph (ea), the offence was a prescribed traffic offence and was committed while a child under 16 years of age was a passenger in the offender's vehicle.

# OFFENCE COMMITTED IN HOME OF VICTIM – s 21A(2)(eb)

## *Jonson v R* [2016] NSWCCA 286

> [40] … First, the section in its terms does not impose as a pre-condition for its operation that the offender be an intruder into the victim's home. Second, the aggravating factor is not limited to the home of the victim but extends to the home of any other person. On a literal construction, this could, hardly surprisingly, include the offender's home. It seems to me that, in those circumstances, the legislator did not intend that the operation of the section was limited to circumstances where the offender was an intruder either in the victim's home or some other home.
>
> [41] That construction promotes the purpose of the section, namely, that a home is a place which should be safe and secure for persons who reside, or are otherwise present, at such a place. Thus, it would extend to persons (for example, children) visiting a relative's home or, for that matter, persons in a domestic relationship at the home of the offender. …
>
> [50] In these circumstances, I am unable to agree that there is a rule of law within the meaning of that expression in s 21A(4) of the *Sentencing Procedure Act* that the fact that the offence was committed in the victim's home can only be an aggravating factor on sentence if the offender is an intruder. …
>
> [52] … The fact that s 21A(2)(eb) can extend beyond offences committed by an intruder does not mean that in all cases the fact that the offence occurred in a home will be an aggravating factor. It is necessary for the Court to conclude that, having regard to ordinary sentencing principles, it actually aggravates the offence in question: *Gore v The Queen* [2010] NSWCCA 330; (2010) 208 A Crim R 353 at [29].

## *R v Lulham* [2016] NSWCCA 287

> [24] It should be noted at this point that the sentencing judge's finding that the offending was aggravated by the fact that the victim was attacked in his own home raised the question of the proper interpretation of s. 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). In particular, it raised the question whether the fact that an offence occurred at a victim's home can be taken into account as an aggravating factor, in circumstances where the offender was not an intruder but was entitled to be at the victim's home at the time of the offence.
>
> [25] The same issue was raised in the matter of *Jonson v R* [2016] NSWCCA 286 which was heard on the same day as this matter. The Court heard submissions on this issue in the course of hearing both appeals. … The Chief Justice (with whom the other members of the Court agreed) concluded (at [40]) that the Parliament did not intend that the operation of s. 21A(2)(eb) be limited to circumstances where the offender was an intruder, either in the victim's home or in some other home.

## *Drew v R* [2016] NSWCCA 310

> [111] As Bathurst CJ (with whom Beazley P, Hall, Bellew JJ and I agreed) held in ***Jonson v R* [2016] NSWCCA 286** (at [50]) s 21A(2)(eb) of the CSP Act is not limited to cases where the offender is an intruder into the home of the victim. Despite this, his Honour went on to observe at [52] that the fact that s 21A(2)(eb) is not so limited does not mean that in all cases the fact that the offence occurred in a home will be an aggravating factor. It is necessary for the Court to conclude that, having regard to ordinary sentencing principles, it actually aggravates the offence in question."

# VULNERABLE VICTIMS – s 21A(2)(l)

## *Drew v R* [2016] NSWCCA 310

> [77] There was no dispute at the hearing of the appeal that the categories of vulnerable victims listed in s 21A(2)(l) are not exhaustive: *Perrin v R* [2006] NSWCCA 64 at [35]; *Ollis v R* [2011] NSWCCA 155 at [96]. It has been recognised that a victim may be "vulnerable" for the purposes of 21A(2)(l) in a variety of circumstances, including the following:
>
> > where the victim was a Japanese adolescent travelling alone on public transport: *Ollis v R* at [97];
> >
> > where the victim was a passenger in a taxi who was heavily intoxicated: *R v Ali* [2010] NSWCCA 35 at [39];
> >
> > where the victim lived in a rural and isolated location: *Stevens v R* [2007] NSWCCA 152 at [33];
> >
> > where the victim was a person travelling on a train who was to some degree isolated from other people on the train: *R v Dyer* [2006] NSWCCA 274 at [27] and *R v Ibrahami* [2005] NSWCCA 153 at [24];
> >
> > where the victim was "unwell and dry retching", so that he was less able to respond to an attack that he otherwise would have otherwise been: *R v Morris* [2007] NSWCCA 127 at [16]; and
> >
> > where the victim was a prisoner confined in a cell after lockdown: *R v Daley* [2010] NSWCCA 223 at [39]
>
> [78] In *R v Betts* [2015] NSWCCA 39, this Court was considering the sentence of an offender who stabbed his partner in circumstances where the sentencing judge had characterised the victim as "vulnerable". RS Hulme AJ (with whom Meagher JA and Hidden J agreed) observed of s 21A(2)(l) at [29] and [30]: that:
>
> > "The authorities make clear that sub-paragraph (l) is concerned with the weakness of a particular class of victim and not with the threat posed by a particular class of offender" and that "the examples set out in the sub-paragraph suggest that it is vulnerability of a particular kind that attracts its operation" and the fact that a victim does not have the characteristics of a powerful offender with violent tendencies does not make the victim vulnerable within the meaning of sub-paragraph (l) ... The paragraph looks to the circumstances of groups or classes of victims inherent in their situation or characteristics as such divorced from any actions of an offender.
> >
> > … While in one sense the complainant was vulnerable, that vulnerability arose because of the particular events of the day, not because of the characteristics of any group of which she was a member. Those events included that the applicant was able to prevent the victim from communicating with her family by taking her mobile phone and replying to text messages from her brother who was waiting downstairs. Accordingly, his Honour erred and this ground of appeal is made out."
>
> …
>
> [80] There was ultimately no dispute at the hearing of the application that, as a matter of general principle, the word "vulnerable" in s 21A(2)(l) is capable of

extending to a person who is vulnerable by virtue of being a member of a class of persons who are unable to complain about wrongful conduct because of a culture of silence and ostracism in their particular community. Where the parties joined issue in this matter was whether there was sufficient evidence before the sentencing judge to make that finding in this particular matter, in circumstances where it is accepted that there was neither any evidence led on the issue nor any submissions directed to it during the proceedings on sentence. The significance of the finding is that her Honour expressly found it to be an aggravating factor and as such it was a matter that the Crown was required to establish beyond reasonable doubt.

[81] It is incumbent upon the Crown to establish any aggravating factor in s 21A(2) of the CSP Act beyond reasonable doubt … This well-established sentencing principle was recently confirmed in *Filippou v The Queen* (2015) 256 CLR 47; [2015] HCA 29 at [24].

…

[84] Similiarly, I am satisfied that a court may not aggravate an offence by taking judicial notice of the fact that some Aboriginal women might be less likely to complain of domestic violence because of a culture of silence and ostracism in their communities. Whether or not the victim in each case is in such a class of vulnerable victims will always be a matter that must be proved beyond reasonable doubt based on the evidence in that case.

…

[90] The sentencing judge was entitled to have regard to the serious problem of domestic violence in Indigenous communities and the under-reporting of such violence. It provided context to her sentencing exercise and was relevant to the need for general deterrence and the protection of the community in sentencing for an offence of domestic violence committed upon an Aboriginal woman. The error established is that her Honour went on to find the offence aggravated for that reason, in the absence of evidence capable of establishing beyond reasonable doubt that this particular victim was a member of a particular class bearing those characteristics."

### ***Katsis v R* [2018] NSWCCA 9 per Hoeben CJ at CL – elderly woman could be considered a 'vulnerable person'**

[62] … That class of person has the following characteristics – she is elderly, lives alone, does not associate with other persons, has no community support and does not look after herself. Because of that social isolation, such persons are often frail and undernourished and can properly be regarded as members of a class who are vulnerable.

# OFFENCE COMMITTED FOR FINANCIAL GAIN – s21A(2)(o)

### *Cicciarello v R* [2009] NSWCCA 272

> [17] Whilst one should be careful about generalising in relation to such factors outside the circumstances of any particular case, here, quite clearly, when one understands the background of this young man and what he was doing, he was not selling for greed or for financial gain, he was selling to feed a drug habit that he had acquired. This does not detract from the fact that he committed a serious offence, but what it does mean is that it was an error, and an important one, to characterise this as selling for financial gain and thus to characterise it as an offence falling within the mid-range.

### *Hejazi v R* [2009] NSWCCA 282 per Basten JA referring to Cicciarello

> [12] This statement must be read in its context. It does not purport to say that an offence committed for financial gain may not involve an element of aggravation. What it does assert is that selling to feed a drug addiction is a factor which does not increase the moral culpability of the offence in the way that it might be increased if financial gain were not otherwise so excused. Nor does it suggest that the fact that the purpose of the offence was to obtain funds to feed a drug habit in any way diminishes the objective seriousness of the offence
>
> ...
>
> [15] It may be that the complaint was really a way of asserting that financial gain was not to be equated with obtaining funds to feed a drug habit, but the two are not mutually incompatible.

### *Farkas v R* [2014] NSWCCA 141

The CCA held, in part, that the sentencing judge erred by aggravating the offending by finding that the applicant profited by way of a reduction in pre-existing drug debts. He profited by receiving drugs but that did not take the case out of the ordinary: at [71]. Per Campbell J at [62]–[63]:

> [62] This Court held in Prculovski v R [2010] NSWCCA 274 at [43] (by Howie AJ; McClellan CJ at CL agreeing) that financial gain and a level of planning are elements of the offence. It is only when these factors are "significant" and above that expected in the "lowest level of offending" that a sentencing judge would not be in error to take this into account as a matter of aggravation.
>
> [63] The Crown accepts that the appellant in this case did not fall into this "significant" category. Neither the level of planning involved nor the "profit" gained were so significant as to take the offence beyond the level inherently contemplated by the elements of the offence. It is difficult to accept his Honour's error was not material in the result given the centrality of this idea in his thinking as summarised at [16] above.

# BREACH OF TRUST

### *Suleman v R* [2009] NSWCCA 70 at [22]–[28] per Howie J (McClellan CJ at CL and Hislop CJ agreeing)

> [22] This aggravating factor is not made out simply because the victim trusted the offender for some reason or other, such as because of the offender's standing in the community or he appeared to be a successful businessman. Nor is it made out because the persons with whom the offender dealt were "commercially naïve people". 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". It is a special relationship existing between them and transcends the usual duty of care arising between persons in the community in their everyday contact or their business and social dealings. The position of trust may reside in only one of the persons, such as between parent and child. But there may be situations where each stands in a position of trust to the other. The relationship is one recognised by the common law as imposing upon one of the participants a particular responsibility not to act to the detriment of the other because of their peculiar relationship.

Generally speaking, a finding that an offence was committed in breach of trust is a seriously aggravating factor: at [28]

### *R v Stanbouli* (2003) 141 A Crim R 531

> [34] The cases where, traditionally, breach of trust has been regarded as exacerbating criminality are where it is the victim of the offence who has imposed that trust — an employer defrauded by his employee, a solicitor who appropriates trust funds to his own use — or where the criminality involves a breach of that which the offender was engaged or undertook to do, eg a teacher or baby-sitter who indecently deals with the subject of his or her charge. Another example is afforded by the case of R v McLean (unreported, CCA, 31 March 1989) where a customs officer employed in the investigations section of the department had conspired to import heroin and cannabis. The offence there was in direct contravention of what the offender had been employed to do."

### *Lu v R* [2014] NSWCCA 307 – *fraud offences*

Offender's position as director of a company not in itself sufficient to establish requisite position of trust; not double counting to have regard to breach of trust as an aggravating factor where it was an element of the offence was that he was a director of a company: [13]–[22].

See also ***Suleman*** at [25] for examples of general fraud and dishonesty offences, where breach of trust is not an essential element of the offence, where courts have recognised that abuse of a position of trust, where it exists on the facts of a particular case, is an aggravating factor on sentence.

# PLANNING

### *RL v R* [2015] NSWCCA 106 per Basten JA, Simpson and Adamson JJ

> [36] … In ***Williams v R***, [4] McClellan CJ at CL said, in the context of an offence of break, enter and steal:
>
> > "[18] The complement of s 21A(2)(n) is found in s 21A(3)(b). In as much as s 21A(2)(n) provides that it is an aggravating feature of an offence that it was 'part of a planned or organised criminal activity' s 21A(3)(b) provides that it is a mitigating factor if the offence was not part of such a planned or organised criminal activity. ...
> >
> > [19] Section 21A(2)(n) has been considered by this court on previous occasions. In ***Fahs v R*** [5] Howie J said that the provision conveyed 'more than simply that the offence was planned'. His Honour suggested that a street dealer who purchased drugs simply to obtain the cash to purchase drugs for his own use is unlikely to fall within the provision. However, those responsible for maintaining the drug distribution network are likely to be committing offences which form part of planned or organised criminal activity.
> >
> > [20] In my opinion the approach adopted to s 21A(2)(n) by Howie J is correct. It is only when the particular offence is part of a more extensive criminal undertaking that the subsection is engaged. The fact that an offence was planned does not of itself bring it within the subsection."
>
> [37] As in ***Williams***, there was some "planning" of the various offences, but not such as to bring it within s 21A(2)(n). Contrary to the Director's approach, this was not an immaterial error: nor was the level of "planning" an objective factor which significantly affected the relative seriousness of the offences for the purposes of s 21A(1)(c). The fact that there were several offences revealing some broad pattern of behaviour does not mean there was relevant "planning". Rather, the fact that the offending, including the matters taken into account, was scattered over a five year period demonstrated that this was opportunistic behaviour.

The fact there was a level of planning in the commission of an offence does not necessarily mean that this aggravating factor applies: ***R v Yildiz* (2006) 160 A Crim R 218**; ***Fahs v R* [2007] NSWCCA 26**; ***Hewitt v R* (2008) 80 A Crim R 306**. There needs to be evidence that would permit a finding beyond reasonable doubt that the degree of planning exceeded the planning which would ordinarily be expected in an offence of that kind: ***Knight v R* [2010] NSWCCA 51**. Similarly, where the particular offence is part of a more extensive criminal undertaking: ***Williams v R* [2010] NSWCCA 15**.

### *Denham v R* [2016] NSWCCA 309

> [72] … In *Moore v R* [2016] NSWCCA 185 at [75] Basten JA said:
>
> > [75] The submissions for the applicant should be accepted in so far as the sentencing judge was in error in identifying the aggravating factor by reference to s 21A(2)(n). However, as also appears from ***RL v R* [2015] NSWCCA 106** at [37], planning may nevertheless constitute a factor

affecting the relative seriousness of the offence, for the purposes of s 21A(1)(c). Whether an offence is "planned" will involve matters of degree; the comparison is between a level of premeditation of criminal conduct and a response which is spontaneous, ill-considered or opportunistic. In this sense, there was a level of planning; the sentencing judge was satisfied that the attack was not simply a response to an unforeseen confrontation. Thus, although the judge was wrong to identify the statutory basis for his finding of aggravation, what he took into account were the matters set out in the passage quoted above. There was no error in treating those matters as aggravating; the incorrect statutory classification cannot be said to have affected the sentence imposed. The error was immaterial."

# 6. OBJECTIVE SERIOUSNESS

A number of questions are often asked when embarking upon the task of assessing objective seriousness of a particular offence or offences. Is the approach to assessing objective seriousness the same in a standard non-parole period offence as it is for offences generally? What are the factors that are relevant to an assessment of objective seriousness? What is the difference between "*characteristics of the offender*" and "*nature of the offending",* and do they sometimes overlap? Does moral culpability inform the assessment of objective seriousness or is it a separate and distinct concept?

Notwithstanding the clear statement of principle enunciated by the High Court in ***Muldrock v The Queen* [2011] HCA 39**, the assessment of objective seriousness and the relevant factors informing the assessment is not as clear-cut as one might expect. Terms such as "objective seriousness", "objective gravity", "moral culpability", "characteristics of the offender" and "the nature of the offending" are sometimes conflated, leading to confusion and imprecision.

One might ask – what does it matter? As long as a sentencing judge assesses objective seriousness and moral culpability and takes into account the subjective circumstances of the individual in such a way as to do justice to the notion of instinctive synthesis, imposing a proportionate sentence in all the circumstances, what does it matter?

The answer to that question is that, by understanding the work that each of these factors has to do, a sentencing judge may have a better understanding as to what weight to give each. Ultimately, however, the process of instinctive synthesis requires that a judge take into account all of the relevant factors without engaging in a two-staged approach.

The sentencing exercise is a complex but unitary (or integrated) process requiring consideration of all relevant factors in quantifying the sentence to be imposed. It is an evaluative assessment: ***Markarian v The Queen* (2005) 228 CLR 357**.

However, in practice, clarity and consistency in approach to an assessment of objective seriousness can make life simpler and may avoid error.

This part of the checklist does not purport to answer all of the questions entirely because the statements of principle post-*Muldrock* have sometimes lacked clarity.

I will set out ***some*** of the relevant cases and have endeavoured to provide some assistance in approaching the assessment of objective seriousness by reference to a number of commonly asked questions.

***Question 1: Do you have to characterise the objective seriousness of an offence which does not carry a standard non-parole period by reference to language such as "middle of the range", "below middle of the range", "above middle of the range"? Is there a difference in approach in assessing objective seriousness between offences which carry a standard non-parole period and offences more generally?***

In ***R v Koloamatangi*** **[2011] NSWCCA 288**, Basten JA pondered that what remained in doubt following the High Court's decision in *Muldrock* is whether the sentencing court is required or permitted to classify, or prohibited from classifying, the particular offence by reference to a low, medium or high range of objective seriousness. His Honour pointed to the statements enunciated at [25] and [29] stating that they indicate that the sentencing judge is not required to undertake such an assessment or classification, emphasising that it would be wrong to adopt a two-staged approach which commenced with such an assessment and then identify reasons for departure. On the other hand, to treat the standard non-parole period as a guidepost requires that the phrase "the middle of the range of objective seriousness", be given content.

In practice, sentencing judges have persisted in classifying offences by reference to a low, middle, or high range of objective seriousness. Indeed, such classification takes place even in cases where the offence does not attract a standard non-parole period.

It is necessary to set out briefly the approach enunciated by the High Court when assessing objective seriousness.

In *Muldrock* the High Court was dealing with an offence that carried a standard non-parole period of 15 years. The sentencing judge, applying a 25% reduction in the otherwise appropriate sentence to reflect the utilitarian value of the plea of guilty, imposed a sentence of 9 years imprisonment with a non-parole period of 96 days.

The appellant was found to be "significantly intellectually disabled". The High Court used the phrase "mentally retarded' to describe the appellant. A Crown appeal to the Court of criminal appeal was upheld and the appellant resentenced to a non-parole period of 6 years and 8 months imprisonment and a balance of sentence of 2 years and 4 months.

The High Court had occasion to consider the provision (as it existed at the time) in respect of the standard non-parole period is for the sentencing of offenders in New South Wales. Section 54A (2) of the Crimes (Sentencing Procedure) Act provided:

> "For the purposes of sentencing and offender, the standard non-parole period represents the non-parole period for an offence in the **middle of the range of objective seriousness** for offences in the Table to this Division".

At the material time s 54B relevantly provided:

> "(2) when determining the sentence for the offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are good reasons for setting a non-parole period that is longer or shorter than the standard non-parole period"

In determining whether to set a longer or shorter or non-parole period the court was to only have regard to the matters set out in section 21A.

The High Court emphasised the long-standing principle that a judge is to identify all the factors relevant to the sentence, discuss their significance and then make a value judgement as to what is the appropriate sentence given all the factors of the case: [26].

Whenever a court imposes a sentence of imprisonment for a Division 1A offence, ss 54B(2) and 54B(3) were said to oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence and in doing so the court would be mindful of the two legislative guideposts: the maximum penalty and the standard non-parole period.

The standard non-parole period represents the non-parole period for a hypothetical offence in the middle of the range of objective seriousness without regard to the range of factors, both aggravating and mitigating, that bear relevantly on sentencing in the individual case.

Importantly, the High Court stated:

> "the latter requires that content be given to its specification as the 'non-parole period for an offence in the middle of the range of objective seriousness'. Meaningful content cannot be given to the concept by taking into account characteristics of the offender. **The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. <u>It is to be determined wholly by reference to the nature of the offending"</u>**: [27].

The High Court went on to say that an offence of sexual intercourse with a child aged under 10 years, falling within the middle of the range of objective seriousness, has a standard non-parole period of 15 years. However, that circumstance said little about the appropriate sentence for the particular offender in that case, a "mentally retarded offender".

The question as to the causal relation, if any, between and offenders mental illness and the commission of an offence, was said to be less likely to arise in sentencing a "mentally retarded offender" because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessens the offender's <u>moral culpability</u> for the offence: [54].

The High Court appears to have distinguished between an assessment of objective seriousness and the assessment of moral culpability, only the latter is informed by the offender's cognitive impairment.

Following the decision in *Muldrock,* the New South Wales Law Reform Commission considered the operation of the standard non-parole period offence scheme in Report No 139, *Sentencing* (July 2013), Chapter 7 'Standard minimum non-parole period scheme'. Following the report, amendments were made to ss 54A and 54B by the *Crimes (Sentencing Procedure) Amendment (Standard Non-Parole Periods) Act 2013*.

Section 54A(2) now states:

> "For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the Table to this Division that, taking into account only the objective factors affecting the relevant seriousness of that offence, is in the middle of the range of seriousness".

The provision clarifies that the standard non-parole period identified for the offences included in the Table is identified by reference only to the objective factors. That does not preclude taking into account characteristics of the offender in determining the appropriate term of imprisonment, including the non-parole period, in the individual case.

Section 54B(2), as amended, provides:

> "The standard non-parole period for an offence is a matter to be taken into account by the Court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender".

In the 2nd reading speech with respect to the amending legislation, the Attorney-General, Mr Smith, said:

> "Since the High Court's decision, there has been uncertainty as to the extent to which the above statement (the objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders) limits the courts ability to consider matters personal to the offender when sentencing for a standard non-parole period offence. **The amendment clarifies that limiting consideration to the objective factors applies only when giving meaning to the hypothetical middle of the range offence described in section 54A. It does not prevent courts from taking into consideration all relevant factors, including those personal to the offender, when determining the appropriate sentence under section 54B.** The amendments adopt the language of section 21A of the Crimes (Sentencing Procedure) Act 1999, which refers to 'objective or subjective factors that affect the relative seriousness of the offence'. There has been extensive consideration in the courts of whether particular factors are objective factors affecting the relative seriousness of an offence, or whether they should be seen as purely personal factors. The amendments ensure that these common law concepts apply to the consideration of objective and subjective factors in the sentencing process"

In ***Tepania v R*** **[2018] NSWCCA 247**, the Court stated that, in approaching the decisions of the Court of Criminal Appeal since the amendments were made in 2013, it is necessary to keep in mind that it is the statute in its present form which is to be considered and applied, with statements made by the High Court in *Muldrock v The Queen* to be considered with that important qualification mind: [96].

*"The amendments made in 2013 clarify that limiting the considerations to objective factors applies only when giving meaning to the hypothetical "middle of the range" offence described in section 54A."* This kind of characterisation is often not helpful even when sentencing for an offence that carries a standard non-parole period. In ***Cargnello v Director of Public Prosecutions (Cth)*** **[2012] NSWCCA 162**, Basten JA stated at [88]:

> "This kind of characterisation, which was no doubt encouraged by the introduction into state law of section 54A(2) of the crimes sentencing procedure act 1999 with respect to offences the subject of standard non-parole period is, is often unhelpful. That is because it is rarely explained what is meant by the 'middle of the range'. Clearly, a range is not a point on a scale, but it could cover anything from 25% to 75% of the most serious case, or it could be far more narrowly defined. Unless it is narrowly defined it is unlikely to provide useful guidance for the sentencing judge, let alone for those reading the judgment."

***Possible Answer to Question 1***

To answer the first question posed here, it appears that the approach enunciated in *Muldrock*, having regard to the 2013 amendments, is applicable in cases involving an offence that carries a standard non-parole period, that is, when sentencing for a Division 1A offence.

Characterising an offence as at the "middle of the range", "below the middle of the range", "above the middle of the range" (and including numerous variations to these categorisations), ***is not necessary*** when sentencing an offender for an offence that does not carry a standard non-parole period.

In ***Taha v R*** **[2019] NSWCCA 240** Button J said at [81]:

> " … The finding made by the sentencing judge about objective seriousness was somewhat obscure. I also agree that it was at the same time overly precise. I also agree that that kind of precision, if it was necessary, is no longer necessary since the decision of Muldrock. And, in my respectful opinion, it is even less necessary with regard to offences that do not carry a standard non-parole period, as here."

However, assessment of the objective seriousness (or objective gravity) of an offence is an essential element of the sentencing process. It is an essential element of the process of instinctive synthesis, a purpose of which is the imposition of a proportionate sentence: *Zreika v R* [2012] NSWCCA 44 at [46]; *R v Dodd* (1991) 57 A Crim R 349 at 354; *Khoury v R* [2011] NSWCCA 118.

Often, sentencing submissions are couched in terms of "*mid-range*", "*below mid-range*", and "*above mid-range* when addressing the issue of the objective seriousness of offences, irrespective of whether the offence attracts a standard non-parole period. Equally as often, sentencing judges assess the objective seriousness of an offence using the same language. This often happens because it is easier to articulate objective seriousness by reference to the language used in the submissions made by the parties. It can, however, import an approach that is really only relevant to cases involving standard non-parole period offences.

While it is important in every sentencing exercise to clearly articulate the assessment of the objective seriousness (using that term interchangeably with objective gravity) of an offence, and identify the factors taken into account***, it is not necessary*** to characterise an offence by reference to a "middle-range" if that offence does not attract a standard non-parole period.

***Question 2: What factors can be taken into account in assessing objective seriousness when sentencing for a Division 1 A offence?***

Characterising an offence as at the middle of the range, below the middle of the range, above the middle of the range (including numerous variations to these categorisations), ***is not necessary*** when sentencing an offender for an offence that does not carry a standard non-parole period.

It appears then that the approach enunciated in *Muldrock*, having regard to the 2013 amendments, is applicable in cases involving an offence that carries a standard non-parole period, that is, in sentencing for a Division 1A offence.

As indicated above, the High Court in Muldrock was very clear in stating that giving "meaningful content to the specification as the non-parole period for an offence in the middle of the range of objective seriousness", requires a determination wholly by reference to the nature of the offending and not matters personal to a particular offender or class of offenders. Does this statement mean that when assessing the objective seriousness of the particular offence for which an individual is to be sentenced, such determination is wholly informed by the nature of the offending?

In ***McLaren v Regina*** **[2012] NSWCCA 284**, McCallum J (McClellan CJ at CL and Bellew J agreeing) referred to the statement enunciated by the High Court in *Muldrock* at [27], stating:

> [27] The appellant contends that his Honour's conclusion may now be seen to have entailed error in that the decision in *Muldrock* renders impermissible any consideration of the applicant's state of mind in assessing the objective seriousness of the offence at hand.
>
> [28] In my view, that submission misconceives the effect of the decision in *Muldrock*. The phrase "objective seriousness" in Muldrock at [27] … refers specifically to the definition in s 54A(2) of the Act as to what a "standard non-parole period" denotes.

> That is the "concept" referred to in the previous sentence of that paragraph. The point there made by the High Court, as I would understand it, is that there is no sense in attempting to place the offence at hand (with all its features, including matters personal to the offender where relevant to an assessment of the nature of the offending) at a point along a purely hypothetical range which, of its nature, is ignorant of those matters.
>
> [28] The decision in Muldrock does not, however, derogate from the requirement on a sentencing judge to form an assessment as to the moral culpability of the offending in question, which remains an important task in the sentencing process. That this assessment is also sometimes referred to as the "objective seriousness" of the offence perhaps contributes to the misconception. I do not understand the High Court to have suggested in Muldrock that a sentencing judge cannot have regard to an offender's mental state when undertaking that task (as an aspect of his or her instinctive synthesis of all of the factors relevant to sentencing).

This analysis supports the view that, when the High Court in *Muldrock* said that the objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders but rather wholly by reference to the nature of the offending, the Court was referring to the factors to be taken into account when giving 'meaningful content' to the concept of an offence in the middle of the range of objective seriousness.

In a number of other cases of the Court of Criminal Appeal, the statement made by the High Court in *Muldrock* has been interpreted as meaning that an assessment of the objective seriousness of the offence for which the individual is to be sentenced (assuming it is a Division 1A offence) is to be determined wholly by reference to the nature of the offending and not matters personal to a particular offender. However, matters that inform the nature of the offending may, in some circumstances, also be characterised as matters personal to a particular offender – for example, the offender being influenced by non-exculpatory duress.

Assuming that a sentencing judge is required to make an assessment of objective seriousness by reference to such a characterisation (for a Division 1A offence), what are the factors that inform the assessment? What factors are relevant to an assessment of the nature of the offending? Can those factors include characteristics of the offender?

In ***Williams v R*** **[2012] NSWCCA 172**, Price J acknowledged that, following the decision in *Muldrock* there has been some debate about the range of factors to be considered in determining the objective seriousness of a standard non-parole period offence, repeating that the objective seriousness of an offence is to be determined wholly by reference to the nature of the offending. His Honour stated at [42]: "*I do not think that the nature of the offending is to be confined to the ingredients of the crime, but may be taken to mean the fundamental qualities of the offence.*"

For example, where a provocation is established such that it is a mitigating factor, it is a fundamental quality of the offending which may reduce its objective seriousness. His Honour stated that in those circumstances there cannot be a realistic

assessment of the objective seriousness of the offence unless a provocation is taken into account.

What are the factors relevant to the nature of the offending as opposed to being personal to a particular offender? In ***Yun v R*** **[2017] NSWCCA 317**, the Court rejected the submission that *Muldrock* limits the range of relevant factors to the actus reus and the consequences of the offence, stating that the physical acts and consequences of some standard non-parole period offences, by their very nature, do not demonstrate much 'scope and variety'. The intention of an offender has always been a significant factor in assessment of objective seriousness and the inclusion of that factor necessarily enlarges the range within which a given offence sits: at [38].

The Court held that the "*nature of the offending*" as referred to by the Court in *Muldrock* is sufficiently broad to include the mens rea that accompanied the commission of the offence because it is an integral part of the offender's conduct constituting the offence. Factors such as duress or provocation are not "characteristics of the offender" but operate to partially excuse or justify the commission of the offence and to that extent are within "the nature of the offending".

The Court went on to consider the issue of intellectual disability or mental illness and whether they are "characteristics of the offender" or factors relevant to "the nature of the offending". Where it is causally connected to the commission of the offence, it is acknowledged that mental illness may properly be described as a characteristic of an offender or a matter personal to an offender: [41].

However, the Court went on to say that the Court of Criminal Appeal has invariably determined, since *Muldrock*, that an offender's mental condition at the time of the commission of the offence is a critical component of "moral culpability" which in turn affects the assessment of "objective seriousness". Here, moral culpability is a matter informing objective seriousness rather than being a concept separate from an assessment of objective seriousness. More will be said about this in answering Question 3, below.

In ***Tepania v R*** **[2018] NSWCCA 247**, the Court held at [112]:

> "In sentencing for an offence (whether or not a standard non-parole period offence) a court should make an assessment of the objective gravity of the offence applying general law principles, so that all factors which bear upon the seriousness of the offence should be taken into account (unless excluded by statute). Factors such as motive, provocation, or non-exculpatory duress may be taken into account in this way. **Regard may be had to factors personal to the offender that are causally connected with or materially contributed to the commission of the offences, including (if it be the case) a mental disorder or mental impairment".**

### *Possible Answer to Question 2*

Differences of opinion have arisen as to the matters covered by the expression "characteristics of the offender" which are to be eschewed when determining "the nature of the offending". As best as one can distil these different opinions into a single approach to be applied in practice, I suggest that, in assessing the objective seriousness for a standard non-parole period offence and offences more generally, a sentencing judge can take into account characteristics of the offender where they inform the nature of the offending, including matters such as motivation, provocation, mental disorder and mental impairment, non-exculpatory duress.

One does not ignore all characteristics of the offender – rather, the practitioner needs to explain how the offender's characteristics inform the nature of the offending. Does the characteristic impact upon mens rea? Is it relevant to motive? Put another way, a sentencing judge may take into account matters that arguably fall into the category of characteristics of the offender where those matters inform the nature of the offending itself. While such factors may be identified as "characteristics of the offender", they can also inform the nature of the offending which is a necessary component of an assessment of objective seriousness.

### *Question 3: Is objective seriousness and moral culpability the same thing or are they separate concepts?*

Sometimes the terms "objective seriousness" and "moral culpability" are used interchangeably. However, while there may be a clear relationship between them (where the assessment of moral culpability affects the assessment of objective seriousness) they are two separate concepts.

In ***Lees v R*** **[2019] NSWCCA 65**, Hoeben CJ at CL stated at [60]:

> Strictly speaking, the question of the applicant's mental health does not arise when one is considering the objective seriousness of an offence. That is part of the applicant's subjective case and needs to be treated as such. (*Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 at [19], [27].)

In that case, the applicant's psychiatric problems impacted upon her moral culpability for the offending. The Court held that, when considering the applicant's *subjective case,* it was essential for the judge to assess the applicant's moral culpability and thus responsibility for the offending. The applicant's "undoubted psychiatric disabilities" were said to significantly reduce her moral culpability for "what was otherwise, looked at objectively, in the high range of seriousness for the offence of manslaughter": at [91].

In *Muldrock,* the High Court referred to the well-recognised principle that where an offender is suffering from a mental illness or intellectual handicap that is causally connected to the commission of the offence, such a condition could substantially

lessen the offender's moral culpability. In other cases, an offender's moral culpability, where reduced by virtue of his/her mental condition, is said to be relevant to the objective seriousness of the offence/s: ***Martin v R*** **[2015] NSWCCA 6** at [53]; ***Yun v R*** **[2017] NSWCCA 317** at [47].

The proposition that an offender's mental health should be taken into account when assessing the objective seriousness of the offending is not without difficulty. This difficulty was recognised in the decision of ***Biddle v R*** **[2017] NSWCCA 128**. Despite these difficulties, it was pointed out that the Court of Criminal Appeal has followed the approach that an offender's mental condition, which must act upon moral culpability, is a matter to be properly taken into account when assessing the objective seriousness of an offence: [68].

### *Possible Answer to Question 3*

In some cases there may be a clear connection between moral culpability and objective seriousness. But they are not the same thing. A characteristic of the offender, for example, cognitive impairment or mental illness that is causally connected to the commission of the offence, may reduce the offender's moral culpability which in turn may inform the assessment of objective seriousness. The reason is because it may inform the "nature of the offending".

On the other hand, where a characteristic of the offender – for example a childhood of deprivation and disadvantage – operates to reduce the offender's moral culpability, it may not necessarily inform the assessment of objective seriousness of the offence. Such a background may not inform the nature of the offending, and therefore an assessment of objective seriousness, but may reduce moral culpability in the way stated by Simpson AJ in ***R v Millwood*** **[2012] NSWCCA 2** at [69]:

> … I am not prepared to accept that an offender who has the start in life that the respondent had bears equal moral responsibility with one who has had what might be termed a "normal" or "advantaged" upbringing. Common sense and common humanity dictate that such a person will have fewer emotional resources to guide his (or her) behavioural decisions. I should not be taken as implying that such a person bears no moral responsibility; but I consider that the DPP's submission significantly underestimates the impact of a dysfunctional childhood. …

Insofar as a question arises about whether an assessment of moral culpability is relevant to an assessment of the objective seriousness of the offence or whether it is a concept to be addressed separately, I suggest that, where a characteristic of the offender says something about the nature of the offending, it is relevant to an assessment objective seriousness. Where that characteristic does not inform the nature of the offending, it may however be relevant to a reduction of moral culpability which is to be addressed separately, and may be relevant to the weight to be given to other purposes of sentencing such general and specific deterrence, denunciation and rehabilitation.

# 7. PURPOSES OF SENTENCING

## GENERAL PRINCIPLES

### *Section 3A Crimes (Sentencing Procedure) Act 1999*

3A **Purposes of sentencing**

> The purposes for which a court may impose a sentence on an offender are as follows—
>
> (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, **– see** **GENERAL AND SPECIFIC DETERRENCE**
>
> (c) to protect the community from the offender, **– see** **REHABILITATION & FUTURE DANGEROUSNESS**
>
> (d) to promote the rehabilitation of the offender, **– see** **REHABILITATION & INDIVIDUALISED JUSTICE**
>
> (e) to make the offender accountable for his or her actions,
>
> (f) to denounce the conduct of the offender, **– see** **DENUNCIATION**
>
> (g) to recognise the harm done to the victim of the crime and the community. – **see** **VICTIMS**

It has been held that this section is largely a codification and elaboration of principles of sentencing at common law: ***R v MA* (2004) 145 A Crim R 434.**

The complexities of sentencing were expressed in ***Veen v The Queen [No 2]* (1988) 164 CLR 465** where Mason CJ, Brennan, Dawson and Toohey JJ said at 476:

> "… sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

There is no attempt to rank the overlapping and sometimes conflicting purposes of sentencing in s 3A: ***Muldrock v The Queen* (2011) 244 CLR 120** at 20.

## *Weininger v The Queen* (2003) 212 CLR 629

[23] Sentencing is … a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money.

## *R v Engert* (1995) 84 A Crim R 67 per Gleeson CJ

[68] A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. That was the particular problem being examined by the court in the case of Veen (No 2). Again, in a particular case, a feature which lessens what might otherwise be the importance of general deterrence, might, at the same time increase the importance of deterrence of the offender.

## *Mainwaring v Regina* [2009] NSWCCA 207

[71] Any period of imprisonment must be understood for what it is: onerous, unpleasant, oppressive and burdensome. It is, as it should be the last available punitive resort in any civilised system of criminal justice. Public discussions about the need to deter crime by the imposition of heavier sentences are not always obviously, or at least apparently, informed by an appreciation of the significance of full-time incarceration upon men and women who receive such sentences.

## *Faleafga v R* [2016] NSWCCA 178

[54] As in all sentencing matters there were relevant factors pointing in opposite directions. The purposes of sentencing as set out in s 3A of the *Crimes (Sentencing Procedure) Act* 1999 require that the applicant is adequately punished for the offence, that he is made accountable for his actions, that his conduct is denounced, that such crime be prevented by both general and specific deterrence and that the harm done to the victim of the crime and the community be recognised. It is also a purpose of sentencing to promote the rehabilitation of the offender. I am satisfied that all of these purposes can be achieved in this case by the sentence I propose.

## *Taylor v R* [2018] NSWCCA 255

[51] It should not be necessary for a sentencing judge to structure a sentence judgment as a checklist, in which statutory or common law principles of sentencing are enumerated and then ticked off as having been applied, to avoid the prospect of an "armchair appeal" at a later stage seizing upon any missing reference as evidence of error (see Darwiche v R; El-Zeyat v R; Aouad v R; Osman v R [2011] NSWCCA 62; reported (2011) 209 A Crim R 424 at [170]).

[52] It is important to bear in mind the multiple purposes of a court in giving a sentence judgment, purposes which all point to a requirement for transparency, but not for mere recitation of law and principle. The offender and the Crown must both be enabled to understand how the sentencing judge arrived at the sentence ultimately imposed, and to ascertain whether there has been some misapplication of

fact or principle, or some other error, such that there may be an available appeal on a matter of substance. Any appellate court considering whether such error has occurred must be able to determine a claim of error by considering the sentence judgment.

[53] In this regard, the basis of the requirement for reasons in a sentence judgment does not greatly differ from that applicable to any judgment of any court. In criminal cases however, sentencing remarks serve other, important, purposes and, to fulfil those purposes, such judgments must be intelligible to the lay listener or reader, and accessible to the community. The community, a term which encompasses those who have a direct interest in a particular crime, such as any victim of it, have a legitimate interest in the work of the courts, and sentencing judgments are one means by which the community may be informed of that work.

[54] As an overall statement, a sentence judgment in a criminal case must make it clear to those directly involved, and to the community more broadly, why the particular sentence was imposed in the circumstances of that case.

[55] None of those purposes requires a court to refer directly and in terms to every statutory provision considered or applied, and to every principle of sentencing law regarded as relevant. Indeed, where clarity of expression is important, to permit the parties, involved persons, and the community to understand the court proceedings, to do so could only lead to obscurity, and incomprehension.

[56] Whilst specific references in a sentencing judgment to law and principle make the job of an appellate court in determining whether there was some error in the application of principle more straightforward, that by no means dictates a need for the slavish recitation of applicable law by first instance judges. It is enough if, on considering the whole of the sentencing remarks, the appellate court is able to determine what the sentencing court did and why, and determine whether law and principle have been correctly applied.

# GENERAL AND SPECIFIC DETERRENCE

## *R v Karnib* [2015] NSWDC 84

> [109] As in any sentencing exercise, at least whilst it continues to have statutory recognition, appropriate account must be given to the object of general deterrence, along with the other, some countervailing, objects of sentencing.
>
> [110] Without any apparent foundation in evidence, whether in the form of academic research or otherwise, in respect of offences of this character (and other offences which might involve a risk to public safety, or be considered abhorrent on some other ground) courts have sometimes said that general deterrence should be a predominant consideration. Frankly, absent an evidence base, it does not appear to me that there is a sufficient basis in principle or policy for the object at all, much less a basis to give that object any prominence in the synthesis over and above the other objects which are given statutory recognition in the sentencing exercise. Bald statements to the effect that it is a "cogent fact that the fear of punishment does, and will, prevent the commission of any many [crimes] that would have been committed if it was thought that the offender could escape punishment", or incur only a light punishment, (R v Rushby [1977] 1 NSWLR 594 at 598 per Street CJ, cited at para [64] of the Crown's written submissions) cannot rationally be elevated to expressions of principle without some objective demonstration of the asserted cogent fact. If the notions of individualised justice, which substantially underpin the exercise of the sentencing discretion, are to be given any more than mere lip service, then the various objects of sentencing must be balanced according to the particular circumstances and features of individual cases.
>
> [111] To dictate in advance that predominance be given to one object over another divorced from a consideration of the circumstances of any particular case, for example merely by reason of the character of the offence, is to fetter the discretion in a way that skews the balancing exercise which must necessarily be undertaken in each individual case. So to skew the exercise neither serves the interests of justice, so far as those interests are comprehended by serving the best interests of the community, nor serves the interests of justice so far as an individual offender is concerned. Indeed to give predominance to general deterrence, without any evidence base to support the proposition that there is any relevant deterrent effect achieved by sentences heavier than they might otherwise be, seems to me to run the significant risk of creating a positive injustice, particularly if other features of a case provide rational support for the proposition that the interests of justice and the community are better served by giving a preponderance of weight to other objects, such as an appropriate mix of rehabilitation and specific deterrence for example. It may be, in due course, there should be reconsideration of the statutory recognition of some of the presently recognised objects of sentencing, so as to reflect an appropriate evidence base

The utility of general deterrence has been questioned. Spigelman CJ said in ***R v Wong*** **(1999) 48 NSWLR 340** at [127]-[128] that:

> there are significant differences of opinion as to the deterrent effect of sentences, particularly, the deterrent effect of marginal changes in sentence. Nevertheless, the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system. Legislation would be required to change the traditional approach of the courts to this matter.

The High Court in ***Munda v Western Australia* (2013) 249 CLR 600** at [54] affirmed the place of general and specific deterrence in sentencing law:

> [54] It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion. That having been said, there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.

## *R v MF* [2015] NSWCCA 283

> [55] … Punishment and deterrence were considered but not at the expense of other, competing purposes for which a court may impose a sentence.
>
> [56] As recently noted by another judge of the same Court in a different context, whilst consideration must be given to the object of general deterrence recognised in the statute (along with the other objects of sentencing), the proposition that general deterrence must have some determined predominance or a fixed weight in the sentencing exercise is inimical to "the notions of individualised justice, which substantially underpin the exercise of the sentencing discretion": *R v Stockbridge* [2015] NSWDC 162 per Whitford SC DCJ at [108] to [110].
>
> [57] Rehabilitation was clearly an important focus of the reasoning of the sentencing judge in the present case. In light of the fact that the respondent was aged 17 years at the time of the offence, that was an appropriate focus for the reasons stated by his Honour. I am not persuaded that rehabilitation was erroneously given undue weight at the expense of the considerations of punishment or deterrence.

## *R v Mueller* [2015] NSWCCA 292 – general deterrence and mental illness

> [39] The authorities make it clear that "general deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others" – Muldrock v The Queen [2011] HCA 39; 244 CLR 120 at [53] although that is not to suggest the topic of general or indeed personal deterrence is to be entirely disregarded – Palijan v R [2010] NSWCCA 142 at 27. However in this case the extent to which the Respondent's mental abnormality contributed to his offending and her Honour's conclusions as to the likelihood of the Respondent re-offending well justified her in taking the stance which she took.

### *R v Loveridge* [[2014] NSWCCA 120]

> [103] Other decisions of this Court have emphasised that violence on the streets, especially by young men in company and under the influence of alcohol and drugs, is all too common and needs to be addressed by sentences that carry a very significant degree of general deterrence: *R v Mitchell; R v Gallagher* [2007] NSWCCA 296; 177 A Crim R 94 at 101 [29]. Even in the case of juvenile offenders (which the Respondent is not), this Court has emphasised that, in relation to crimes of violence committed in the streets by groups of young persons, general deterrence should be given substantial weight notwithstanding the youth of the offenders: *AI v R* [2011] NSWCCA 95 at [69]; *MB v R* [2013] NSWCCA 254 at [27].

### *Muggleton v R* [[2015] NSWCCA 62] per Adamson J

> [50] The second difficulty is that although general deterrence was a factor that her Honour took into account, one cannot reliably discern what weight was given to it or what impact it had on the length of the sentence. The reason for this is that sentencing is a process of "instinctive synthesis" (Wong v The Queen [2001] HCA 64; 207 CLR 584 at [75]) of several relevant factors, which may point in different directions.

### *RL v R* [[2015] NSWCCA 106]

> [68] Given that the offending was largely limited to the primary victim and involved a course of conduct over a significant period of time, and taking into account the principle of totality, it is necessary to determine the degree of accumulation and concurrency appropriate in the circumstances. In that exercise, significant weight should be given to the subjective circumstances of the offender and the absence of any need for specific deterrence. Further, limited weight should be given to general deterrence in the circumstances of the case; whilst that factor is not to be entirely disregarded, the individual circumstances of the mature offender require that it should be given limited weight. As Howie J noted in Moon, [30] a case involving offending by an adult against his step-daughter:
>
>> "In a case such as this where there has been such a lengthy delay between offence and sentence and where the offender is rehabilitated, it is the fact of imprisonment rather than the length of the sentence which will be of greatest significance to punish the offender and denounce his conduct. Although general deterrence is important it can never be allowed to dictate a sentence which is not proportionate to the offence committed or appropriate to punish the particular offender before the court."

### *Weribone v R* [[2018] NSWCCA 172]

One of the grounds of appeal advanced was "That the sentence imposed was manifestly excessive, in particular since it featured an element of general and specific deterrence".

White JA agreed with Wilson J in finding the application for leave to appeal was without merit, and added the following:

> [14]: The argument advanced by Mr Ozen is that although s 3A provides that the sentencing judge may take general deterrence into account in fixing a sentence, the

> sentencing judge cannot do so unless there is evidence that to increase for reasons of general deterrence what would otherwise be an appropriate sentence is not authorised. Section 3A does not bear that construction. To the contrary, it entitles the sentencing judge to assume that specific or general deterrence is a relevant factor in sentencing without requiring proof that that is so. Section 3A retains the legislative imprimatur to which Wood CJ at CL referred in R v Henry at [265]. Whether the assumption upon which s 3A(b) is enacted is justified is a different question … As Wilson J says, what the law should be is a matter for the legislature.
>
> [15] For these reasons the sentencing judge was not in error in taking both specific and general deterrence into account in fixing the sentence. That is not to say that he was required to take those matters into account. Specific and general deterrence are relevant considerations under s 3A(b), but they are matters that "may", not must, be taken into account. The extent that it is appropriate to take those matters into account is a matter for the determination of the sentencing judge which might be influenced by the existence or absence of any evidence as to the likely deterrent effect, either specifically or generally, of an increase in what would otherwise be an appropriate sentence. But the applicant did not demonstrate error in relation to the sentence imposed by the sentencing judge.

In relation to ground two of the appeal, Wilson J found:

> [54] It is not necessary to consider this argument further other than to observe that there is no support for it in authority, or in the wording of s 3A of the *Crimes (Sentencing Procedure) Act*. If long standing law is to be overturned, something rather more than the adoption of a modal verb in a section of a statute will be required. Such a significant change to legal principle would have to be clearly stated by the legislature.

While dismissing the appeal, White JA cited the several passages that had been relied on by the appellant as showing there was no evidence to support the proposition that an incremental increase in sentencing for the type of crime of which the applicant was convicted has any deterrent effect:

> [4] … One such study was that of Professor Weatherburn "The effect of prison on adult reoffending", Crime and Justice Bulletin BOCSAR, No 143, August 2010. That study addressed the specific deterrent effect of prison on offences of burglary and non-aggravated assault. Professor Weatherburn concluded that:
>
> > "After matching and statistical controls have been introduced, prison exerts no significant effect on the risk of recidivism for burglary. The effect of prison on those who are convicted of non-aggravated assault seems to have been to increase the risk of further offending. These findings are consistent with the results of overseas studies reviewed in the introduction to this bulletin, most of which either find no specific deterrent effect or a criminogenic effect",
>
> and
>
> > "The consistency of the current findings with overseas evidence on the effects of prison on re-offending suggests that it would be unwise to imprison offenders when the only reason for doing [so] is a belief in the specific deterrent effect of prison." (at 10)

# DENUNCIATION

### *Ryan v The Queen* (2001) 206 CLR 267 per Kirby J at [118]:

> *Denunciation and impartiality*: A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'. In the case of offences against children, which involve derogations from the fundamental human rights of immature, dependent and vulnerable persons, punishment also has an obvious purpose of reinforcing the standards which society expects of its members.

# REHABILITATION & LIKELIHOOD OF REOFFENDING

Parliament did not intend by the enactment of s 3A(c) to introduce a system of preventative detention contrary to the principles expressed by the High Court in *Veen v The Queen (No 2)*: ***Aslett v R*** **[2006] NSWCCA 49** at [137].

### *R v Zamagias* [2002] NSWCCA 17 per Howie J

> [32] It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate.

### *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575

Per Gleeson CJ

> [12] The way in which the criminal justice system should respond to the case of the prisoner who represents a serious danger to the community upon release is an almost intractable problem. No doubt, predictions of future danger may be unreliable, but, as the case of Veen shows, they may also be right. Common law sentencing principles, and some legislative regimes, permit or require such predictions at the time of sentencing, which will often be many years before possible release. If, as a matter of policy, the unreliability of such predictions is a significant factor, it is not necessarily surprising to find a legislature attempting to postpone the time for prediction until closer to the point of release.

Per Kirby J

> [124] Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness.

Findings as to future dangerousness and likelihood of reoffending do not need to be established beyond reasonable doubt: ***R v SLD*** **(2003) 58 NSWLR 589** at [40]:

> [40] A sentencing judge is not bound to disregard the risk that a prisoner would pose for society in the future if he was at liberty merely because he or she cannot find on the criminal onus that the prisoner would re-offend. The view that the risk of future criminality can only be determined on the criminal standard is contrary to all the High Court decisions since Veen (No 1).

See also ***R v McNamara*** **[2004] NSWCCA 42** at [20]–[30]

### *Wray v R* [2014] NSWCCA 166

> [41] … Although the past is not always repeated in the future, it is a guide to what may occur, particularly when past conduct, as in the present case, arises from a mental condition which, when acted on, necessarily results in criminal conduct.

### *R v Holyoak* (1995) 82 A Crim R 502 per Allen J

> It is, of course, clear that a sentence imposed upon an offender when he is of such an age that, should him not die in jail, he will have little worthwhile life left after his release is likely to bear more heavily upon the offender then a similar term imposed upon a younger man who can look forward to a worthwhile life after release … The real question, as I see, it is whether the objective gravity of the offences in the present case were such that it is within the proper bounds of judicial discretion for his honour to impose the sentence that he did not withstanding what, having regard to the applicant's age, the consequences well might be. It simply is not the law that it never can be appropriate to impose a minimum term which will have the effects, because of the advanced age of the offender, that he may well spend the whole of his remaining life in custody.

### *Cowling v R* [2015] NSWCCA 213 – sexual offences

See [36]-[44] regarding utility of Level of Services Inventory – Revised (LSI-R) assessment of risk of reoffending

### *Cramp v R* [2016] NSWCCA 305 – absence of evidence of motive

> [25] … Howie J (McClellan CJ at CL and Grove J agreeing) in Louizos v R; R v Louizos (2009) 194 A Crim R 223; [2009] NSWCCA 71 at [102]:
>
> > "An offence is not mitigated by the fact that no comprehensible motive can be shown. Motive is like any other aspect of the circumstances surrounding the commission of an offence. The Crown is only required to prove the elements of the crime charged. If the Crown wishes to rely upon motive as an aggravating feature, the Crown must prove it beyond reasonable doubt. If the accused contends that the motive is a mitigating factor, the accused is required to prove it on the balance of probabilities. **If the court cannot determine what motivated the offender, it follows that it is not a factor that can be taken into account in determining the objective seriousness of the offence or in any other way relevant to sentencing.**"
> > [Emphasis added.]"

…

[27] The final sentence of the passage from *Louizos v R* quoted at [15] was not intended by the Court to be a general statement, for all cases, that where no specific motive can be proved the subject of motive cannot be relevant to any factor which may bear upon the exercise of the sentencing discretion. If such a meaning had been intended by their Honours it would have been wider than necessary for the determination of the appeal then before the Court.

…

[31] … the need for the Court to sentence the applicant on the basis that he posed a danger to the community was confirmed and the degree of risk against which the community was to be protected was heightened by the circumstance that no motive for the murder was apparent. Absent proof of a motive, there was no causal explanation of the crime such as might be taken into account in calculating whether repetition of the circumstances which led to it was likely or whether the applicant's prospects of rehabilitation were greater or less. We consider that no error is shown in this respect.

### *R v Hookey* [2018] NSWCCA 147

[61] Persons of Aboriginal descent are not entitled to any greater leniency than any other person. Nevertheless, as the High Court stated in Bugmy v The Queen, supra, the social exclusion and disempowerment of persons of Aboriginal descent and of Aboriginal communities seems to have made an environment of violence, alcohol and drugs more prevalent in the Aboriginal community than in the total population. The answer is not longer incarceration. The answer lies in the treatment that neutralises or reverses the effect of social exclusion, disempowerment, discrimination and violent environment. It is fair to say that the respondent has taken steps towards that end.

## REHABILITATION & INDIVIDUALISED JUSTICE

Rehabilitation is a concept which is broader than merely avoiding reoffending.

### *R v Pogson and ors* [2012] NSWCCA 225 per McClellan CJ at CL & Johnson J

[124] By contrast to deterrence, rehabilitation has as its purpose the remodelling of a person's thinking and behaviour so that they will, notwithstanding their past offending, re-establish themselves in the community with a conscious determination to renounce their wrongdoing and establish or re-establish themselves as an honourable law abiding citizen: Vartzokas v Zanker at 279 (King CJ).

[125] In this sense, every offender is in need of rehabilitation. Some may need greater assistance than others. It has been commonplace to speak of "paying your debt" to society. That phrase, in colloquial parlance, captures the essence of rehabilitation, enabling the offender to re-establish him or herself as an honourable member of the community.

### *R v Blackman and Walters* [2001] NSWCCA 121

At [44], the Court cited with approval King CJ's remarks in ***Yardley v Betts*** (1979) 22 SASR 108:

> "The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never be lost sight of and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. If a sentence had the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an order to avoid offending in the future, the protection of the community is to that extent enhanced. To say that the criminal law exists for the protection of the community is not to say that severity is to be regarded as the sentencing norm..."

### *R v Osenkowski* (1982) 5 A Crim R 394 per King CJ

> There must always be a place for the exercise of mercy where a Judge's sympathies are reasonable excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the Judge forms the view, almost intuitively in the case of experienced Judges, that leniency at that particular stage of the offender's life might lead to reform.

### *R v Lattouf* (unrep, 12/12/96, NSWCCA) per Mahoney ACJ at 6–8

> It is in my opinion necessary that the law allow to a sentencing judge a discretion to determine the sentence appropriate for the particular offence, for the particular offender, and for the circumstances of the particular case … General principles must, of their nature, be adjusted to the individual case if justice is to be achieved … Paramount amongst these is the achievement of justice in the individual case. To see the sentencing process as involving no more than stern punishment for each offender is not merely simplistic; it damages the public interest. A sentencing process which is seen by the public merely as draconian and not just will lose the support of those whom it is designed to protect. If a sentencing process does not achieve justice, it should be be put aside. As I have elsewhere said, if justice is not individual, it is nothing …
>
> But, in addition, a sentencing process must be capable of discriminating between cases. There is, as I have said, a public interest in punishment. But if the desire to punish results in a person who would otherwise not become a confirmed criminal becoming such, that sentencing process is inconsistent with the public interest.
>
> It is to be recognised that imprisonment may convert a person who will not be a persistent criminal into one who is. Particularly is this so where the person to be sentenced is a first offender of a comparatively young age whose family circumstances are such that he may, with assistance, not become a criminal. It would be wrong to the individual and costly to the community not to attempt the rehabilitation of such a person.

### *R v DH; R v AH* [2014] NSWCCA 326 Button J – wholly exceptional sentence

> [104] The respect which this Court must pay to the role of a sentencing judge (see Mulato v R [2006] NSWCCA 282) extends to respecting the discretion of a

> sentencing judge to impose a wholly exceptional sentence where the circumstances are suitably exceptional. That is what is meant by "individualised justice".

### *Brown v R* [2014] NSWCCA 335 – *remarkable rehabilitation from drug addiction*

Per Hidden J:

> [29] … This is a case in which the applicant was entitled to a measure of leniency for the reasons articulated by Simpson J in the passage from her judgment in *Henry* which I have quoted in [27] above. Equally, it is a case in which, to adopt her Honour's words in the passage last cited, it was "appropriate...for the rehabilitative aspects of sentencing to assume a more significant role than might otherwise be the case." There was also "strong evidence of real progress towards actual rehabilitation." That said, while I myself might assess his prospects of rehabilitation as better than "somewhat guarded", it is important that a sentence be structured so as to afford him the opportunity of a lengthy period of conditional liberty, subject to supervision and the sanction of parole. To that end, like his Honour, I would find special circumstances.
>
> [30] While taking these matters into account, it remains necessary to pass a sentence which adequately reflects the applicant's criminality. However, the non-parole period, while also meeting the need for an appropriate measure of punishment and retribution, must recognise the progress he has made towards defeating his drug addiction and encourage him to remain on that rehabilitative path. The balance of term I propose would provide for a lengthy period of supervision and maintain the sanction of parole for a further period thereafter."

Per R S Hulme AJ:

> [36] For someone who was in the applicant's situation, his achievements are remarkable. They lessen greatly the weight needing to be given to personal deterrence, rehabilitation and the protection of the community in determining the length of the applicant's non parole period. No doubt his reform has its own rewards but it enables the Court also to provide some reward.

***R v Omar*** **[2015] NSWCCA 67** - evidence that respondent had undergone total and complete rehabilitation from illicit drug use during the period between the offending and his arrest "necessarily meant that considerations of specific deterrence were of less significance than might otherwise have been the case" (at [67])

### *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2017] HCA 41 per Kiefel CJ, Bell and Keane JJ

> [49] In *Elias v The Queen* [(2013) 248 CLR 483 at 494-495 [27]; [2013] HCA 31], French CJ, Hayne, Kiefel, Bell and Keane JJ said: '[t]he administration of the criminal law involves individualised justice.' The imposition of a just sentence on an offender in a particular case is an exercise of judicial discretion concerned to do justice in that case. It is also the case that, as Gleeson CJ said in *Wong v The Queen* [(2001) 207 CLR 584 at 591 [6]; [2001] HCA 64]: '[t]he administration of criminal justice works as a system … It should be systematically fair, and that involves, amongst other things, reasonable consistency.' As was explained by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Hili v The Queen* [(2010) 242 CLR 520 at 535 [49]; [2010] HCA 45]: '[t]he consistency that is sought is consistency in the application of the relevant legal principles'."

### ***Grey v R*** **[2018] NSWCCA 39**

The court reduced a drivers licence disqualification period when imprisoning an offender in order to promote his prospects of rehabilitation upon release:

> [63] Before proposing orders, I will return to the question of the licence disqualification. I accept Ms Paingakulam's submission that the availability of a driver's licence is likely to be an important factor in the applicant's prospects of finding worthwhile employment which in turn will enhance his prospects of rehabilitation and reduce the risk of re-offending. Bad as his record is, it is not characterised by serious driving offences or, on the material available to us, repeated disregard of the Road Transport legislation. In the circumstances, I think it appropriate to reduce the period of disqualification from 3 years to 18 months which will operate from his date of release on parole.

See also ***Reddy v R*** **[2018] NSWCCA 212** – reduction of disqualification period to promote rehabilitation and reintegration of an offender once released to parole

### ***R v Gray*** **[2018] NSWCCA 241 per Hamill J concurring with Bathurst CJ**

> [118] Mr Gray was described appropriately in his counsels' written submissions as a "highly institutionalised man with an intellectual disability and no life skills". It was noted that he had spent most of the last 20 years in some form of custodial sentencing. His intellectual functioning was in the "extremely low range". Notwithstanding these difficulties, the sentencing judge found that "[Mr Gray] shows good insight in relation to the fact that he needs support." Indeed, and unusually, the Breach of Parole Report recorded Mr Gray had "self-reported" his relapse into drug use while on parole. This occurred on 28 April 2016. He did not, at the same time, disclose to his parole officer that he had committed the offence in count 2 about six weeks earlier (17 March 2016). It was only two days after his self-reported relapse into drug use that he committed the offence in count 1 (30 April 2016). It is a matter of significance that he sought some assistance before he committed the second offence in time.
>
> [119] In light of these compelling subjective features of the case, and in spite of the seriousness of the instant offending and ongoing breaches of parole for similar offences, it was open to the sentencing judge to attempt to fashion a sentence that was not crushing and which maximised Mr Gray's prospects of rehabilitation. As King CJ said in The Queen v Osenkowski (1982) 30 SASR 212 at 212-213:
>
>> "There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform."

# VICTIMS – RECOGNITION OF HARM

s 3A(g) of the *Crimes (Sentencing Procedure) Act* establishes that one of the purposes of sentencing is to recognise the harm done to the victim of the crime and the community. Note, additionally, that s 21(2)(g) provides that an aggravating factor that is to be taken into account is whether "the injury, emotional harm, loss or damage caused by the offences is substantial".

### *MLP v R* [2014] NSWCCA 183

In the context of child sexual assault offences:

> [31] Moreover, even accepting that the offending was limited to a short period of time, the resultant effect upon the victim is not similarly limited. The importance of taking into account the ongoing effect, upon a young victim, of offending such as this was recently emphasised by this Court (Leeming JA, Johnson and Hall JJ) in R v Gavel [2014] NSWCCA 56 at [110]-[112]:
>
>> "This Court has observed that child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: R v CMB [2014] NSWCCA 5 at [92]. Sexual abuse of children will inevitably give rise to psychological damage: SW v R [2013] NSWCCA 255 at [52]. In R v G [2008] UKHL 37; [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the "long term and serious harm, both physical and psychological, which premature sexual activity can do". The absolute prohibition on sexual activity with a child is intended to protect children from the physical and psychological harm taken to be caused by premature sexual activity: Clarkson v R [2011] VSCA 157; 32 VR 361 at 364 [3], 368-372 [26]-[39].
>>
>> 111. This factor no doubt contributes to the setting of the heaviest maximum penalty known to the criminal law for s.66A(2) offences, accompanied by a standard non-parole period of 15 years. It is important that sentences for s.66A(2) offences reflect this grave element implicit in the offence itself.
>>
>> 112. This is an important feature in the present case. Young child victims are especially vulnerable. It is important that sentences passed for s.66A(2) offences recognize the harm done to the victim of the crime: s.3A(g) Crimes (Sentencing Procedure) Act 1999."

### *Abdelmeseeh v R* [2016] NSWCCA 312

> [56] This Court has made clear that severe punishment is required in circumstances where members of the public are attacked on public transport or after leaving public transport. In R v JW [2010] NSWCCA 49; 77 NSWLR 7, McClellan CJ at CL, Howie J and I said at 41-42 [207]-[208]:
>
>> "207 It is important to bear in mind that the offences were committed by a group of young men on persons using the public transport system at night. There is no doubt that in the first offence the group were waiting for a likely candidate to rob as he made his way through a secluded park from the station. The group then went to another station and again selected a likely victim and chased him to his home. But even there he was not safe. Crimes of violence committed in those circumstances warranted severe punishment

notwithstanding the age of members of the group or the other sentencing principles that apply to the sentencing of young offenders. Persons who are required to use public transport at night should be considered as vulnerable and protected by the sentences imposed in the courts.

208 In R v Kelly [2005] NSWCCA 280; 155 A Crim R 499, a case concerning an offence of violence committed at a railway station at night, Johnson J wrote:

‘6 In R v Ranse (Court of Criminal Appeal, 8 August 1994, BC9402928), Gleeson CJ said at page 8:

‘One of the primary purposes of the system of criminal justice is to keep the peace. In this connection the idea of peace embraces the freedom of ordinary citizens to walk the streets and to go about their daily affairs without fear of physical violence. It also embraces respect for the property of others.’

This statement has been adopted recently by this Court with respect to the protection of citizens who use public transport late in the evening, thereby placing themselves in a position of some vulnerability: R v Ibrahimi [2005] NSWCCA 153 at paragraphs 22-24.”

# 8. PENALTIES

## SECTION 5 THRESHOLD

### *West, Trent v R* [2017] NSWCCA 271 *per Rothman J*

[60] … the terms of s 5 of the *Crimes (Sentencing Procedure) Act* make clear that the starting point, in imposing a sentence on any offender, is that full-time custody is the last choice; not the starting point for the imposition of a sentence.

[61] In order to impose a sentence of imprisonment (whether full-time or otherwise), the Court must be satisfied that no other possible alternative is available. The Court must not start with the proposition that full-time custody is necessary, unless exceptional circumstances can be established. To start with such a proposition is inconsistent with the provisions of s 5 of the *Crimes (Sentencing Procedure) Act*

## RECORDING OF A CONVICTION

### *R v Mauger* [2012] NSWCCA 51

[36] … It is implicit in the position taken by the Crown that the recording of a conviction is a matter of special significance or importance in this case.

[37] Whilst that contention is understandable as a general proposition, it is important that it not be permitted in this case to dilute or to downgrade the significance of the imposition of a bond. If the seriousness of the present offence and the need for denunciation and general deterrence are important considerations, they are to my mind more than adequately contemplated in this case by both the terms and the duration of the bond that has been imposed. The respondent has been made subject to a judicially sanctioned requirement that he be of good behaviour for a period of two years. There are onerous consequences that apply if he fails to observe that requirement. That fact alone would in my view impress the seriousness with which the Court was treating the respondent's conduct upon an objective and reasonable member of the community ... **It is wrong in my view to assume that the decision to not record a conviction is automatically or necessarily coextensive with the imposition of an inadequate, or even a particularly lenient, sentence**.

…

[39] … As Spigelman CJ said in *R v Ingrassia* (1997) 41 NSWLR 447 at 449, in a comment directed to a consideration of the impact of a conviction upon an individual offender, "[t]he legal and social consequences of being convicted of an offence often extend beyond any penalty imposed by a Court".

[40] It goes without saying that by endorsing the use of s 9 as an alternative sentencing option in this case, the Crown tacitly recognises the importance of the imposition of a bond as an effective alternative to a sentence of imprisonment. In my view it is clear that the imposition of a bond pursuant to s 10 operates in fact, and will be perceived by the community as operating, in the same way as a bond imposed pursuant to s 9. The particular legal and social consequences for the respondent of recording a conviction against him in this case far outweigh the requirements of punishment, denunciation, or special or general deterrence. The purposes of sentencing described in s 3A of the Act are in my opinion properly and adequately achieved by the imposition of a conditional bond. …

# INTENSIVE CORRECTION ORDERS

### *R v Pogson; R v Lapham; R v Martin* [2012] NSWCCA 225

> [108] It should be kept in mind that an ICO is a substantial punishment to be utilised in an appropriate case: *Whelan* at [120]. However, as with all sentencing options which do not involve immediate incarceration, it may also reflect a significant degree of leniency: *Whelan* at [120].

### *Robertson v R* [2017] NSWCCA 205 per Simpson JA (Harrison and Davies JJ agreeing)

> [42] … An ICO is a sentence of considerable severity. It is a sentence of imprisonment (although the fact that it is to be served in the community introduces a substantial degree of leniency). It is subject to stringent statutory conditions, as well as other conditions that may be imposed to suit the circumstances of the individual case. It involves a minimum level of community service, and potentially intrusive supervision.

His Honour Rothman J in ***West, Trent v R*** **[2017] NSWCCA 271** at [69] agreed with the description of an ICO set out by Simpson JA (above) in *Robertson*.

### *R v Pullen* [2018] NSWCCA 264 per Harrison J (Johnson and Schmidt JJ agreeing)

> [66] The statement in *R v Pogson; R v Lapham; R v Martin* that ICOs involve substantial punishment was to a significant extent premised on the existence of onerous mandatory conditions which imposed significant restrictions upon an offender's liberty … That remains the case with the new scheme as persons subject to an ICO are required to comply with multiple mandatory obligations which are attached to the standard conditions … There are also additional obligations which are prescribed by regulation which attach to the additional conditions that may be imposed … The degree of punishment involved in an ICO, and therefore its appropriateness in a particular case, must now be assessed having regard to the number and nature of conditions imposed. In some cases, as a result of the significant number of obligations prescribed by the regulations, an ICO will be more onerous than it was under the previous scheme.
>
> …
>
> [84] In determining whether an ICO should be imposed, s 66(1) makes "community safety" the paramount consideration. The concept of "community safety" as it is used in the Act is broad. As s 66(2) makes plain, **community safety is not achieved simply by incarcerating someone. It recognises that in many cases, incarceration may have the opposite effect. It requires the Court to consider whether an ICO or a full-time custodial sentence is more likely to address the offender's risk of re-offending. The concept of community safety as it is used in the Act is therefore inextricably linked with considerations of rehabilitation**. It is of course best achieved by positive behavioural change and the amendments recognise and give effect to the fact that, **in most cases, this is more likely to occur with supervision and access to treatment programs in the community.**
>
> …

[86] The Court must also have regard to, but is not bound by, any assessment report obtained as well as evidence from a community corrections officer: Crimes (Sentencing Procedures) Act, s 69. The prioritisation of the consideration of community safety as the "paramount consideration" necessarily means, however, that other considerations, including those enunciated in s 3A of the Act, become subordinate.

[87] This is likely to occur most frequently in the case of a young offender with limited or no criminal history and excellent prospects of rehabilitation. In every case, however, a balance must be struck and appropriate weight must be given to all relevant factors which must be taken into account in arriving at the sentence, by way of the instinctive synthesis discussed in *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [51].

[88] This interpretation is supported by the second reading speech, in which the Attorney General said the following:

> "New section 66 of the *Crimes (Sentencing Procedure) Act* will make community safety the paramount consideration when imposing an intensive correction order on offenders whose conduct would otherwise require them to serve a term of imprisonment. Community safety is not just about incarceration. Imprisonment under two years is commonly not effective at bringing about medium- to long-term behaviour change that reduces reoffending. Evidence shows that community supervision and programs are far more effective at this. That is why new section 66 requires the sentencing court to assess whether imposing an intensive correction order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending": NSW Legislative Assembly, Parliamentary Debates (Hansard), 11 October 2017 at 2 (emphasis added).

[89] The result of these amendments is that in cases where an offender's prospects of rehabilitation are high and where their risk of reoffending will be better managed in the community, an ICO may be available, even if it may not have been under the old scheme. The new scheme makes community safety the paramount consideration. In some cases, this will be best achieved through incarceration. That will no doubt be the case where a person presents a serious risk to the community. In other cases, however, community protection may be best served by ensuring that an offender avoids gaol. As the second reading speech makes plain, evidence shows that supervision within the community is more effective at facilitating medium and long term behavioural change, particularly when it is combined with stable employment and treatment programs.

### *R v Fangaloka* [2019] NSWCCA 173 per Basten JA (Johnson and Price JJ agreeing)

The CCA held that there is no statutory obligation to consider, in circumstances where a sentencing court decides to impose a sentence of imprisonment of less than two years, whether it is appropriate that the sentence be served by way of an intensive correction order: at [60]-[61]

[61] … However, the fact that the *power* to consider imposing an ICO exists invites a further question as to the basis upon which a court should decline to consider imposing an ICO. That must include cases where the court is satisfied, not only that there is no alternative to a sentence of imprisonment, but also that factors not limited to deterrence and rehabilitation of the offender require no lesser sentence than one involving a fulltime custodial term. That may be because of the need for adequate punishment, for general deterrence, for denunciation, or for recognising the harm

done to the victim and the community. That being so, it would be strange if those broader considerations were reduced to a subordinate role immediately the court gave consideration to making an ICO. Such a conclusion would achieve a high degree of inflexibility and artificiality in the process of sentencing. There is no indication that the statutory scheme intended such a result.

[62] There is also a question as to how the court should assess "community safety" by reference to means of addressing the offender's risk of reoffending. As the Attorney noted in his Second Reading Speech, short term imprisonment may not be effective at reducing offending, whereas community supervised programs may be more effective. Is the court required to apply a presumption to that effect in sentencing individual offenders? If it is, how will it determine the cases in which the presumption may not apply? Alternatively, if the presumption is not the appropriate course, how will the court determine in a particular case the nature of the punishment which is "more likely to address" his or her risk of reoffending?

[63] An alternative reading of s 66 is restrictive, rather than facilitative. Thus, the paramount consideration in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the offender's risk of reoffending. That is, unless a favourable opinion is reached in making that assessment, an ICO should not be imposed. At the same time, the other purposes of sentencing must all be considered and given due weight.

[64] The first purpose of sentencing, identified in s 3A(a) of the Sentencing Act is "to ensure the offender is adequately punished for the offence." It is a fundamental principle of long-standing and requires that the sentence be reasonably proportional to the offending. [39] One would expect a clear statement or necessary implication of legislative intention for the 2018 amendments to alter that fundamental principle. Equally, there is no doubt that a sentencing court must have regard to the personal circumstances of the offender; but they should not divert the court from imposing adequate punishment, having regard to the objective gravity of the offence. [40]

[65] The better view is that the legislature has, appropriately, acted upon the available evidence by requiring the court to have regard to a specific consideration, namely the likelihood of a particular form of order addressing the offender's risk of reoffending. That obligation, imposed by s 66(2), is not stated to be in derogation of the more general purposes of sentencing outlined in s 3A, nor in derogation of other relevant matters: s 66(3). Nor does the legislation limit the consideration of community safety to a means more likely to address the risk of reoffending; it merely identifies that as a mandatory element for consideration.

[66] There is no doubt that community safety can operate in different ways in different circumstances. It is conventionally accepted that a purpose of punishment, including by way of imprisonment, is to deter the offender from further offending; it is also accepted that removal of an offender from the community for a period may have a protective function. The purpose of s 66, on this approach, is merely to ensure that the court does not assume that fulltime detention is more likely to address a risk of reoffending than a community-based program of supervised activity. Consistently with that view, s 66 does not seek to address potentially conflicting demands of community safety in the short term, as opposed to the longer term, and the risk that leniency will be abused. In short, there is nothing in s 66 which favours an ICO over imprisonment by way of fulltime custody. Further, while s 66 expressly referred to s 3A, it did so, not by identifying it as a set of "subordinate" considerations, but as mandatory considerations. It would be wrong for a court to treat every consideration other than the means of addressing the risk of reoffending as a subordinate consideration.

[67] Although the sentencing judge in the present case did not expressly refer to Pullen; she adopted an approach which had the effect of giving little weight to other purposes. No doubt there will be cases in which a person otherwise likely to serve

fulltime custody will obtain an ICO, because general deterrence is largely disregarded in favour of a possible reduction in the risk of reoffending by the particular offender, if not sent to gaol. On the other hand, there will remain cases in which the significant element of leniency contained in an ICO is inconsistent with the imposition of an adequate penalty, so that an ICO is an unacceptable form of punishment.

## *Casella v R* [2019] NSWCCA 201 per Beech-Jones J (N Adams J agreeing)

[107] In *Fangaloka*, Basten JA construed s 66 as follows (at [63]):

> “An alternative reading of s 66 is restrictive, rather than facilitative. Thus, the *paramount consideration* in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the offender’s risk of reoffending. *That is, unless a favourable opinion is reached in making that assessment, an ICO should not be imposed.* At the same time, the other purposes of sentencing must all be considered and given due weight.” (emphasis added)

[108] Read literally, the emphasised statement appears to extract from s 66 a prohibition on the imposition of an ICO unless the Court positively concludes that an ICO is more likely to address the offender’s risk of reoffending as opposed to serving a sentence of full time custody. If that is what was meant then it appears to travel well beyond s 66. **Nothing in s 66 purports to operate as a prohibition to that effect.** On its face, s 66(2) only requires an assessment of whether making the order or serving the sentence by way of full‑time detention is more likely to address the offender’s risk of reoffending. **It does not appear to necessarily preclude the imposition of an ICO if, say, the outcome of the assessment is neutral because the offender has good prospects of rehabilitation and does not represent a danger to the community, irrespective of whether he or she is incarcerated or subject to an ICO.** The imposition of an ICO in such a case would still be consistent with community safety. If this is truly the effect of *Fangaloka*, then I have significant doubts about whether it is correct. However, this matter was not the subject of argument and its correctness need not be resolved to determine this appeal. Given the findings of the sentencing judge and the Chief Justice, I am satisfied that imposing an ICO in this case gives effect to s 66.

## *Wany v DPP* [2020] NSWCA 318 per McCallum JA, Simpson JA agreeing

[60] … where the court is considering an ICO, the paramount (mandatory) consideration is community safety; in considering that issue, the sentencing court is required by s 66(2) to make an assessment as to “whether making the order or serving the sentence by way of full-time detention is more likely to address the offender’s risk of reoffending”.

[61] As I will explain, there is a separate controversy as to the proper construction of s 66 but, on any view, it requires the sentencing magistrate or judge to form a view as to which method of serving the sentence of imprisonment (by ICO or in detention) is more likely to address an offender’s risk of re-offending. The controversy arises from a suggestion offered by Basten JA in *Fangaloka* at [63]:

> “An alternative reading of s 66 is restrictive, rather than facilitative. Thus, the paramount consideration in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the offender’s risk of reoffending. That is, unless a favourable opinion is reached in making that assessment, an ICO should not be

> imposed. At the same time, the other purposes of sentencing must all be considered and given due weight."

[62] The correctness of the proposition identified in the third sentence ("unless a favourable opinion is reached in making that assessment, an ICO should not be imposed") has been doubted … I would respectfully agree with the view expressed by Beech-Jones J in *Casella v R* [2019] NSWCCA 201 at [108], with whom N Adams J agreed at [111], and which Brereton JA appeared to approve in his dissenting judgment in *Karout*, that s 66 is not restrictive; it should not be understood to preclude the imposition of an ICO except where the sentencing court reaches a positive determination that an ICO (as opposed to full-time detention) is more likely to address an offender's risk of reoffending.

[63] In any event, the authorities are at least consistent as to the task identified in s 66(2), which requires the court to make a determination: which method of serving the sentence is more likely to address the offender's risk of reoffending?

[64] That is not to say that, having reached a conclusion favouring an ICO on that issue, the sentencing court cannot still refuse to make such an order. The weight to be given to the outcome of that determination is then a matter within the discretionary judgment of the sentencing judge. So much is made plain by s 66(3); and see the remarks of Basten JA in *Fangaloka* at [65]. But the point of the section is to require the sentencing court to consider that question without any preconception in favour of incarceration as the only path to rehabilitation.

# 9. STRUCTURE OF SENTENCE

## ACCUMULATION AND CONCURRENCY

Questions of the degree of accumulation and concurrency are matters that fall squarely within the discretionary judgment of the sentencing Judge: see, eg, ***R v Hammoud*** **(2000) 118 A Crim R 66 per Simpson J at [7]**

It is accepted that when sentencing an offender for more than one offence, a sentencing judge must fix an appropriate sentence for each offence and then consider questions or accumulation or concurrency, as well as questions of totality: see ***Pearce v The Queen*** **[1998] HCA 57; 194 CLR 610** at [45].

### *Johnson v The Queen* [2004] HCA 15 per Gummow, Callinan and Heydon JJ

> [26] … Judges of first instance should be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime under which the sentencing is effected. …

### *Hutchen v R* [2015] NSWCCA 101 per Hoeben CJ at CL

> [36] It is incorrect to characterise the time spent in custody, as a result of the revocation of parole, as "any time for which the offender has been held in custody in relation to the offence" as referred to in s47 of the *Crimes (Sentencing Procedure) Act 1999*. Section 47(3) is directed to incarceration directly relating to the offence in respect of which the offender is being sentenced. The period in custody, as a result of the revocation of parole, was directly referable to the previous offending not this offending.
>
> [37] A sentencing judge when considering a sentence of imprisonment is to take into account any time for which the offender was in custody in relation to the offence, i.e. the offence for which the offender is being sentenced (s24(a) of the *Crimes (Sentencing Procedure) Act*. If the sentencing judge orders that a sentence of imprisonment commence on a date before the date of sentence, the court is to take into account time held in custody for the offence (s47(2)).
>
> [38] There is no doubt, as the applicant submitted, that his Honour had a discretion to backdate the commencement date of this sentence so that it would be concurrent with or partly concurrent with the balance of parole (*R v Kitchener* [2003] NSWCCA 134; *Callaghan v R* [2006] NSWCCA 58; 160 A Crim R 145). This does not mean that his Honour was obliged to exercise his discretion in that way. When parole is revoked as a consequence of the commission of a subsequent offence, whether the sentence for the subsequent offence should be backdated in that way is a matter for the sentencing judge.
>
> [39] The relevant principles were set out by Simpson J in *Callaghan*. There Simpson J (with whom James and Hall JJ agreed) said:
>
>> "21 That the matter is discretionary appears to be the prevailing view of members of this Court. Even in *Andrews* and *Kelly*, the court accepted that a judge might backdate a sentence where parole had been revoked by reason of the offence for which the offender is then to be sentenced.

22 I maintain the view that a discretion exists. There is no clear rule which will govern all cases. The circumstances that bring an offender before a court for sentence after parole has been revoked are far too varied to permit a single absolute rule.

23 It would, in my opinion, in some cases be unfair not to backdate to some point (not necessarily the date of revocation of parole) before the expiration of the earlier parole period. It is always open to an offender to seek and be granted parole even after a revocation; to sentence in such a way as to commence the subsequent sentence only on the date of expiration of the whole of the previously imposed head sentence is to assume that, absent the subsequent offences, the offender would not have been granted a second chance at parole.

24 However, I am also of the view that, particularly where, as here, the re-offending has occurred within a very short time of release on parole, and the balance of term to which the offender is exposed is quite short, it may be appropriate to proceed on the hypothesis that the whole of the period spent in custody up to the expiration of the parole period is, as Hunt CJ at CL said, referable to the earlier offences and not to the subsequent offences."

## *Glynn Kaderavek v R* [2018] NSWCCA 92 per Hamill J (Beazley P and Schmidt J agreeing)

[19] The section [s 47] provides a sentencing Judge with a degree of flexibility. The prima facie position is that the sentence commences on the day it is imposed. If the sentence is to commence before that date, the section provides no particular guidance except that the sentencing Judge "must take into account any time for which the offender has been held in custody in relation to the offence".

## *R v XX* [2009] NSWCCA 115; 195 A Crim R 38

Per Hall J (Tobias and Kirby JJ agreeing):

[52] There is no general rule that determines whether sentences ought to be imposed concurrently or consecutively: see *Cahyadi v Regina* (2007) 168 A Crim R 41 per Howie J at 47. However, a number of propositions relevant to the consideration of that issue may be derived from the case law. They include the following:-

(1) It is well established that questions of accumulation are, subject to the application of established principle, discretionary. What is important is that, firstly, an appropriate sentence is imposed in respect of each offence; and, secondly, that the total sentence imposed properly reflects the totality of the criminality: Regina v Wilson [2005] NSWCCA 219 at [38] per Simpson, Barr and Latham JJ agreeing.

(2) In Regina v Weldon; Regina v Carberry (2002) 136 A Crim R 55, Ipp JA at [48] stated that it is "not infrequent that, where the offences arise out of one criminal enterprise, concurrent sentences will be imposed" but his Honour observed that"this is not an inflexible rule" and "[t]he practice should not be followed where wholly concurrent sentences would fail to take account of differences in conduct".

(3) The question as to whether sentences in respect of two or more offences committed in the course of a single episode or a criminal enterprise or on a

particular day should be concurrent or at least partly accumulated is to be determined by the principle of totality and the relevant factors to be taken into account in the application of that principle. See observations in this respect of Howie J in Nguyen v Regina [2007] NSWCCA 14 at [12].

(4) In applying the principle of totality, the question to be posed is whether the sentence for one offence can comprehend and reflect the criminality of the other offence. See generally Regina v MMK [2006] NSWCCA 272 at [11] and [13], Cahyadi (supra) at [12] and [27] and Vaovasa v Regina [2007] NSWCCA 253.

(5) If the sentence for one offence can comprehend and reflect the criminality of the other, then the sentences ought to be concurrent, otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the totality of the two offences: Cayhadi (supra) per Howie J at [27].

(6) If not, the sentence should be at least partially cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality: Cayhadi (supra) per Howie J at [27].

(7) Whether the sentence for one offence can comprehend and reflect the criminality of the other calls for the identification and an evaluation of relevant factors pertaining to the offences. These will include the nature and seriousness of each offence.

(8) In cases involving assault with violence where the offences involve two or more attacks of considerable violence and are distinct and separate (eg, see Regina v Dunn [2004] NSWCCA 41 at [50]) or in cases where there are separate victims of the attacks as in Wilson (supra), the closeness in time and proximity of the two offences will often not be determinative factors. See also Regina v KM [2004] NSWCCA 65. In Wilson (supra), having regard to the purposes of sentencing set out in s.3A of the Crimes (Sentencing Procedure) Act, Simpson J observed at [38] that "... to fail to accumulate, at least partially, may well be seen as a failure to acknowledge the harm done to those individual victims ..."

In **Dunn** (supra), the respondent to the Crown appeal had entered a guilty plea to an offence under s.51A of the *Crimes Act 1900* of breaking and entering the dwelling house of a female, being armed with an offensive weapon, namely a knife with which he wounded the victim by inflicting three shallow lacerations to her neck. He also pleaded guilty to the offence of assaulting a male thereby occasioning actual bodily harm, that crime also occurring in the female's home when the male victim attempted to protect her from the respondent.

On the appeal, the Crown submitted that the sentences should have been partially accumulated. Adams J (with whom Ipp JA and Sully J agreed) stated at [50] that there should have been some accumulation in the sentences to reflect the fact that the respondent had persisted in his violence when the male victim attempted, justifiably and lawfully, to restrain him:-

"... there is a distinct difference between assaulting one victim and assaulting two. Each was intentionally injured with the knife. The learned sentencing judge did not articulate his reasons for making the sentences wholly concurrent. Merely that the offences occurred in the course of a single extended episode does not justify such a conclusion. In my view the

two attacks were distinct and separate instances of considerable violence and required distinct punishment, although they were so closely related in time and proximity as to require a significant degree of concurrency. Of course, it is also important to ensure that the effective sentence thus derived does not exceed the respondent's criminality considered as a whole."

(9) Where two offences committed during the course of a single episode are of a completely different nature and each individually involved significant or extreme gravity, it is likely that some accumulation will be necessary to address the criminality of the two: **Nguyen** (supra) per Howie J at [13].

(10) Possession of two different kinds of drugs may not be regarded as one episode of criminality in a case of *"deemed"* supply: **Luu v Regina** [2008] NSWCCA 285 at [32].

(11) The fact that the evidence of two offences (eg, documentary evidence or the presence of drugs) are located by police at or in the one place is not a relevant factor in favour of concurrent sentences:-

"... The fact that the evidence of a number of discrete offences is located in the one place is completely irrelevant to any question of how the sentences for those offences should be imposed." (**Cahaydi** (supra) at [26])

## *Bobbin v R* [2016] NSWCCA 38

Per Wilson J (Johnson and Schmidt JJ agreeing):

[49] It should be recognised at the outset that the level of concurrency or accumulation between two or more sentences imposed upon an offender is a matter which falls within the broad discretion of the sentencing judge: R v Hammoud [2000] NSWCCA 540; (2000) 118 A Crim R 66; *LG v R* [2012] NSWCCA 249 at [24] – [26]; *Franklin v R* [2013] NSWCCA 122 at [42] – [44]*; Mato v R; Rusu v R* [2015] NSWCCA 328 at [115] – [117].

[50] The exercise of the discretion is circumscribed by the application of principle, most relevantly that of totality: *R v Pearce* [1998] HCA 57; (1998) 194 CLR 610; MMK v R [2006] NSWCCA 272; (2006) 164 A Crim R 481 at [13].

[51] When imposing sentence for two or more offences, a sentencing judge is required to consider each offence separately and determine the appropriate sentence for each. The question of accumulation or concurrency of the individual sentences follows, with that question articulated by Howie J in *Cahyadi v R* [2007] NSWCCA 1; (2007) 168 A Crim R 41, at [27] as,

"[…] can the sentence for one offence comprehend and reflect the criminality for the other offence?"

[52] Howie J continued, at [27],

"If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality."

[53] There is no general rule or formula that determines whether sentences ought to be imposed concurrently or cumulatively. The assessment to be made by the sentencing judge in that regard is very much a matter for judgment and, although minds might reasonably differ on the extent of any concurrency or accumulation of sentence, establishing error in the exercise of the discretion requires more than a difference of opinion. It must be demonstrated that an error of the type enunciated in House v The King [1936] HCA 40; (1936) 55 CLR 499 has occurred.

[54] Where sentences are imposed, as here, for drug offences, there will be a number of features that may be relevant to the assessment of the criminality involved: any commonality in the elements of each of the individual offences; the nature of the drug involved; the nature of the enterprise and how it was enacted; the question of any profit from the offences; and the period of time in which the crimes occurred, are some considerations that may arise.

## *Grills v R* [2016] NSWCCA 46

[39] The principles to be applied with respect to accumulation and concurrency were set out by Hall J (Tobias JA and Kirby J agreeing) in *R v XX* [2009] NSWCCA 115; (2009) 195 A Crim R 38 at [52]. Those principles make clear that when applying the principle of totality the question to be posed is whether the sentence for one offence can comprehend and reflect the criminality of the other offence. If it can then the sentences ought to be concurrent but if it cannot the sentence should be at least partially cumulative, and that is so “regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality”.

[40] In *JT v R* [2012] NSWCCA 133 Rothman J (with whom Whealy JA and Davies J agreed) said:

> [71] The exercise involved in determining accumulation and concurrence and the application of the principles of totality are inconsistent with the proposition that one single correct answer will be derived in every circumstance by every judge. The application of the principle of totality is an exercise of discretion, intuitive or instinctive synthesis, and cannot be conducted arithmetically: *Pearce* at [46]; *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357. The principle assumes that each individual sentence imposed will reflect the criminality of that offence and that the combination of the sentences shall reflect the total criminality of all of the crimes committed: *Pearce*.
>
> …
>
> [73] Generally, in the application of the principle of totality, it is difficult, if not impossible, for a sentencing judge to do more than state and apply the principle on the facts as found. Greater transparency is extremely difficult. The process is at the essence of intuitive or instinctive synthesis. As a consequence, once a sentencing judge notes that the principle is being applied (or plainly, by an examination of the process involved, has applied the principle), assuming the facts are correctly stated, in order for an appeal court to intervene, the result must manifest an incorrect application of the principle. Otherwise, interference with the result is impermissible.

[41] In *Ayshow v R* [2011] NSWCCA 240 Johnson J (with whom Bathurst CJ and James J agreed) said:

> The Applicant's possession of a loaded pistol required some separate and identifiable penalty for that crime. The sentence on the drug supply offences

could not comprehend and reflect the criminality for the firearm offence. The offences involved discrete and independent criminal acts so that a significant measure of accumulation was appropriate for the s.7(1) offence: *R v AZ* at 235-236 [85].

**See also:**

- ***R v Caldwell* [2016] NSWCCA 55** at [46]
- ***R v Hollaway* [2016] NSWCCA 166** at [28]
- ***Silvestri v R* [2016] NSWCCA 245** at [50]-[52]
- ***R v Jeremiah* [2016] NSWCCA 241** at [6]-[13]
- ***R v Dashti* [2016] NSWCCA 251** at [108]-[110]

### *Chaouk v R* [2017] NSWCCA 295 per Fullerton J

[62] Although her Honour was not required to make explicit, or to specify with precision the degree to which the indicative sentences would be accumulated, since to require that of sentencing judges would be tantamount to expressing commencement dates for each offence contrary to one of the rationales for the introduction of s 53A of the *Crimes (Sentencing Procedure) Act* (see *Beale v R* [2015] NSWCCA 120 at [4]), having made no assessment of the total criminality reflected in the overall offending, the rationale according to which some or all of the indicative sentences should be partially accumulated was not clear. In addition, there is nothing in the sentencing reasons to illuminate the basis upon which the aggregate sentence of 27 years was assessed as just and proportionate to the overall offending so as to avoid the imposition of a crushing sentence as required in the proper application of the totality principle (see *Postiglione v The Queen* (1997) 189 CLR 295; [1997] HCA 26 at 304, 307-308 and 313-314).

[63] While I accept that questions of accumulation and concurrency are intuitive, in this case the relative severity of the individual sentences indicated by the sentencing judge (in particular the sentence of 17 years for the s 33A(1)(a) offence) called for a far greater degree of notional concurrency in the imposition of the aggregate sentence in order to avoid the imposition of a crushing sentence on a relatively young man who had a subjective case that was worthy of some greater weight in mitigation of sentence. In my view, the aggregate sentence is unreasonable and plainly unjust for that reason.

[64] In *ZA v R* [2017] NSWCCA 132 at [74], Johnson J and I observed:

> The significance of an aggregate sentence reflecting *"the total criminality comprised in the totality of offences"* has been emphasised recently by the High Court. As Gageler, Nettle and Gordon JJ observed in *Nguyen v The Queen* at 677 [64]:
>
> "Ultimately the object of the sentencing exercise is to impose individual sentences that, so far as possible, accurately reflect the gravity of each offence while at the same time rendering a total effective sentence which, so far as possible, accurately reflects the totality of criminality comprised in the totality of offences. That is an exercise which involves a significant measure of discretionary moderation and accumulation of individual sentences according to the particular circumstances of each case. Up to a point,

> therefore, it is something about which sentencing judges might take different views of which neither could be said to be wrong. Generally speaking, however, the imposition of less severe individual sentences may call for a greater degree of accumulation in order to reflect total criminality whereas more severe individual sentences may necessitate a greater degree of concurrency."

### *Suksa-Ngacharoen v R* [2018] NSWCCA 142

Regarding partial accumulation of the sentence for the primary offence and related offence of contravene ADVO, Wilson J (Leeming JA and Bellew J agreeing) said:

> [130] In providing for some degree of accumulation, the sentencing judge observed that a distinct sentence was necessary to recognise the seriousness of breaching a court order, involving as such an offence does a failure to observe an order of a court to refrain from acts prohibited by its terms. Her Honour was cognisant of the care to be taken in avoiding "double counting", referring to it expressly.
>
> [131] In my opinion, the applicant's contention overlooks the fact that an offence committed in breach of an ADVO, and an offence of breaching an ADVO, involve quite separate and distinct criminality. It is often the case that a court is called upon to sentence an offender for both breaching an order, and for the conduct which constitutes the breach, charged as distinct offences: there is no duplicity in imposing distinct sentences for what are distinct offences.
>
> [132] The criminality of breaching an ADVO rests in the complete disregard for an order of a court, conduct which has the practical effect of undermining the authority of the courts, and preventing the courts from extending effective protection to persons at risk of harm from another. The legislative intent of the scheme for apprehended domestic violence orders is to permit a court to restrain the conduct of an individual who poses a risk to a person with whom he or she is or was in a domestic relationship. If the authority of the courts in making these orders is simply ignored, as the applicant did when he attacked Ms Sripho, the law and the courts are diminished, and the capacity for the courts to protect vulnerable individuals is impeded. Conduct which involves deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence that occurs at the same time, always having regard to the requirements of the totality principle as set out in *Pearce v The Queen* (1998) 194 CLR 610.

# AGGREGATE SENTENCES

## *Hamid v R* [2006] NSWCCA 302; 164 A Crim R 179

[135] A paramount principle for the law of sentencing is that the aggregate sentence should fairly and justly reflect the total criminality of the offender's conduct. This principle applies in all cases, including those where punishment is imposed for multiple offences: R v Weldon (2002) 136 A Crim R 55 at 62 [46].

## *JM v R* [2014] NSWCCA 297 per R A Hulme J (Hoeben CJ at CL agreeing)

[39] A number of propositions emerge from the above legislative provisions and the cases that have considered aggregate sentencing:

1. Section 53A was introduced in order to ameliorate the difficulties of applying the decision in *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 in sentencing for multiple offences: *R v Nykolyn* [2012] NSWCCA 219 at [31]. It offers the benefit when sentencing for multiple offences of obviating the need to engage in the laborious and sometimes complicated task of creating a "cascading or 'stairway' sentencing structure" when the principle of totality requires some accumulation of sentences: *R v Rae*[2013] NSWCCA 9 at [43]; *Truong v R; R v Le; Nguyen v R; R v Nguyen* [2013] NSWCCA 36 at [231]; *Behman v R* [2014] NSWCCA 239; *R v MJB* [2014] NSWCCA 195 at [55]-[57].

2. When imposing an aggregate sentence a court is required to indicate to the offender and make a written record of the fact that an aggregate sentence is being imposed and also indicate the sentences that would have been imposed if separate sentences had been imposed instead (the indicative sentences): s 53A(2). The indicative sentences themselves should not be expressed as a separate sentencing order: *R v Clarke* [2013] NSWCCA 260 at [50]-[52]. See also *Cullen v R* [2014] NSWCCA 162 at [25]-[40].

3. The indicative sentences must be assessed by taking into account such matters in Part 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant: s 53A(2)(b).

There is no need to list such matters exhaustively, but commonly encountered ones in Part 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement authorities (ss 22, 22A and 23); and offences on a Form1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.

*SHR v R* [2014] NSWCCA 94 is an example of a case where a sentencing judge took pleas of guilty into account only in relation to the aggregate sentence, and not in relation to the indicative sentence. This was held (at [35]-[43]) to be in breach of the requirement in s 53A(2)(b). *Khawaja v R* [2014] NSWCCA 80 is another example. *Martin v R* [2014] NSWCCA 124 is a case in which a sentencing judge was held (at [17]) to have correctly taken into account pleas of guilty in relation to the indicative sentences.

In *JL v R* [2014] NSWCCA 130 at [54] it was said by way of conclusion in an appeal against the asserted severity of a sentence that "The starting point for the aggregate sentence of 24 years before the allowance of a discount of 25 per cent to reflect the

utilitarian value of the early pleas of guilty was not excessive". This must be understood as a broad assessment within the conclusion rather than indicating that it is the aggregate sentence to which the discount should be applied. *Stoeski v R* [2014] NSWCCA 161 is anomalous in that at [33]-[34] it rejected a complaint that the sentencing judge had not discounted the aggregate sentence for the plea of guilty rather than rejecting the assertion that the discount applied to the aggregate sentence at all.

4. It is still necessary in assessing the indicative sentences to have regard to the requirements of *Pearce v The Queen* [1998] HCA 57; 194 CLR 610. The criminality involved in each offence needs to be assessed individually. To adopt an approach of making a "blanket assessment" by simply indicating the same sentence for a number of offences is erroneous: *R v Brown*[2012] NSWCCA 199 at [17], [26]; *Nykolyn v R*, supra, at [32]; [56]-[57]; *Subramaniam v R* [2013] NSWCCA 159 at [27]-[29]; *SHR v R*, supra, at [40]; *R v Lolesio* [2014] NSWCCA 219 at [88]-[89]. It has been said that s 53A(2) is "clearly directed to ensuring transparency in the process of imposing an aggregate sentence and in that connection, imposing a discipline on sentencing judges": *Khawaja v R*, supra, at [18].

5. The imposition of an aggregate sentence is not to be used to minimise the offending conduct, or obscure or obliterate the range of offending conduct or its totality: *R v MJB*, supra, at [58]-[60].

6. One reason why it is important to assess individually the indicative sentences is that it assists in the application of the principle of totality. Another is that it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence: *Nykolyn v R*, supra, at [58]; *Subramaniam v R*, supra, at [28]. A further advantage is that it assists when questions of parity of sentencing as between co-offenders arise: *R v Clarke*, supra, at [68], [75].

7. Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a standard non-parole period is prescribed: ss 44(2C) and s 54B(4); *AB v R* [2014] NSWCCA 31 at [9].

8. Specification of commencement dates for indicative sentences is unnecessary and is contrary to the benefits conferred by the aggregate sentencing provisions: *AB v R*, supra, at [10]. Doing so defeats the purpose of a court availing itself of the power to impose an aggregate sentence: *Behman v R* [2014] NSWCCA 239 at [26]. See also *Cullen v R*, supra, at [25]-[26].

9. If a non-custodial sentence is appropriate for an offence that is the subject of the multiple offence sentencing task, it should be separately imposed as was done in *Grealish v R* [2013] NSWCCA 336. In my respectful view, there was error involved in *Behman v R* [2014] NSWCCA 239 where an offence with an indicative, but unspecified, non-custodial sentence was included in an aggregate sentence imposed by this Court. The provision for imposing an aggregate sentence in s 53A appears within Part 4 of the *Crimes (Sentencing Procedure) Act* which is headed "Sentencing procedures for imprisonment", and within Division 1 of that Part which is headed "Setting terms of imprisonment".

[40] The following further propositions emerge from the cases in relation to appellate review of aggregate sentencing exercises:

10. Another benefit of the aggregate sentencing provision is that it makes it easier on appeal to impose a new aggregate sentence if one of the underlying convictions needs to be quashed: *R v Brown*, supra, at [51]; *FP v R* [2012] NSWCCA 182; 224 A Crim R 82 at [327]-[329]; *Nykolyn v R*, supra, at [58]-[59]; *Subramaniam v R* at [28].

> 11. The indicative sentences recorded in accordance with s 53A(2) are not themselves amenable to appeal, although they may be a guide to whether error is established in relation to the aggregate sentence: *R v Brown*, supra, at [17]; *Nykolyn v R*, supra, at [58]; *PD v R* [2012] NSWCCA 242 at [44]; *R v Rae* [2013] NSWCCA 9 at [32]-[33], [42]-[43]; *Truong v R; R v Le; Nguyen v R; R v Nguyen*, supra, at [218], [227]; *Subramaniam v R*, supra, at [28]; *SHR v R*, supra, at [40]; *R v Clarke*, supra, at [56]; *Martin v R* [2014] NSWCCA 124 at [47]; *JL v R* [2014] NSWCCA 130 at [17]; *Stoeski v R*, supra, at [43]; *CL v R* [2014] NSWCCA 196 at [53]-[55].
>
> 12. Even if the indicative sentences are assessed as being excessive, that does not necessarily mean that the aggregate sentence is excessive: *PD v R* at [44],[82]; *BJS v R* [2013] NSWCCA 123 at [252]-[254].
>
> 13. A principle focus of determination of a ground alleging manifest inadequacy or excess will be whether the aggregate sentence reflects the totality of the criminality involved: *R v Brown*, supra, at [37]; *R v Rae*, supra, at [42]-[46], [62], [69]. This Court is not in a position to analyse issues of concurrence and accumulation in the same way that it can analyse traditional sentencing structures: *Truong v R; R v Le; Nguyen v R; R v Nguyen*, supra, at [231]; *Martin v R*, supra, at [33]-[41].
>
> 14. Erroneous specification by a sentencing judge of commencement dates for indicative sentences (such as there being gaps between the expiry of some indicative sentences and the commencement of subsequent sentences) are immaterial and may be ignored as being otiose: *AB v R*, supra, at [10], [67].
>
> 15. A failure of a judge to specify a non-parole period in the indicative sentence for a standard non-parole period offence will not lead to an appeal being upheld. Failure to do so does not invalidate the sentence: s 54B(7). Setting non-parole periods for the indicative sentences for standard non-parole period offences would have no effect upon the aggregate sentence imposed: *Truong v R; R v Le; Nguyen v R; R v Nguyen*, supra, at [214]-[218].

### *McIntosh v R* [2015] NSWCCA 184

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**. In *Dunn* the Court 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).

### *Dimian v R* [2016] NSWCCA 223

The indicative sentence reflects the head sentence. Davies J (Hoeben CJ at CL and Hall J agreeing) said:

> [46] Section 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) enables the Court to impose an aggregate sentence with respect to all or any two or more offences. Sub-section (2) says that the Court must indicate “the sentence that would have been imposed for each offence”. On any proper construction of s 53A seen in the context of the whole of the *Sentencing Act*, the sentence that would have been imposed (called the indicative sentence) must be a reference to the overall sentence. The Sentencing Act does not contemplate two sentences for any one

offence. It contemplates a sentence and in many cases a non-parole period and a balance of the term.

### *R v Faaoloii, Schaafhausen & Tuala* [2016] NSWCCA 263

R S Hulme AJ (Hall and McCallum JJ agreeing) said:

> [82] … it is well to bear in mind the remarks of Sully J endorsed by this Court in *R v Harris* [2007] NSWCCA 130 at [46]:
>
> > … (there) is the need to ensure public confidence in the administration of criminal justice; and, in particular, to ensure that there does not emerge in the community at large a perception that there is not all that much to choose between the person who commits one or two offences, and the person who commits six or seven offences, for the reason that somehow or other they all manage to finish up with effective sentences between or among which there is hardly anything in practical terms to choose.
> >
> > It needs to be clearly understood by all concerned that a person who commits a deliberate series of discrete offences, - and the present applicant's case, is a good example of this kind, - he must not be left with the idea that by intoning references to the principle of totality as though it were some magic mantra, he can escape effective punishment for the offences which follow successively one upon another throughout the whole course of a studied and deliberate course of criminal behaviour."

### *Director of Public Prosecutions v Darcy-Shillingsworth* [2017] NSWCCA 224

Per Basten JA at [42]: 'section 12(3) should not be read as precluding the imposition of a suspended sentence where the sentence is an aggregate sentence.'

### *PG v R* [2017] NSWCCA 179

Per Button and N Adams JJ at [74] (Basten JA dissenting on this point at [67]–[69]):

> … as Hoeben CJ at CL (Bathurst CJ and McCallum J agreeing) recently observed in Elsaj v R [2017] NSWCCA 124 at [56]:
>
> > "Section 53A of the Crimes (Sentencing Procedure) Act 1999 (NSW) makes it clear that discounts for a guilty plea are to be applied to the indicative sentences, not the aggregate sentence. To the extent that there is any doubt on that issue, it has been resolved by such cases as R v Nykolyn [2012] NSWCCA 219, Subramaniam v R [2013] NSWCCA 159, JM v R [2014] NSWCCA 297 and R v Cahill [2015] NSWCCA 53."

**See also:**

- ***RJB v R*** **[2015] NSWCCA 93**
- ***Elsaj v R*** **[2017] NSWCCA 124** at [56]
- ***Gordon v R*** **[2018] NSWCCA 54**

# COMMENCEMENT DATE

### *R v DW* [2012] NSWCCA 66 per R S Hulme J (Hall J agreeing)

[79] There is no doubt that the decision as when, within a period of revoked parole, another sentence should commence is a matter of discretion - see ***Callaghan v R* (2006) 160 A Crim R 145**. It may be at the beginning; it may be at the end; it may be somewhere in between. A number of matters are liable to inform the exercise of that discretion. Without attempting to be exhaustive, one is the fact that imprisonment for the period of revoked parole is, in its origins, due to the sentence pursuant to which the period when the offender was eligible for parole was granted. Revocation may have occurred because it has been demonstrated that an offender has been unable to adapt to normal community life. A second, although there will commonly be overlapping with the first, may be as in this case, that the revocation arises in consequence of a new offence for which a fresh sentence is being imposed, rather than for some unconnected cause. A third and fourth are likely to be the period served with apparent adherence to the terms of parole and the periods of revocation and for which the revocation is liable to continue.

### *Hutchen v R* [2015] NSWCCA 101 per Hoeben CJ at CL (Adams and McCallum JJ agreeing)

[38] When parole is revoked as a consequence of the commission of a subsequent offence, whether the sentence for the subsequent offence should be backdated in that way is a matter for the sentencing judge.

[39] The relevant principles were set out by Simpson J in *Callaghan*. There Simpson J (with whom James and Hall JJ agreed) said:

> "21 That the matter is discretionary appears to be the prevailing view of members of this Court. Even in Andrews and Kelly, the court accepted that a judge might backdate a sentence where parole had been revoked by reason of the offence for which the offender is then to be sentenced.
>
> 22 I maintain the view that a discretion exists. There is no clear rule which will govern all cases. The circumstances that bring an offender before a court for sentence after parole has been revoked are far too varied to permit a single absolute rule.
>
> 23 It would, in my opinion, in some cases be unfair not to backdate to some point (not necessarily the date of revocation of parole) before the expiration of the earlier parole period. It is always open to an offender to seek and be granted parole even after a revocation; to sentence in such a way as to commence the subsequent sentence only on the date of expiration of the whole of the previously imposed head sentence is to assume that, absent the subsequent offences, the offender would not have been granted a second chance at parole.
>
> 24 However, I am also of the view that, particularly where, as here, the re-offending has occurred within a very short time of release on parole, and the balance of term to which the offender is exposed is quite short, it may be appropriate to proceed on the hypothesis that the whole of the period spent in custody up to the expiration of the parole period is, as Hunt CJ at CL said, referable to the earlier offences and not to the subsequent offences."

# FORM 1 OFFENCES

Where Form 1 offences include serious offences, they must be taken into account on sentence. This includes taking into account the totality of the offender's criminality. However, the penalty imposed should be significantly less than which would have been imposed had the Form 1 been prosecuted separately: ***R v Bavadra* (2000) 115 A Crim R 152 at [31]; *R v Harris* (2001) 125 A Crim R 27**.

"There is no statutory inhibition upon taking into account an offence punishable only by fine when imposing a custodial sentence": ***Marshall* v R [2013] NSWCCA 16** at [11]-[13].

### *R v Mueller* [2015] NSWCCA 292

> [25] The leading authorities as to the significance to be given to offences taken into account are Attorney-General's Application under s 37 Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002) (2002) 56 NSWLR 146; 137 A Crim R 180; [2002] NSWCCA 518 and Abbas,Bodiotis, Taleb and Amoun v R [2013] NSWCCA 115. In the first of these the Court observed (at [42]):-
>
>> 42. The position, in my opinion, is that, although a court is sentencing for a particular offence, it takes into account the matters for which guilt has been admitted, with a view to increasing the penalty that would otherwise be appropriate for the particular offence. The Court does so by giving greater weight to two elements which are always material in the sentencing process. The first is the need for personal deterrence, which the commission of the other offences will frequently indicate, ought to be given greater weight by reason of the course of conduct in which the accused has engaged. The second is the community's entitlement to extract retribution for serious offences which there are offences for which no punishment has in fact been imposed. These elements are entitled to greater weight than they may otherwise be given when sentencing for the primary offence. There are matters which limit the extent to which this is so. The express provision in s33(3) referring to the maximum penalty for the primary offence is one. The principle of totality is another.
>
> [26] Although the taking into account further offences may be with a view to increasing the penalty that would otherwise be appropriate, the authorities make it clear that there will be occasions when the taking of offences into account may add little or nothing to the sentence that would otherwise be imposed. Thus in *Abbas, Bodiotis, Taleb and Amoun v R,* at [22] and [23] the Chief Justice observed that "The existence of these additional offences **may** demonstrate the greater need for personal deterrence and retribution in respect of the offence charged" and taking offences into account "**would generally, but not universally**, lead to the imposition of a sentence longer, and in some cases significantly longer, than would otherwise be required if the Form 1 offences were not taken into account". (My emphasis) See also *Abbas, Bodiotis, Taleb and Amoun v R* at [258].
>
> [27] In this case the mental state that inspired or at least substantially contributed to the Respondent's offending provided plenty of justification for the conclusion that personal deterrence required no increase in punishment. Furthermore the same reason that leads to an offender with a mental disorder or abnormality being an inappropriate medium for making an example to others and thus diminishes, perhaps greatly, the weight to be given to general deterrence – see *Muldrock v The*

*Queen* [2011] HCA 39; 244 CLR 120 at [53]; *DPP v De La Rosa* (2010) 79 NSWLR 1; argues in the same direction so far as retribution is concerned.

[28] In the circumstances I am not persuaded that it was not within the legitimate range of her Honour's sentencing discretion to decline to increase the Applicant's sentence because of the offences on the Form 1. While the Crown is correct in submitting that victim 1's rejection of the Respondent's advances the subject of the first indecent assault, placed him on notice prior to his subsequent assault, her Honour was fairly entitled to take the view that the offences on the Form 1 were but incidents of the one course of criminality that culminated in the second indecent assault and merited no increase in punishment.

## *R v Dashti* [[2016] NSWCCA 251]

[119] The proper approach to Form 1 offences in sentencing was considered by Spigelman CJ, with whom Wood CJ at CL and Grove, Sully and James JJ agreed, in the guideline judgment *Attorney General's Application Under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518; 56 NSWLR 146. His Honour summarised the position as follows:

> "42 The position, in my opinion, is that, although a court is sentencing for a particular offence, it takes into account the matters for which guilt has been admitted, with a view to increasing the penalty that would otherwise be appropriate for the particular offence. The Court does so by giving greater weight to two elements which are always material in the sentencing process. The first is the need for personal deterrence, which the commission of the other offences will frequently indicate, ought to be given greater weight by reason of the course of conduct in which the accused has engaged. The second is the community's entitlement to extract retribution for serious offences which there are offences for which no punishment has in fact been imposed. These elements are entitled to greater weight than they may otherwise be given when sentencing for the primary offence. There are matters which limit the extent to which this is so. The express provision in s 33(3) [of the *Crimes (Sentencing Procedure) Act* referring to the maximum penalty for the primary offence is one. The principle of totality is another.
>
> 43 … The important point is that the focus throughout must be on sentencing for the primary offence."

## *PB v R* [[2016] NSWCCA 258] *per Davies J*

[55] This Court has on more than one occasion expressed strong views about the approach taken to the inclusion of offences on a Form 1 in cases where a separate victim is involved and where the offences carry standard non-parole periods: *SGJ v R; KU v R* [2008] NSWCCA 258 at [24]-[29] and *Karel Eedens v R* [2009] NSWCCA 254 at [17]-[19].

[56] In the present case it was inappropriate for four offences of aggravated indecent assault against a different victim to have been placed on a Form 1 when the offence to which that Form 1 was attached charged one count of aggravated indecent assault against the principal victim. The second victim was younger than the principal victim being aged 10 or 11. The principal victim was aged 15. The age of the second victim was a matter of some significance and made the offences on the Form 1 objectively more serious than the principal offence charged: *Shannon v R* [2006] NSWCCA 39 at [28]; *Eedens* at [17]. Further, the offences against her were committed at a different time and in different circumstances from the offence against the principal victim.

[57] In respect of counts 3 and 5 charging sexual intercourse with a child aged between 14 and 16, an offence which does not carry a standard non-parole period, each such count had a Form 1 which charged (inter alia) aggravated indecent assault which carries a standard non-parole period. As the Court said in *SGJ* at [26] it is illogical to include crimes relating to one victim on a Form 1 where the offence to which it attached was charged against another victim, and it made it difficult for the sentencing judge to give such offences any real weight when sentencing on the count relevant to the Form 1. Further, as the Court made clear in *Eedens* at [19] the significance of the standard non-parole provisions loses its impact when the offence is placed on a Form 1.

## *Le v R* [2017] NSWCCA 26

[37] The fact of the admitted offence and the circumstances surrounding it cannot be disregarded. It clearly played a significant part in his Honour's exercise of the sentencing discretion. This can be seen from the detailed description given by his Honour of the actions taken by the applicant in relation to this offence. In that regard, the oft quoted passages from *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518; 56 NSWLR 146 in the judgment of Spigelman CJ (with whom Wood CJ at CL, Grove, Sully and James JJ agreed) remain pertinent:

> "18 A number of propositions with respect to the process of taking into account matters on a Form 1 are well established and are uncontroversial. First, the entire point of the process is to impose a longer sentence (or to alter the nature of the sentence) than would have been imposed if the primary offence had stood alone. Secondly, it is wrong to suggest that the additional penalty should be small. Sometimes it will be substantial. (See e.g. *The Queen v White* (1981) 28 SASR 9 at 13;*Murrell v The Queen* (1985) 4 FCR 168 at 179 per Blackburn J; *R v Vougdis* (1989) 41 A Crim R 125 at 128-129; *R v Morgan* (1993) 70 A Crim R 368 at 371-372.)
>
> …
>
> 42 The position, in my opinion, is that, although a court is sentencing for a particular offence, it takes into account the matters for which guilt has been admitted, with a view to increasing the penalty that would otherwise be appropriate for the particular offence. The Court does so by giving greater weight to two elements which are always material in the sentencing process. The first is the need for personal deterrence, which the commission of the other offences will frequently indicate, ought to be given greater weight by reason of the course of conduct in which the accused has engaged. The second is the community's entitlement to extract retribution for serious offences which there are offences for which no punishment has in fact been imposed. These elements are entitled to greater weight than they may otherwise be given when sentencing for the primary offence. There are matters which limit the extent to which this is so. The express provision in s 33(3) referring to the maximum penalty for the primary offence is one. The principle of totality is another."

[38] More recently in *Abbas, Bodiotis, Taleb and Amoun v R* [2013] NSWCCA 115 Bathurst CJ (with whom Hoeben CJ at CL, Garling and Campbell JJ agreed) said:

> "22 In my respectful opinion, the approach suggested by Adams J is incorrect if it is interpreted as meaning that a sentence cannot be increased to take into account an additional need for deterrence and retribution in respect of the offences charged by virtue of the Form 1 offences being taken into account. Such an interpretation is contrary, in my opinion, to the

> meaning of s 33 properly construed and to what was said by Spigelman CJ in *Attorney General's Reference*. Section 33(1) empowers the Court to take the further offences into account where the preconditions in that section and s 32 are met. It is clear from the provisions of s 33(3) that that could lead to an increase in penalty up to the maximum penalty for the principal offence. The existence of these additional offences may demonstrate the greater need for personal deterrence and retribution in respect of the offence charged. This does not mean the Court is imposing a separate penalty for the Form 1 offences. Rather, as part of the instinctive synthesis approach to sentencing explained by McHugh J in *Markarian v The Queen* [2005] HCA 25; (228 CLR 357 at [51]-[54], it takes these matters into account as required by the statute in determining the appropriate penalty for the offence for which the offender is convicted.
>
> 23 That approach would generally, but not universally, lead to the imposition of a sentence longer, and in some cases significantly longer, than would otherwise be required if the Form 1 offences were not taken into account: *R v Barton* [2001] NSWCCA 63; (2001) 121 A Crim R 185. That does not mean that the principle of proportionality referred to by the High Court in cases such as *Hoare v The Queen* [1989] HCA 33; (1989) 167 CLR 348 at 354; *Veen v The Queen (No 2)* supra at 472 and 477; *Markarian* supra at [83], is offended. Rather, the fact that the sentence is to be determined by reference to the additional need for personal deterrence and retribution for the offence for which the offender is being sentenced as a result of the Form 1 charges means that the principle of proportionality falls to be assessed by reference to matters which include those additional factors. That does not involve any injustice to the offender who has chosen to avail him or herself of the s 33 procedure. Nor does it mean that the offender is being sentenced for offences for which he or she has not been convicted. This is because the sentence is imposed by reference to the offence for which the offender has been convicted, by contrast to the "top down" approach rejected in *Attorney General's Reference.*"

[39] The fact of the admitted offence goes further than explaining why in the case of the applicant the sentence for the primary offence should be substantially increased. It also provided an insight into the part played by the applicant in this drug supply enterprise. It made it clear that the applicant's involvement extended from 29 June until 27 July 2012 when he was arrested. That contrasted starkly with the period of the involvement of Ms Nguyen which was in the order of two days.

### *Gordon v R* [2018] NSWCCA 54

The majority held that the timing of the offender's acceptance of responsibility for the offences contained on the Form 1 document could not be taken into consideration in respect of the discount applied.

[96] There are a number of difficulties with the suggestion that a court when sentencing for one offence should consider the procedural history of any additional offences that were to be taken into account in assessing by how much the sentence for the primary offence should be reduced on account of the utilitarian value of the plea of guilty to that primary offence.

[97] There are a number of possible situations that would give rise to problems if this Court were to accede to this proposed new requirement. They include:

> Should the number of Form 1 offences for which acknowledgement of guilt was earlier or later than that for the primary offence affect the degree to which the "discount" is assessed?
>
> Should an offender receive a greater "discount" than would otherwise be the case if there is a late plea of guilty to the primary offence but early acknowledgements of guilt in respect of offences on a Form 1?
>
> Would the seriousness of the Form 1 offences relative to the primary offence make a difference?
>
> Would any relationship (or lack thereof) between the primary offence and the Form 1 offences make a difference?
>
> Would an offender become eligible for a "discount" on sentence following conviction after trial because offences which were the subject of early acknowledgments of guilt are taken into account?

[98] This proposed requirement for judges to factor in the procedural history of offences which are to be taken into account when assessing the utilitarian value of a plea of guilty has the potential to add significant complexity to sentencing which is already an overly complex task. It is also apt to create a new field of disputation in sentence appeals which are already bedevilled with complexity beyond the question of whether a sentence is erroneously excessive or inadequate.

### *R v Campbell; R v Smith* [2019] NSWCCA 1

Remarks of Rothman J on sentencing for firearms offences that occur in the context of ‘organised’ criminal activity/drug supply, where firearm is functioning etc:

[9] The possession and use of firearms in society is an extremely troubling aspect, for which general deterrence and specific deterrence loom large. The possession of weapons generally, by which I include knives, has become far too common in society. The possession of such weapons undermines the fabric of society and, when possessed for the purpose of other criminal activity, puts at risk the rule of law and the appropriate relationship between members of society.

[10] It must be accepted that the kernel of the criminal conduct involved in possession of firearm offences is the possession of the firearm. Where, as here, the firearm is real and not a replica firearm; is in working order; is a modern firearm and not an antique or collectors’ piece; is possessed at the same time as the offender possesses ammunition; and is possessed in the context of the involvement of the offender in a criminal organisation and/or other criminal conduct, it is difficult to imagine any more serious circumstances.

[11] The classification of the objective seriousness of an offence as a worst case is not precluded by the capacity to imagine even worse circumstances. Unfortunately, human imagination is almost limitless and is usually possible to imagine worse circumstances.

# NON-PAROLE PERIOD

The purpose of fixing the non-parole period is not to convert a punishment into an opportunity for rehabilitation, but that the non-parole period should be the minimum period that the offender must spend in gaol having regard to all the elements of punishment, including the objective seriousness of the crime, deterrence and the subjective circumstances: ***Power v The Queen* (1973) 131 CLR 623** at 627-629

A serious offence warrants a greater non-parole period due to its deterrent effect upon others, but the nature of the offence does not assume the importance it has when the head sentence is determined: ***Bugmy v The Queen* (1990) 169 CLR 525** at 531-2

### *R v Zolfonoon* [2016] NSWCCA 250

> [77] A non-parole period is correctly to be seen as a mitigation of punishment in favour of rehabilitation through conditional freedom by parole. Ultimately, the non-parole period actually imposed must be the minimum period of custody appropriate to all of the circumstances of the offence: *Bugmy v R* [1990] HCA 18; (1990) 169 CLR 525*; Power v R* [1974] HCA 26; (1974) 131 CLR 623*.*

# PRE-SENTENCE CUSTODY

### *R v McHugh* (1985) 1 NSWLR 588 at 590-591

> It is desirable sentencing practice that, where there has been a period of pre-sentence custody exclusively referable to the offences for which sentence is being passed, the commencement of the sentence (and the non-parole or non-probation period) should be back-dated for an equivalent period. This is to be preferred to a process of assessing the proper sentence (and non-parole or non-probation period) and allowing, as it were, a discount in consequence of the pre-sentence custody. The desirable practice will promote the accuracy of the record, preventing there being a hidden factor affecting the length of the custody involved in consequence of the sentencing order. In addition, this practice will remove inequalities and unfairnesses as between prisoners arising from delays prior to sentencing, in particular in relation to remission or reduction entitlements; recognition of this does not infringe the principle in R v O'Brien [1984] 2 NSWLR 449 that remissions and reductions are to be disregarded when determining the length of sentences, non-parole and non-probation periods. A judge departing from this practice could be expected to indicate his reason for so doing.

Backdating a sentence to allow credit for pre-sentence custody is the usual and preferable course: ***Wiggins v R*** **[2010] NSWCCA 30** at [2].

See also:

- ***Brown v R*** **[2013] NSWCCA 44**
- ***Martinez v R*** **[2015] NSWCCA 5**

# QUASI CUSTODY

Time spent in a full-time residential program, either in conformity with a conditional bail requirement, or an adjournment pursuant to section 11 of the Act, may constitute a period of quasi-custody, which may be taken into account by a sentencing judge to reduce the sentence eventually imposed upon an offender: ***R v Eastway*** NSWCCA (19/05/92); ***R v Everingham*** NSWCCA (04/07/94); ***R v Psaroudis*** NSWCCA (01/04/96); ***R v Campbell*** [1999] NSWCCA 76; ***R v Thompson*** [2000] NSWCCA 362; **R v Perry** [2000] NSWCCA 375; **R v Fowler** (2003) 151 A Crim R 166; **R v Delaney** (2003) 59 NSWLR 1; **R v Sullivan** (2004) 41 MVR 250.

The failure of a sentencing judge to take account of time actually spent in a full-time residential program would constitute an error in the exercise of the sentencing discretion: ***Hughes v R*** **(2008) 185 A Crim R 155**; ***Renshaw v R*** [2012] NSWCCA 91. Confirmed in ***Gardiner v R*** [2018] NSWCCA 27.

A reduction in the sentence imposed does not depend on whether the residential program has been productive. The rationale for the allowance is the need to factor into the sentencing exercise the restriction on the offender's liberty during the period of the program: ***Truss v R*** [2008] NSWCCA 325 at [22].

An offender's motive for undertaking the program is not considered to be a relevant consideration when determining entitlement to some credit as a result of being subjected to quasi-custody: ***R v Delaney*** **(2003) 59 NSWLR 1.**

To qualify for a discount on sentence, the conditions on the program must closely resemble imprisonment and thus impose a form of punishment on the offender.

### *Brown v R* [2013] NSWCCA 44

Provides a summary of the authorities above and summaries of deductions made in other cases. Per Fullerton J:

> [27] In this case, I am satisfied that the extended period of residential rehabilitation (totalling 257 days) in which the applicant participated without blemish or breach, coupled with the content of the pre-sentence report dated 2 August 2012, both of which confirmed that the applicant successfully completed both residential rehabilitation programs, and his successful transition to a community-based rehabilitation program (including regular attendance at Alcoholics Anonymous meetings) has demonstrated a level of determination to abstain from his illicit drug use. In addressing what he recognised as the motivating cause of his drug offending, the risk of his future offending may be significantly reduced. For these reasons I am satisfied he is entitled to a discounted sentence at the top of the available discretionary range.
>
> [28] I am conscious of the need to ensure that in applying a sentence reduction of the time spent in quasi-custody that the resulting sentence does not fail to reflect the objective seriousness of the offence (see **R v Delaney** [2003] NSWCCA 342; 59 NSWLR 1).

[29] On re-sentence I am guided by the decision of Street CJ in **R v McHugh** (1985) 1 NSWLR 588, referred to more recently by Grove J in Hughes at [38] as to the approach to best achieve that result. I propose to backdate the commencement date of the sentence imposed against the applicant by a period of 193 days (being 75 per cent of 257 days)."

### *Reddy v R* [[2018] NSWCCA 212]

The CCA held it does not matter whether the quasi custody (in this case residential rehabilitation) is voluntary or not.

[31] It must be borne in mind that reducing or backdating sentences to take account of an offender's participation in pre-sentence residential rehabilitation programs has long been recognised as an available sentencing option by this Court: R v Cartwright (1989) 17 NSWLR 243 at 259 per Hunt and Badgery-Parker JJ; R v Eastway (Court of Criminal Appeal (NSW), 19 May 1992, unrep) per Hunt CJ at CL, Gleeson CJ and Matthews J agreeing.

[32] The evidence below, while it may not have been detailed, did make clear that the applicant had voluntarily referred himself to two separate residential rehabilitation programs continuously for a number of months leading up to the sentencing hearing. The sentencing judge was aware of his participation before sentence as his Honour had adjourned the matter to enable the applicant to continue the course of full-time residential rehabilitation in which he had been engaged since May 2016 (AB 56 and 58).

[33] In my judgment it makes no difference that the applicant's participation was voluntary, rather than by compulsion of court order. I understand that this was regarded as relevant as a reason for not reducing the sentence in Bonett v R ([58], per Adamson J). However that may be, I would not regard it as a condition of a sentencing court taking quasi-custody into account that the offender's attendance should have been under legal compulsion. The earlier cases do not say so. Moreover, even where participation is pursuant to a court order such as a Griffiths remand (these days under s 11 of the Sentencing Procedure Act) or as a condition of bail, in our adversarial system of criminal justice normally it will have been the offender who has moved the court for the order. I am unsure how often orders in the nature of a Griffiths remand are made. Bail is not infrequently granted (in appropriate cases) to enable a person on remand to attend a full-time residential program. In those cases invariably it is the offender who moves the court for that order. If anything the offender's own attempts at rehabilitation were to his credit. That he actively pursued it, and that it was apparently productive enhances this impression…

…

[45] … It seems to me that what matters more is not whether the applicant's participation was voluntary or under legal compulsion, but rather whether the applicant did in fact subject himself to the restrictions of the course. I am satisfied that he did. It also seems from the evidence, as I have said, that his participation was productive.

# SENTENCING DISCRETION

### *R v Jurisic (1998) 45 NSWLR 209, at [221]*

> The preservation of a broad sentencing discretion is central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders.

### *R v Osenkowski (1982) 30 SASR 212; (1982) 5 A Crim R 394* per King CJ

> There must always be a place for the exercise of mercy where a judge's sympathies are reasonable excited by the circumstance of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when a judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform.

### *Muldrock v The Queen* (2011) 244 CLR 120 at [26]

The High Court confirmed the approach to sentencing described by McHugh J in ***Markarian v The Queen*** **(2005) 228 CLR 357** at 378

> "[T]he judge identifies *all* the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case." (emphasis added)

### *Suksa-Ngacharoen v R* [2018] NSWCCA 142

> [92] …There seems to be a common misconception that a sentencing court is bound by a statement of "agreed" facts, and not permitted to go beyond it by referring to additional information. That belief is contrary to both authority and the interests of justice …

# SPECIAL CIRCUMSTANCES

### *R v Simpson* (2001) 53 NSWLR 704 per Spigelman CJ

> The words special circumstances … are words of indeterminate reference and will always take their colour from their surroundings. The non-parole period is to be determined by what the sentencing judge concludes that all of the circumstances of the case, including the need for rehabilitation, indicate ought to be the minimum period of actual incarceration

If there are circumstances that are capable of constituting special circumstances, the court is not obliged to vary the statutory ratio; before a variation is made "it is necessary that the circumstances be sufficiently special": ***R v Fidow*** **[2004] NSWCCA 172** at [22]; ***Langbein v R*** **[2013] NSWCCA 88** at [54].

The decision is, first, one of fact, to identify the circumstances, and secondly, one of judgment, to decide whether the circumstances justify a lowering of the non-parole period below the statutory ratio: ***R v Simpson*** **(2001) 53 NSWLR 704** at [73]; ***Fitzpatrick v R*** **[2010] NSWCCA 26** at [36].

A finding of special circumstances is a discretionary finding of fact: ***R v El-Hayek*** **(2004) 144 A Crim R 90** at [103]; ***Caristo v R*** **[2011] NSWCCA 7** at [28].

The degree or extent of any adjustment of the "statutory ratio" is a matter for the discretion of the sentencing judge: ***R v Cramp*** **[2004] NSWCCA 264 at [31]**

### *Trad v R* [2009] NSWCCA 56*; (2009) 194 A Crim R 20*

> [33] Section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* requires that the balance of the term of the sentence must not exceed one third of the non-parole period, unless the Court decides that there are special circumstances. The size of an adjustment to the statutory ratio, special circumstances having been found, is essentially a matter within a Judge's discretion. As was observed by Spigelman CJ in *Regina v Cramp* [2004] NSWCCA 264 at [31] the size of an adjustment for special circumstances "raises so many matters of a discretionary character that this Court should be very slow to intervene" and will not usually be interfered with unless the non-parole period is found to be manifestly inadequate or manifestly excessive.

### *MD V R* [2015] NSWCCA 37

The CCA allowed the appeal on the basis the sentence failed to reflect the judge's finding of special circumstances. Gleeson JA (Johnson and Hall JJ agreeing) summarised the authorities relevant to this type of submission:

> [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)).

## *R v Dashti* [2016] NSWCCA 251

[83] In *R v Simpson* [2001] NSWCCA 534; 53 NSWLR 704 at [73], Spigelman CJ described the process involved in finding special circumstances:

> "The decision is first one of fact – to identify the circumstances – and, secondly, one of judgment – to determine that those circumstances justify a lower proportionate relationship between the non-parole period and the head sentence."

…

[86] The Chief Justice accepted, at [58], that consideration of "*the desirability of a longer than computed period of supervision*" so as to assist or promote an offender's rehabilitation, will be an appropriate approach in many cases. However, it was not the only perspective to be considered in determining whether to make a finding of special circumstances. The Chief Justice pointed out, at [65], that the exercise of the discretion to depart from the statutory ratio is limited both by the need to find "*special circumstances*", and by:

> "… the need to ensure that the time an offender must spend in prison reflects all of the circumstances of the offence and the offender – including the objective gravity of the offence and the need for general deterrence – operates to confine the proper range for the exercise of the discretion."
>
> …

[89] Thus, a very wide range of factors are capable of constituting special circumstances, although the particular circumstance must be "*sufficiently special*" to justify a departure from the statutory ratio in a particular case: *R v Fidow* [2004] NSWCCA 172 at [22].

[90] In *Collier v R* [2012] NSWCCA 213, McClellan CJ at CL (R A Hulme and Schmidt JJ agreeing) expressed doubt that the fact of being in custody for the first time was capable of constituting special circumstances. As his Honour stated, at [36]:

> "The fact that a person has no previous criminal record and, accordingly, has not previously been incarcerated is a matter relevant to the total sentence and non-parole period. However, it is unlikely to be a circumstance

> warranting further leniency to an offender by a reduction in the term of the non-parole period: *R v Fidow…* at [18] (Spigelman CJ). Many persons who are sentenced will receive a sentence of imprisonment for the first time. That fact alone is unlikely to justify a finding that the offender's circumstances are special."

[91] In *R v Van Ryn* [2016] NSWCCA 1 at [200] R A Hulme J (Leeming JA and Johnson J agreeing), after referring to cases raising doubts about the soundness of findings of special circumstances based on the fact that a person will be in custody for the first time, held that there had been no error in the making of such a finding in circumstances in which there was another more significant basis for it, namely, the need for a lengthier non-parole period for treatment purposes.

[92] The authorities establish, therefore, that a finding of special circumstances based upon it being the offender's first time in custody will ordinarily bear little if any weight unless the finding of special circumstances can be supported by other factors."

## *R v Lulham* [2016] NSWCCA 287

Per Bathurst CJ:

> [7]: In dealing with the question of special circumstances, Bellew J has stated that, before such a finding can be made, it is necessary for a sentencing judge to be satisfied that there exists significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful as opposed to a mere possibility. I agree there must be evidence on which a finding of special circumstances is based. However, in dealing with rehabilitation, it seems to me a judge would be entitled to find special circumstances if there is evidence before him or her that demonstrates that the offender has prospects of rehabilitation and that these prospects would be assisted if a longer parole period was allowed…

Per Beazley J:

> [8] I have had the advantage of reading in draft the reasons of Bathurst CJ and Bellew J and N Adams J. Save for the observations made by Bellew J at [54] that "*a sentencing judge must be satisfied that there exist significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful as opposed to a mere possibility*", I agree with his Honour's reasons and proposed order. I also agree with the additional reasons of the Chief Justice and N Adams J. I wish only to make the following brief observations in respect of the question of special circumstances.
>
> [9] As this Court explained in *R v Dashti* [2016] NSWCCA 251 at [84] a finding of special circumstances is integrally linked with the determination of an appropriate parole period. Although the statement of Bellew J to which I have referred in the previous paragraph is supported by authority, regard must always be had to the context in which a particular statement is made. The seemingly unqualified nature of his Honour's observation would not be appropriate in every case.
>
> [10] An obvious, but not the only circumstance where his Honour's observation may not be appropriate, is in the case of a long prison sentence where the prospects of rehabilitation may be difficult to assess or, at that stage, even be non-existent. The Court may nonetheless be satisfied that a finding of special circumstances is appropriate to assist or promote an offender's rehabilitation. As Spigelman CJ explained in *R v Simpson* (2001) 53 NSWLR 704; [2001] NSWCCA 534 at [58], that may be an appropriate approach to the question of special circumstances in a given case: see generally the discussion in *Dashti* at [81]-[91].

Per Bellew J:

> [54] There is no statutory definition of "special circumstances", but a finding that such circumstances are established is integrally linked with the determination of an appropriate non-parole period, that being the minimum period for which an offender must be kept in detention in relation to the offence: *R v Dashti*[2016] NSWCCA 251 at [84] per the Court (Beazley P, Garling and Fagan JJ). A wide range of factors are capable of constituting special circumstances: *Dashti* (supra) at [89]. However before a finding of special circumstances can be made, it is necessary for a sentencing judge to be satisfied that there exist significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful as opposed to a mere possibility: *R v Carter* [2003] NSWCCA 243 at [20]; *R v Tuuta* [2014] NSWCCA 40; (2014) 239 A Crim R 399 at [57]).

### ***Brennan v R*** **[2018] NSWCCA 22 per Button J (Hoeben CJ at CL agreeing)**

> [35] It is not the case that, pursuant to either section (Section 44(2B) and s 44(2) *Crimes (Sentencing Procedure) Act 1999*), a sentencing judge or magistrate needs to find special circumstances in order to impose a non-parole period that is *more* than 75% of a head sentence

His Honour went onto consider whether procedural fairness had been denied when the sentencing judge imposed a sentence where the ratio between the non-parole period and the head sentence was substantially greater than 75%, and the prosecutor had made no submission seeking this outcome, the sentencing judge gave no warning that such a sentence was under consideration, and the defence advocate had sought a finding of special circumstances. The Court held that procedural fairness had been denied and the offender should be re-sentenced.

> [97] I do not purport to suggest some inflexible rule of practice that sentencing magistrates and judges must, in every single case, have raised with the defence advocate the possibility of imposing a sentence with a ratio greater than 75% before doing so. Nevertheless, in the circumstances of this particular case – the silence of the Crown about the topic; the subjective features that could, depending upon one's point of view of them, "cut both ways"; the recitation of matters by the defence advocate said to found special circumstances; the inference that the adverse outcome would have been firmly resisted by him if foreshadowed; the silence of his Honour; and the fact that judgment was reserved (permitting opportunity for further submissions, at the least in written form) – I consider that there has been a denial of procedural fairness to the applicant to the extent that the ratio between the non-parole period and the head sentence was substantially greater than 75%. I say that because there was a practical injustice done to him by the imposition of an aggregate sentence with that attribute, without his lawyer having been made aware that that was a possibility. That constitutes an error of law that should lead this Court to consider re-sentence.
>
> [98] Finally, I trust that what I have written above cannot be understood as a derogation from the important principles discussed in *Zreika v R* [2012] NSWCCA 44. That is because the principle for which that case stands is that appeals against sentence that are based upon the omission from the remarks on sentence of a factor that was not mentioned in the oral or written submissions of the defence advocate at first instance should seldom succeed. This unusual case, on the other hand, is founded upon the failure at first instance to mention the possibility of an exceptional and adverse outcome by the sentencing judge or the Crown, not the defence advocate, and yet that outcome occurred.

# STANDARD NON-PAROLE PERIOD

### *Muldrock v The Queen* (2011) 244 CLR 120

The non-parole period is not the necessary starting point or the only important end-point in framing a sentence to which Div 1A applies: at [17].

Sentencing for Div 1A offences must be consistent with the approach to sentencing described by McHugh J in *Markarian v The Queen* (2005) 228 CLR 357 at [51] whereby the judge identifies all the factors that are relevant to the sentence, discusses their significance, and then makes a value judgment as to what is the appropriate sentence given all the factors of the case: at [26].

The standard non-parole period and the maximum penalty are legislative guideposts:

> [27] The [standard non-parole period] requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.

The court is still required to assess the objective seriousness of an offence:

### *R v Campbell* [2014] NSWCCA 102 per Simpson J (Hall J agreeing)

> [27] … the assessment of objective seriousness is, and has always been, a critical component of the sentencing process: R v Geddes (1936) 36 SR (NSW) 554; R v Dodd (1991) 57 A Crim R 349; Markarian v The Queen [2005] HCA 25; 228 CLR 357; Khoury v R [2011] NSWCCA 118; 209 A Crim R 509 at [71]-[72]. These cases were all decided before judgment was given in Muldrock v The Queen [2011] HCA 39; 240 CLR 120. There is nothing in that judgment that cuts across the principle stated. Muldrock exposed error in this Court in over emphasising the assessment of objective gravity in offences to which Pt 4 Div 1A of the Sentencing Procedure Act applies, of notional offences in the mid-range of objective seriousness. It does not preclude proper attention being paid to the objective seriousness of the particular offence under consideration: see, for example, R v Koloamatangi [2011] NSWCCA 288 per Basten JA. In respect of offences to which Pt 4 Div 1A of the Sentencing Procedure Act applies, two "legislative guide posts" are to be observed - the maximum sentence prescribed, and the standard non-parole period.
>
> [28] A "legislative guide post" is an instrument of measurement. Standing alone, it is meaningless. It is used to measure the relevant features of a particular instance of a crime against (in the case of the maximum penalty) a worst case: see Markarian, [30]-[31]; (in the case of the standard non-parole period) an offence in the mid-range of objective seriousness.

See also: ***R v Van Ryn*** [2016] NSWCCA 1 at [134]

# TOTALITY

Where a court sentences an offender for more than one offence, or sentences an offender serving an existing sentence, the aggregate or overall sentence must be "just and appropriate" to the totality of the offending behaviour: ***Johnson v The Queen* (2004) 78 ALJR 616** at [18]; ***R H McL v The Queen* (2000) 203 CLR 452** at [15]; ***R v Harris* (2007) 171 A Crim R 267** at [44].

In the case of imprisonment, this may involve fixing an appropriate sentence for each offence and then considering matters of accumulation or concurrency: ***Pearce v The Queen* (1998) 194 CLR 610**

The sentencing judge is required to have regard to the fact that an offender is being sentenced for multiple offences and ensure that the ultimate sentence imposed is appropriate to the totality of the offender's offending and to the offender's personal circumstances: ***R v Chan* [2000] NSWCCA 345**; ***Stratford v R* [2007] NSWCCA 279**.

The principle of totality of criminality may have the practical effect that a lower penalty may be imposed for all the offences as compared to if the offences were dealt with separately and distinctly: ***R v Holder* (1983) 13 A Crim R 375**

### *Cahyadi v R* [2007] NSWCCA 1; 169 A Crim R per Howie J

> [27] In any event there is no general rule that determines whether sentences ought to be imposed concurrently or consecutively. The issue is determined by the application of the principle of totality of criminality: can the sentence for one offence comprehend and reflect the criminality for the other offence? If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality. Of course it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence cannot comprehend the criminality of the other. Similarly, where they are part of a single episode of criminality with common factors, it is more likely that the sentence for one of the offences will reflect the criminality of both.
>
> [28] This issue was most recently discussed in *R v MMK* [2006] NSWCCA 272 where the Court stated:
>
>> [11] One of the limiting principles that constrains a sentencing court in seeking to promote the purposes of punishment is the principle of proportionality. Another is the, not-unrelated, principle of totality and it is this principle that operated in the present case. It is the application of the totality principle that will generally determine the extent to which a particular sentence is to be served concurrently or cumulatively with an existing sentence in accordance with statements of the High Court as to the operation of the principle in *Mill v R* (1988) 166 CLR 59; *Pearce v R* (1998) 194 CLR 610 and Johnson v R [2004] HCA 15; (2004) 78 ALJR 616.

> [12] In *R v Holder* (1983) 3 NSWLR 245, Street CJ described the principle as follows: (at 260)
>
> "The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences... Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances...In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences".

## ***R v MAK; R v MSK* [2006] NSWCCA 381; 167 A Crim R 159**

> [16] The severity of a sentence is not simply the product of a linear relationship. That is to say severity may increase at a greater rate than an increase in the length of a sentence. As Malcolm CJ said in R v Clinch (1994) 72 A Crim R 301 at 306:
>
> > ... the severity of a sentence increases at a greater rate than any increase in the length of the sentence. Thus, a sentence of five years is more than five times as severe as a sentence of one year. Similarly, while a sentence of seven years may be appropriate for one set of offences and a sentence of eight years my be appropriate for another set of offences, each looked at in isolation. Where both sets were committed by the one offender a sentence of 15 years may be out of proportion to the degree of criminality involved because of the compounding effect on the severity of the total sentence of simply aggregating the two sets of sentences.
>
> [17] … an extremely long total sentence may be “crushing” upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the offender may not be entitled to the element of mercy entailed in adopting such a constraint.

Whether a particular sentence is a “crushing” depends upon the offences committed, the maximum penalties, standard non-parole periods (if relevant) and all objective and subjective factors and principles concerning accumulation, concurrency and totality: ***Paxton v R* (2011) 219 A Crim R 104** at [215].

An extremely lengthy sentence would not necessarily be characterised as crushing if it reflects the total criminality of the offender’s conduct and would not be disturbed on appeal because the offender may feel crushed by it: ***Stanton v R* [2017] NSWCCA 250** at [153]; ***ZA v R* [2017] NSWCCA 132** at [76]–[85].

For young offenders a crushing sentence is one that is so long that the offender cannot conceive of enjoying a useful life after its expiration: ***Holliday v R* [2013] ACTCA 31** at [61].

# 10. SPECIFIC OFFENCES

## CHILD PORNOGRAPHY

### *Vincenzo Jon Fedele v R* [2015] NSWCCA 286

> [53] In this line of authority general deterrence is sometimes described as "paramount" or "the primary sentencing consideration." It is said that, absent exceptional circumstances, a sentence of imprisonment involving full time custody is "ordinarily" warranted. It is also said that less weight is given than in other cases to the fact that an offender has prior good character and favourable prospects of rehabilitation.
>
> [54] These pronouncements are a guide to the exercise of discretion in child pornography cases; but, of course, are not prescriptive of the result in a particular case, which must turn on its facts and circumstances. In *EF v R* [2015] NSWCCA 36, Simpson J (as she then was) referred to the line of authority that, in the absence of exceptional circumstances, a full time custodial sentence should be imposed upon an offender who has been substantially involved in the supply of prohibited drugs. Her Honour said at [10]:
>
> > "Nothing in any of those decisions obviates the need for sentencing judges to consider the circumstances of each case individually, including the availability (in a practical sense) of alternatives to full-time custody."
>
> [55] At [11], her Honour cited a passage in the judgment of Priestley JA in *R v Cacciola* (1988) 104 A Crim R 178 at 183-4. His Honour referred to the proposition that drug dealing to a substantial degree calls for the imposition of a prison sentence as something which the Court continues to consider as "the proper approach to sentencing, always bearing in mind the need to consider every convicted person's case on its own merits and in its own circumstances."

### *R v Porte* [2015] NSWCCA 174

The CCA reaffirmed the sentencing principles with respect to child pornography offences as set out in ***Minehan v R*** [2010] NSWCCA 140 at [94]-[95].

> [59] At the same time as maximum penalties for these offences have been increased, the courts have made clear that the ready availability of material of this type has warranted substantial penalties with general deterrence and denunciation being paramount considerations.
>
> [60] The comity principle has been applied in establishing sentencing principles with respect to child pornography offences: R v Gent at 36 [29]. In Director of Public Prosecutions (Cth) v D'Alessandro ("D'Alessandro") [2010] VSCA 60; 26 VR 477, Harper JA (Redlich JA and Williams AJA agreeing) said at 483-484 [21] (references omitted):
>
> > "When construing and applying Commonwealth legislation, this Court follows principles of comity in according respect to the decisions of intermediate appellate courts of other jurisdictions concerning the same legislation. It is therefore worth recording that there seems to be unanimous support across the jurisdictions for a number of propositions. First, that the problem of child pornography is an international one. Secondly, that the prevalence and

> ready availability of pornographic material involving children, particularly on the internet, demands that general deterrence must be a paramount consideration. Thirdly, that those inclined to exploit children by involving them in the production of child pornography are encouraged by the fact that there is a market for it. Fourthly, that those who make up that market cannot escape responsibility for such exploitation. Fifthly, that limited weight must be given to an offender's prior good character. Sixthly, that a range of factors bear upon the objective seriousness of the offences to which the respondent in this case pleaded guilty. They include:
>
> (a) the nature and content of the pornographic material - including the age of the children and the gravity of the sexual activity portrayed;
>
> (b) the number of images or items of material possessed by the offender;
>
> (c) whether the possession or importation is for the purpose of sale or further distribution;
>
> (d) whether the offender will profit from the offence."

[61] These principles have been frequently repeated since D'Alessandro …

[62] A helpful 2010 publication, issued by the Judicial Commission of New South Wales, observed that intermediate appellate courts had recognised that the prevalence of child pornography offences justified strongly deterrent sentences, and that the Internet accounts for the increase in offending: Mizzi, Gotsis and Poletti, "Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences", Judicial Commission of New South Wales, Monograph 34, September 2010, paragraph 2.2.

[63] After a thorough examination of authorities in Minehan v R (a case dealing with Commonwealth and State offences, including dissemination and grooming charges as well as access and possession offences), RA Hulme J (Macfarlan JA and myself agreeing) said at 260-261 [94]-[95]:

> "94 Drawing primarily from the authorities to which I have referred, the following matters may be relevant to an assessment of the objective seriousness of offences involving the possession or dissemination/transmission of child pornography:
>
> 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.

95 This list of factors is, of course, not closed. Individual cases may always produce further matters relevant to the assessment of their objective seriousness."

[64] The Minehan v R factors have been applied in a number of later decisions: R v Linardon at [53]; R v Martin at [34]; James v R [2015] NSWCCA 97 at [23].

[65] A number of additional propositions should be kept in mind.

[66] In this case, the Respondent was to be sentenced for accessing child pornography material and possession of child abuse material. He was not charged with sale, distribution or dissemination of material. The absence of features of this type do not operate to mitigate penalty for a possession offence: Saddler v R [2009] NSWCCA 83; 194 A Crim R 452 at 464-465 [49]-[50]; R v Booth [2009] NSWCCA 89 at [46]; Warner, "Sentencing for Child Pornography" (2010) 84 ALJ 384 at 385.

[67] The possession of child pornography material creates a market for the continued corruption and exploitation of children: *R v Coffey* [2003] VSCA 155; 6 VR 543 at 552 [30]; *R v Cook; Ex parte Director of Public Prosecutions (Cth)* [2004] QCA 469 at [21]; *R v Jongsma* [2004] VSCA 218; 150 A Crim R 386 at 395 [14]; *Heathcote (A Pseudonym) v R* at [40].

[68] The courts have stressed that possession of child pornography is not a victimless crime: *R v Jones* [1999] WASCA 24; 108 A Crim R 50 at 52 [9]; *R v Gent* at 38 [33]; *D'Alessandro* at 484 [23]; *R v Martin* at [43].

[69] An additional feature of harm done to victims of child pornography offences was referred to by Professor Kate Warner (as her Excellency then was) in *"Sentencing for Child Pornography"* (2010) 84 ALJ 384 at 385 (references omitted):

> "The damage done to the children so abused can be, and undoubtedly often is, profound. In addition to the physical and psychological harm from the abuse itself, the New South Wales Sentencing Council has explained that harm may also result from the knowledge, as they grow older, that the material may remain in circulation, heightening the shame and distress associated with being exploited when young and vulnerable."

[70] In an extract cited frequently in later decisions, Simpson J (as her Honour then was) (with the agreement of McClellan CJ at CL and Howie J), encapsulated in *R v Booth* at [39]-[44], the particular vice of child pornography offences and the sentencing principles which have been deployed as a response by the Courts:

> "39 A number of previous decisions of this and other appellate courts have found that, in respect of offences of child pornography, general deterrence is, at least, a significant element of the sentencing process: R v Gent; Assheton v R [2002] WASCA 209; 132 A Crim R 237; Mouscas v R [2008] NSWCCA 181. In Assheton, indeed, general deterrence was said to be 'the paramount consideration'. This view was endorsed in Gent.
>
> 40 I would add my further endorsement to that view. It seems to me that possession of child pornography is an offence which is particularly one to which notions of general deterrence apply. Possession of child pornography is a callous and predatory crime.
>
> 41 In sentencing for such a crime, it is well to bear firmly in mind that the material in question cannot come into existence without exploitation and abuse of children somewhere in the world. Often this is in underdeveloped or disadvantaged countries that lack the resources to provide adequate child protection mechanisms. The damage done to the children may be, and undoubtedly often is, profound. Those who make use of the product feed upon that exploitation and abuse, and upon the poverty of the children the subject of the material.
>
> 42 What makes the crime callous is not just that it exploits and abuses children; it is callous because, each time the material is viewed, the offender is reminded of and confronted with obvious pictorial evidence of that exploitation and abuse, and the degradation it causes.
>
> 43 And every occasion on which an internet child pornography site is accessed (or when such material is accessed by any means at all) provides further encouragement to expand their activities to those who create and purvey the material.
>
> 44 It is for that reason that this is a crime in respect of which general deterrence is of particular significance."

[71] A common feature on sentence for this class of offence is the tender of material (and often substantial material) concerning steps taken with respect to counselling and treatment in aid of rehabilitation. Evidence of this type is important to the exercise of the sentencing discretion: s.16A(2)(n) *Crimes Act 1914 (Cth)*; s.21A(3)(h) *Crimes (Sentencing Procedure) Act 1999 (NSW)*. However, it is important to keep in mind the further observations of Simpson J in *R v Booth* at [47]:

> "Examination of the Remarks on Sentence satisfies me that undue focus was placed upon the respondent's need for counselling at the expense of other legitimate and important sentencing considerations. While I do not dissent from the importance of achieving prevention of further offences by such means, it is not the only matter to be considered. As I have made clear, the need to deter others from involving themselves in child pornography by signalling that such behaviour will be met by significant penalties is an important consideration. So also is denunciation of those who engage in this callous and predatory crime."

[72] Citing this passage from *R v Booth*, it has been said that, 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: Mizzi, Gotsis and Poletti, *"Sentencing Offenders Convicted of Child Pornography and Child Abuse Material Offences"*, paragraph 2.4.
>
> …
>
> [126] The Respondent had a number of factors operating in his favour on the subjective side of the case, including his health. His prior good character was to be afforded limited weight: *R v Gent* at 40-44 [48]-[69]; *D'Alessandro* at 483-484 [21] cited at [60] above. Prior good character is not unusual in this area of offending. Positive personal antecedents and a reduced or absent need for personal deterrence are relatively commonplace amongst offenders in possession of child pornography: *Hill v State of Western Australia* [2009] WASCA 4 at [28]. Significant weight is to be given to general deterrence and correspondingly less weight to matters personal to the offender: *Hill v State of Western Australia* at [28].

## *Fitzgerald v R* [2015] NSWCCA 266

> [33] As his Honour recognised, general deterrence is of paramount importance when sentencing for these kinds of offences. This kind of offending primarily requires the imposition of sentences that will both deter others in the community from committing similar offences and which will punish and denounce the conduct of the offender. The ease and relative anonymity of the internet, the use by like-minded people of peer to peer file sharing technology to form networks exchanging such material and the difficulties of detection demonstrate the importance of general deterrence.
>
> [34] In *R v Lee* [2013] WASCA 216 McLure P (with whom Mazza JA and Hall J agreed) noted that with offences of this kind a term of imprisonment was ordinarily the only appropriate sentencing option:
>
> > "In relation to those offences in which a term of immediate imprisonment is ordinarily the only appropriate sentencing option, significant weight is given to general deterrence with the consequence that mitigating circumstances personal to the offender, including age and good character, are accorded less weight …" (at [31])
> >
> > "… The application of these principles by this Court has the effect that a sentence other than immediate imprisonment for offences within this category is, as a matter of fact, exceptional …" (at [33])

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 CET classification. No further evidence of the depiction of actual cruelty or harm was necessary.": at [36].

***R v Hutchinson* [2018] NSWCCA 152 per Hulme J (Meagher JA and Button J agreeing)**

The CCA added to the list of factors that may bear upon the assessment of the objective seriousness of offences involving child pornography and child abuse material:

> [43] The Crown indicated to the Court that the list of factors that may bear upon the assessment of the objective seriousness of offences concerning child pornography and child abuse material provided in Minehan v R [2010] NSWCCA 140; 201 A Crim R 243 has been endorsed in subsequent cases and has been found to be of assistance to sentencing judges. Whilst acknowledging that it was said in that case that this list of factors is not closed, the Crown invited the Court to add two further matters to the list that have emerged in the present case. If the list has been found useful it is appropriate to update it. I have done so by amending the 9th item in the list to include deception and adding a new 10th item.
>
> [44] Accordingly, a revision of the list provided in Minehan v R of potentially relevant matters that may bear upon the assessment of the objective seriousness of offences concerning the possession, dissemination or transmission of child pornography and child abuse material is:
>
> 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; [1981] HCA 31.
>
> 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, sophistication and/or deception employed by the offender in acquiring, storing, disseminating or transmitting the material.
>
> 10. The age of any person with whom the offender was in communication in connection with the acquisition or dissemination of the material relative to the age of the offender.
>
> 11. Whether the offender acted alone or in a collaborative network of like-minded persons.

12. Any risk of the material being seen or acquired by vulnerable persons, particularly children.

13. Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.

14. Any other matter in s 21A(2) or (3) of the Crimes (Sentencing Procedure) Act (for State offences) or s 16A of the Crimes Act 1914 (for Commonwealth offences) bearing upon the objective seriousness of the offence.

[46] Once again, it must be stressed that individual cases can always identify other matters relevant to an assessment of objective seriousness and so this list remains one that is not exhaustive.

The fact that an offender does not pay to access a child pornography website or was not involved in the distribution or sale of child pornography does not mitigate the offending: ***R* v *De Leeuw*** **[2015] NSWCCA 183** per Johnson J at [72] citing *R v Coffey* [2003] VSCA 155; 6 VR 543 at 552 [30]

The number of images is not, of itself, determinative of the seriousness of the offending: ***R v Freedman*** **[2017] NSWCCA 201 per Bellew J at [125]**

# CONSPIRACIES

### *Regina (C'Wealth) v Elomar & Ors* [2010] NSWSC 10 per Whealy J

Regarding the objective seriousness of a conspiracy:

> [15] While the assessment of the criminality of each of the offenders will not overlook, as a relevant matter, his particular act or acts in furtherance of the conspiracy, it is clear that the criminality of an offender in a conspiracy case goes well beyond the mere recognition of his or her actions and role in the enterprise. The primary aspect of the assessment of individual criminality is well understood to be on a broader basis. The gravamen of the offence – the essential feature – is the agreement to participate in organised criminal activity. The sentence must reflect the organisational nature of the conspiracy rather than by confining the sentencing discretion to the identification of the role of an offender with specific reference to the physical acts that he undertook (*Tyler v R* [2007] 173 A Crim R 458; *Diesing v R* [2007] NSWCCA 326). It is necessary, as a consequence, to examine the nature and scope of the conspiracy and to assess on a basis, generally common to all the participants, the level of criminality exhibited by the conspiracy itself. …

# DRUGS

### *Objective seriousness:*

In ***Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584**, the High Court was critical of an approach that unduly elevated the weight of the drug imported as the crucial factor to be taken into account when determining the appropriate sentence: joint judgment at [34]–[88]; Kirby J at [89]–[150].

See also ***Roberts (a Pseudonym) v R*** **[2019] NSWCCA 102** at [51].

### *Parity and roles:*

While in some circumstances it may be useful to use shorthand descriptions of different kinds of participation in a single enterprise of importing drugs, “it is always necessary … to bear steadily in mind the offence for which the offender is to be sentenced. Characterising the offender as a ‘courier’ or a ‘principal’ must not obscure the assessment of what the offender did.”: ***R v Olbrich*** **[2000] NSWCCA 389** at [19].

In the context of an offence cultivating a large commercial quantity of cannabis, Simpson J (Davies J agreeing) stated that the definition of a principal involves, among other indicators “having some hand in the management of the operation (although it is well recognised that principals will, so far as possible, distance themselves from the day to day operation, they nevertheless maintain considerable control over the enterprise)”: ***Nguyen v R*** **(2011) 208 A Crim R 432** at [4].

It is not uncommon that principal offenders in a drug enterprise have separate but equally serious roles to play: ***Kemp v R*** **[2014] NSWCCA 153** per McCallum J at [8]-[14], [27]-[36].

In ***Kemp v R*** **[2014] NSWCCA 153** at [33] McCallum J cautioned against ‘the “hypnotic” effect of the chain metaphor frequently adopted in the discussion of drug supply’:

> … It is often assumed, without analysis, that the supply of drugs involves a vertical or linear hierarchy from manufacturer to end buyer (here, the undercover police officer) in which the seriousness of the role of any individual participant is necessarily greater the closer that person is to the ultimate supplier. That may in fact be the case in some instances but the experience of other cases cannot be elevated to the status of a legal principle or presumption. Each case must be assessed on its own facts according to the material before the court.

***Lam v R; Lam v R*** **[2015] NSWCCA 87** per Schmidt J (Meagher and Bellew JJ agreeing):

> [27] … Disparity in sentencing is not simply the imposition of different sentences for the same offence, but a question of disproportion between them. Parity must be determined by having regard to the circumstances of the co-offenders and their respective degrees of culpability for their offending (see Postiglione v The Queen [1997] HCA 26; (1997) 189 CLR 295 at 878).
>
> …
>
> [67] Further, his Honour had to bear in mind, as discussed in *R v Shi* [2004] NSWCCA 135, Wood CJ at CL, at [34] the importance of giving consideration to:
>
>> "… the well-recognised principle that the culpability of those who engage, at any level, in drug supply networks is significant, and that deterrent sentences are necessary, since absent the involvement of couriers, warehousemen and so on, these networks, whether established for the purposes of importation or subsequent distribution, would simply collapse: R v Le Cerf (1975) 13 SASR 237 and *R v Laurentiu and Becheru* (1962) 63 A Crim R 402".

See also ***Kay v R*** **[2019] NSWCCA 275** in which the Court held that it was a mistake to conflate the sophistication of the organisation that employed the appellant with her role as a "runner".

### *Involvement of Authorities:*

***R v DW*** **[2012] NSWCCA 66** per RS Hulme J:

> [117] I have no difficulty in accepting that, absent circumstances where criminality has been exacerbated by or at the instigation of authorities, the circumstance that the authorities have been complicit in offending or have prevented drugs from being disseminated into the community, in no way mitigates the subjective criminality of the offender. However, if the involvement of the authorities prevents the transaction from resulting in harm, it is illogical not to afford that fact appropriate weight just as in the converse situation one would take account of any damage that was a consequence of the offending. Insofar as the authorities to which I have referred suggest the contrary or that the significance of the absence of dissemination into the community is slight or "very minor", they are in my view wrong. Of course, in any comparison with sentences in past cases, it must be recognised that most of those are also cases where there has been no, or no significant, dissemination of drugs.

### *Section 25A – Ongoing Supply:*

An offence under section 25A is generally considered to be more serious than an offence under s 25(1). In ***Fayd'Herbe v R*** **[2007] NSWCCA 20**, Adams J reviewed the authorities regarding s 25A and cited the following passage with approval:

> [18] … In *R v CBK* [2002] NSWCCA 457 Wood CJ at CL said …
>
>> [57] …An offender charged with a s 25A offence cannot rely upon an argument that the act of supply was an isolated event. Nor can he expect to receive a sentence of the kind which may be appropriate for a single offence of supply. Significant sentences must be imposed in such cases in order to give effect to the clear legislative intention to discourage the ongoing trade

> in drugs, which depends entirely upon the availability of a person such as the present applicant."

In ***Mirza v R*** **[2007] NSWCCA 248,** the Court dealt with an offence under s 25A involving what were considered to be unusually large amounts of drugs for this type of offence. The offender had supplied cocaine on three occasions to an undercover operative in quantities ranging from 28.4 g to 29.8 g, with a purity of 49%. The offender had pleaded guilty to one count of ongoing supply of cocaine and was sentenced to a term of imprisonment of six years with a non-parole period of 3 ½ years. Howie J stated:

> [11] … It may well be the case that the seriousness of this type of offence will not be diminished simply because the overall amount of drug supplied is small. But it does not follow that the amount of drug supplied is an irrelevant matter in determining the seriousness of the particular offence.

In ***Nguyen, The Tao v R*** **[2018] NSWCCA 176**, the Court held that an offence of supplying prohibited drugs on an ongoing basis contrary to s 25A is not confined to the *actual* supply of prohibited drugs (other than cannabis) for financial or material reward on three or more occasions, and that the extended definition of "supply" in s 3(1) of the Drugs Misuse and Trafficking Act can apply to the offence.

> [37] … Where an accused's purpose in supplying a prohibited drug is to obtain a financial or material reward the offence is committed provided the other elements of s 25A are met. Applying such a construction, s 25A operates in the same way in respect of agreements to supply, or offers to supply as it does in respect of actual supplies.

The fact that actual supply has not occurred for a s 25A offence will not automatically lessen the seriousness of the offence. In ***R v Younan*** **[2018] NSWCCA 180** the Court commented:

> [46] Ongoing supply offences contrary to s 25A often involve offenders dealing at a street level in relatively small quantities. Indeed, that was the type of criminal behaviour the offence was designed to meet. As the Attorney General described it in the Second Reading speech referred to earlier, the creation of the offence was designed to close a loophole with the pre-existing quantity-based offences by targeting those who were involved in repetitive drug dealing but avoiding the more serious penalties available under the Act by supplying in small quantities. See also, for example, R v Smiroldo [2000] NSWCCA 120; 112 A Crim R 47 at [11]-[15]; Mirza v R [2007] NSWCCA 248 at [11].
>
> [47] This is not to say that quantity is not important in the assessment of the seriousness of an ongoing supply offence. In MRN v R [2006] NSWCCA 155 at [145], Simpson J (as her Honour then was) referred with apparent approval to observations made in earlier cases to the effect that "repetition, system and organisation" as well as the magnitude of the organisation and the number and quantities of individual incidences of supply are all relevant to the objective criminality of offences against s 25A.

***Sentencing Options:***

Sentencing courts are to approach the task of sentencing offenders charged with drug supply offences in accordance with ordinary sentencing principles and not by starting from the assumption that a sentence of full-time imprisonment is required: ***Parente v R*** **[2017] NSWCCA 284** at [106].

> [106] … the "principle" described in *Clark* – that drug trafficking alone in any substantial degree should normally lead to a custodial sentence and it will only be in exceptional circumstances that a non-custodial sentence will be appropriate – should no longer be applied in sentencing for drug supply cases. …

The Court went on to state that the correct approach is to determine: (at [106])

> (1) whether no sentence other than imprisonment is appropriate (regardless of how it might be served);
>
> (2) if so, the length of such a sentence (regardless of how it might be served); and
>
> (3) whether any alternatives to full-time incarceration are available and appropriate.

At [112], the Court approved the following statement by Simpson JA in ***Robertson v R*** **[2017] NSWCCA 205** at [50]:

> [I]t may be accepted that examination and analysis of sentencing practices establishes that, where the facts of an offence demonstrate drug dealing "to a substantial degree", a sentence of imprisonment will ordinarily be imposed. Moreover, recognition of the serious social implications of drug dealing (reflected, if in nothing else, in the maximum prescribed sentences) suggests that, in the ordinary case, a sentence other than imprisonment will fail to meet sentencing objectives.

A judge must not sentence an offender to imprisonment unless satisfied that, having considered all possible alternatives, no other penalty is appropriate. This involves consideration of the possibility of options such as a fine and other sentencing options, rather than of possible alternative ways to serve a sentence of imprisonment: ***Parente v R*** **[2017] NSWCCA 284** at [113].

Full-time custody is therefore the last choice, not the starting point for the imposition of a sentence: ***West v R*** **[2017] NSWCCA 271** per Rothman J at [60]–[61]. At [56] his Honour stated:

> In my view, all that is intended by the expression "exceptional circumstances" is a statement as to that which will ordinarily apply, given the seriousness with which society must treat substantial drug trafficking. It is not intended to be a jurisdictional or preconditioned gateway to the imposition of a sentence other than a full-time custodial sentence.

See also:

- ***R v Zamagias*** **[2002] NSWCCA 17** at [22]–[29]
- ***Douar v R*** **[2005] NSWCCA 255**; **(2005) 159 A Crim R 154** at [70]–[72]

***Definition of Manufacture and Knowingly Taking Part:***

### *R v Bucic* [2016] NSWCCA 297

[26] I accept that the process of separating the cocaine from the paper within which it was contained is a process of extraction for the purpose of the *DMTA,* as the Crown argued. Accordingly, to knowingly take part in that process was to knowingly take part in the manufacture of the prohibited drug cocaine.

…

[42] … To be guilty of an offence under s 24, it is not necessary that the person charged is responsible for all necessary steps in the manufacture of the drug from acquisition of raw materials to realisation of the drug as a "marketable commodity". Participation in *any* one of the various steps along the continuum of a process of manufacture that may be required to realise the drug as a marketable commodity is sufficient.

[43] To like effect is the dictum of Doyle CJ in *R v Randylle* at 582:

> "In my opinion… a step in the process of manufacture can be taken by someone who does not have all of the equipment or chemicals required to complete the process. Such a step could be taken before any chemical reaction is produced by the use or treatment of consumables. The process of production can be broken into stages, that might be conducted at different places and by different people and on different days. If the evidence establishes that that is what was intended, an act or event which in isolation might not appear to be a step in the process of production may, properly understood, be found to be such a step. All of these things have to be considered.""

### *Legislative Intent of DMTA (Hydroponic Cultivation) Amendment Act 2006:*

### *Tran v R* [2018] NSWCCA 220

[73] As the sentencing Judge observed, an examination of past sentencing decisions for offences of this type in this State does not reveal offending of the magnitude of that of the Applicant by reference to the number of premises involved.

[74] The offences for which the Applicant was sentenced were enacted by the Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Act 2006. In the second reading speech with respect to that legislation, Ms Carmel Tebbutt (on behalf of the Attorney General) said (Hansard, Legislative Assembly, 25 May 2006):

> "In recent years NSW Police have detected a significant increase in the number of hydroponic cannabis operations conducted in domestic dwellings, as well as an increasing tendency for these operations to involve organised crime syndicates. Cannabis plants cultivated by hydroponic and other enhanced indoor means grow much faster than plants grown by traditional outdoor methods, and produce between five and seven times the yield. The current quantity amounts in the Drug Misuse and Trafficking Act at which maximum penalties apply for cannabis cultivation offences are based upon the yield, harvest patterns and profitability of outdoor, or "bush grown" cannabis. They are not an accurate reflection of the commerciality of hydroponic cannabis operations. This bill addresses this inequity."

…

[77] Also relevant to the present case was the following statement by the Minister:

> "Due to the widespread practice among organisers of hydroponic cannabis operations to steal electricity from the grid to operate their lights, ventilators and other equipment, the bill also amends the Electricity Supply Act 1995 to increase maximum penalties associated with this practice."

[78] The Minister concluded the second reading speech in the following way:

> "In summary, the measures in the bill constitute yet another decisive response by the Government to developments in drug crime as they emerge. The new laws have been designed in such a way as to specifically target the commercial cultivation of prohibited plants through hydroponic and other enhanced indoor means, and will ensure that maximum penalties for these offences accurately reflect the level of commerciality and criminality involved."

[79] It may be seen from the second reading speech that the mischief to which the 2006 legislation was directed included the suppression of organised criminal activity, whereby extremely valuable cannabis crops could be cultivated in residential or commercial premises in urban areas utilising hydroponic cultivation measures and illegally diverted electricity. The legislation was directed at suppressing a lucrative market where valuable crops were cultivated in places which were effectively hidden in plain sight in urban communities. As the Minister made clear in the second reading speech, there was a substantial increase in penalties for these offences when compared to available sentences and past sentencing practices for offences of cultivation and supply of cannabis under the pre-existing law. This was achieved in practice by reducing the large commercial quantity for cannabis plants cultivated by enhanced indoor means to 200 plants (from 1,000 plants for other forms of cultivation) and the commercial quantity to 50 plants (from 250 plants for other forms of cultivation).

[80] As the Minister made clear in the second reading speech, the legislation was directed to the cultivation of large commercial and commercial quantities of prohibited plants by enhanced indoor means. For large commercial quantity offences, the maximum penalty was imprisonment for 20 years. For commercial quantity offences, the maximum penalty was imprisonment for 15 years

# FIREARMS OFFENCES

### *Raniga v R* [2016] NSWCCA 36

> [41] In Thalari matters that were said to be relevant to be taken into account on the present offence were the connection with drug supply (at [86] and [89]), whether the firearm was loaded and whether the offender possessed other ammunition (at [88]) and whether the serial number had been obliterated (at [89]). Whether a loaded firearm was possessed for an offender's own protection was not a matter of significance (at [88]). The Court emphasised that general and specific deterrence were particularly relevant matters for such offences (at [92] and [93]).

### *Alrubae v R* [2016] NSWCCA 142

A schedule of "comparable" cases was provided to the Court in respect of a sentence appeal relating to offences of possessing unauthorised pistol and prohibited firearm. See references made to the cases in that schedule at [41]-[43].

### *Sutton v R* [2016] NSWCCA 249

> [55] First, compact firearms are particularly dangerous because of their capacity for concealment: *R v Brown* [2006] NSWCCA 249 at [23] (Spigelman CJ; Howie and Rothman JJ agreeing). This makes them suited for serious criminal activity…
>
> [56] … There could be no legitimate purpose for the possession of a silencer. A silencer "is quintessentially a feature of weapons used in violent crimes": *R v Howard* at [66] (Spigelman CJ). It has been said that the possession of a silencer and pistol in relation to a drug supply business "adds a more serious connotation" to the firearm offence (*R v XX* [2009] NSWCCA 115 at [56] (Hall J, Tobias JA and Kirby J agreeing)."

# HISTORICAL SEXUAL ASSAULT OFFENCES

## *Denham v R* [2016] NSWCCA 309

[96] Particular features of the objective seriousness of this offending we regard as important were as follows:

1. The offences involved systematic exploitation by a man using his guise as a priest, his pretence to be a moral authority in breach of trust and his position of authority;
2. Many of the serious sexual assaults were accompanied by the deliberate infliction of pain, such as sexually assaulting children using the cane as both a disciplinary weapon and an instrument of sexual gratification;
3. There were instances where the applicant was invited into people's homes and the children of Catholic families were instructed to treat him as an honoured guest and then he interfered with the boys when the parents were not looking;
4. The place where the majority of offences were committed is important. The applicant used occasions when he could administer some discipline or pretend to do so to take victims to his room and there sexually assault them. He made brutal threats to the children to keep his activities secret;
5. These offences were not spontaneous or opportunistic. This was a systematic exploitation of his position of trust at the school;
6. Whilst age was not an element of the offences contrary to ss 79 and 81 of the *Crimes Act* (buggery and indecent assault respectively), the very young age of the victims is a matter important to objective seriousness;
7. The applicant targeted the most vulnerable boys. Generally they came from difficult family backgrounds.

## *R v Cattell* [2019] NSWCCA 297

[123] When fixing a sentence for an old child sexual offence which falls within s 25AA, a sentencing judge should:

(a) Take into account the sentencing pattern which exists at the time of sentence where such a pattern is able to be discerned;

(b) Determine the facts as now available to the court;

(c) Pay regard to the maximum penalty and standard non-parole period (if any) that applied at the time of the offence;

(d) Identify where the offence falls in the range of objective gravity of that offence;

(e) Take into account any relevant aggravating factors and mitigating factors in s 21A(2) and (3) of the CSP Act;

(f) Set a non-parole period in accordance with s 44 of the CSP Act as it operates at the time of sentence, and

(g) Fix the balance of the term of the sentence.

…

[125] The sentencing judge should expressly state that the offender has been sentenced in accordance with s 25AA(1) and that the court has had regard to the trauma of sexual abuse on the child in accordance with s 25AA(3).

[126] The sentencing judge must have no regard to patterns or practices of sentencing which may have operated at the time of the offending.

# 11. PROCEDURAL & EVIDENTIARY MATTERS

## BAIL

### *M v R* [2015] NSWSC 138

McCallum J stated, in relation to the 'show cause' test:

> [16] But the Court should not approach the show cause requirement, in my view, on the ground that an applicant must go further in order to show cause why his or her detention is not justified or bears any higher onus than to persuade the Court that there is no unacceptable risk having regard to the bail conditions that could reasonably be imposed to address any bail concerns in accordance with s 20A.

### *Director of Public Prosecutions (NSW) v Tikomaimaleya* [2015] NSWCA 83

> [24] We accept that in many cases it may well be that matters that are relevant to the unacceptable risk test will also be relevant to the show cause test and that, 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 person, necessarily resolve the unacceptable risk test in his or her favour as well.
>
> [25] It is important, however, that the two tests not be conflated. Determination of the unacceptable risk test is not determinative of the show cause test. The show cause test by its terms requires an accused person to demonstrate why, on the balance of probabilities (s 32), his or her detention is not justified. The justification or otherwise of detention is a matter to be determined by a consideration of all of the evidence or information the bail authority considers credible or trustworthy in the circumstances (s 31(1)) and not just by a consideration of those matters exhaustively listed in s 18 required to be considered for the unacceptable risk assessment.
>
> [26] The present case provides an example of why it is important to bear in mind the two-stage approach Parliament has prescribed in relation to bail applications concerned with offences of the type listed in s 16B in that here there is a matter that is relevant to the show cause test that is not available to be considered in relation to the unacceptable risk test. The jury's verdict of guilty is not within any of the matters listed in s 18; yet it is plainly germane to the question whether cause can be shown that his continuing detention is unjustified, since the presumption of innocence, which operated in his favour before the jury returned its verdict, has been rebutted by that verdict.

### *Barr (a pseudonym) v Director of Public Prosecutions (NSW)* [2018] NSWCA 47

In relation to the 'show cause' test, Leeming J held:

> [76] Division 1A, which comprises ss 16A and 16B, stands in contrast with Division 2, comprising ss 17-20A. The latter, which is headed "unacceptable risk test – all offences" applies to all bail decisions irrespective of their subject matter. The former applies only when a bail decision is made for a "show cause offence".

> [77] It is plain that in the case of a show cause offence, Division 1A must be applied, and if cause is not shown, bail must be refused, and that is an end of the application. However, if cause has been shown, then the bail decision must be made in accordance with Division 2. Division 2 is notably prescriptive. It specifies, in s 17(2), four particular “bail concerns”, and it prescribes in s 18(1) a lengthy but exhaustive list of the matters which a bail authority must consider in assessing those bail concerns. There follow a series of provisions directed to determining whether there is an unacceptable risk, and the way in which bail conditions are to be imposed. Division 2A provides special rules for particular relatively minor offences, which give rise to a right to release, and particular serious offences, such as certain terrorism related offences in s 22A …
>
> [81] True it is that there is a qualified endorsement in [24] of *Tikomaimaleya* of what was said in *M v R*. However, this Court in *Tikomaimaleya* was at pains to say not merely that the show cause requirement in Division 1A was distinct from the unacceptable risk test in Division 2, but also that the determination by a bail authority as to whether cause had been shown was to be determined by consideration of all the evidence (rather than the matters confined by s 18) and against a different criterion. I regard the Court in *Tikomaimaleya* to have held, by way of contrast with what had been said at [16] in *M v R*, that there would be occasions when a person who would be granted bail because he or she satisfied the unacceptable risk test, would fail to obtain bail because he or she could not show cause why his or her detention was not “justified”. …
>
> [83] But Division 1A and s 16A must perform *some* function. The mandatory language, the legislative history and the extrinsic materials all speak to Division 1A imposing a separate and additional test upon a class of accused persons. There is no way in which s 16A may be construed other than requiring that a class of persons, namely, those who are the subject of a bail decision for a show cause offence, must themselves demonstrate some cause why they should be permitted to remain at liberty. …
>
> [86] Save to say that the text and structure of the statute confirms what was held in *Tikomaimaleya*, namely that there will be times when a court is entitled to conclude that an accused person who poses no relevant risk may nevertheless fail to discharge the onus placed on him or her by s 16A.

In the same case McCallum J, in dissent, stated:

> [98] The Act expressly contemplates that the court might refuse bail for failure to show cause without first complying with the obligation that otherwise arises to assess any bail concerns in accordance with division 2 of Part 3 of the Act: s 17(4). However, for my part, I find it difficult to conceive how a person’s detention could be “justified” (prior to the imposition of sentence) if he or she posed none of the risks identified in the Act. While s 17(4) authorises the bail authority to take a different approach in the case of show cause offences (because it removes the mandatory assessment of bail concerns), in my view an accused person would show cause why his or her detention was not justified if he or she persuaded the bail authority that there was no unacceptable risk.
>
> …
>
> [103] Justice Leeming has remarked that the word “justified” in s 16A is “conspicuously open-textured”. By that expression, I understand his Honour to mean that the section deliberately imposes an onus the content of which is left to be developed by bail authorities. His Honour suggests in that context that some content may be given to the show cause test by the fact that all bail authorities will be persons familiar with the basic principles of the Australian legal system. But, outside the express provisions of the *Bail Act,* there is no principle in the Australian legal system that authorises the detention of a person because he has been charged with

> a "show cause" offence. None of the authorities that have considered that test has identified any principled basis, apart from the obviation of risk, on which pre-sentence detention may be regarded as being "justified" or "not justified". That is why I construe s 16A in the manner I have explained. I am bound to accept that, in principle, the two tests should "not be conflated" but I do not understand the content of the first test, if it is not concerned with obviating risk. None of the authorities has provided a satisfactory answer to that question.

## *R v Gountounas* [2018] NSWCCA 40

Fullerton J held:

> [36] The anterior show cause question in s 16A of the *Bail Act*, as it arises on the Crown's detention application, was whether Mr Gountounas had discharged the onus of establishing on the balance of probabilities that he has shown cause as to why his continued detention is not justified. An assessment of the factors that bear upon that question must be considered separately from the question whether there is an unacceptable risk of him failing to appear to answer his bail (the bail concern in s 17 of the Act upon which the Crown placed primary reliance) and the matters in s 18 that are relevant to an assessment of that risk.
>
> [37] While it is important not to conflate the two tests, or to import into the show cause question in s 16A the factors that are specified in s 18 as the matters to be considered as an assessment of the bail concerns in s 17 of the Act.
>
> …
>
> [43] In contrast to the approach taken by Hamill J, I do not propose to make an assessment of the impact of delay on the show cause question on what I regard as nothing other than a theoretical possibility of an application being made under s 91 of the *Criminal Procedure Act* adding to the delay in the matter progressing to trial.

Simpson JA stated:

> [2] I do not regard the lengthy delay that is likely to occur before Mr Gountounas comes to trial as of little weight; I would accord it significant weight. Similarly, I consider that the fact that Mr Gountounas will be held in a New South Wales facility while his family, including a young child, remain in South Australia, and the difficulties of preparing for trial in those circumstances also to be of significant weight.

McCallum J, in dissent, stated:

> [50] I consider that the respondent satisfied the show cause requirement. The decision of the Court of Appeal in *Director of Public Prosecutions (NSW) v Tikomaimaleya* [2015] NSWCA 83 holds that that is a separate test, not to be conflated with the unacceptable risk test. However, as Fullerton J has explained, factors relevant to the unacceptable risk test may also inform the determination of the show cause requirement. The Act does not preclude that approach; so much was accepted in *Tikomaimaleya* at [24]. In practice, the two tests will often involve overlapping considerations.
>
> [51] The Act provides no express guidance as to when detention is "not justified." The content of that broad, evaluative test is left to be developed by bail authorities having due regard to accepted legal principles, including the right to personal liberty.

> [52] It must be accepted that the imposition of the show cause requirement stands as a deliberate encroachment on that right, implicitly holding that the fact of having been charged with a show cause offence of itself affords some justification for detaining a person pending trial. In order to understand what an accused person must show in order to displace or outweigh that justification, it is necessary to examine its underlying premises. It cannot be seen as a reversal of the presumption of innocence or authority for pre-empting punitive detention. It appears, rather, to reflect an assumption that a person charged with a show cause offence is inherently likely to pose unacceptable risk and a policy that such persons should bear the onus of displacing that justification for their detention.
>
> [53] I agree with Simpson JA that delay, the interests of the respondent's family in South Australia, including his young child, and the likely difficulties of preparing for trial in circumstances where his legal representatives are also in South Australia are matters of significant weight in the present case.

# LOCAL COURT DISPOSITION

### *R v Crombie* [1999] NSWCCA 297 per Wood CJ at CL (Simpson J, Hunt AJA and Hulme J agreeing)

> [15] This Court has acknowledged that the fact that a matter could have been dealt with in the Local Court, had the prosecuting authority not elected otherwise, remains a relevant consideration in the exercise of the discretion reserved to the sentencing judge …
>
> [16] … Depending upon the objective and subjective criminality of the offender, it may properly be regarded as calling for some mitigation of the sentence that would otherwise be imposed in the District Court for an offence prosecuted upon indictment. Moreover, where it appears that in the circumstance has been entirely overlooked by the sentencing judge, it may properly justify the granting of leave to appeal.

See also:

- ***R v Palmer*** **[2005] NSWCCA 349** at [84]–[85]
- **Clinton v R [2014] NSWCCA 320**

### *El-Masri [2005] NSWCCA 167:*

> [29] It is a well-established sentencing principle that a court dealing on indictment with a matter which was capable of summary disposal may have regard to that fact on sentence … But it is not a universal rule … nor a factor which operates universally to reduce sentence … In some circumstances, the Court may conclude that the offender's criminality was too serious to be dealt with in the Local Court and that the matter was properly before the District Court: *R v Hanslow* [2004] NSWCCA 163 at paragraph 21. The significance of the loss of a chance to be dealt with in the Local Court will vary from case to case: *R v Depoma* [2003] NSWCCA 382 at paragraph 13.

# DELAY

### *R v Hathaway* [2005] NSWCCA 368 per McClellan CJ at CL (Spigelman CJ and Hall *J, agreeing)*

> [41] The circumstances in which delay may be relevant when sentencing are well understood (see *R v Todd* [1982] 2 NSWLR 517 at 519; *Mill v The Queen* (1988) 166 CLR 59 at 64-66; *R v Niass* [2004] NSWCCA 149 at [16].
>
> [42] There are three relevant matters:
>
> - the suspense or uncertainty in which a person may have been left;
> - whether the offender has demonstrated progress towards rehabilitation during the intervening period; and
> - a sentence for a stale crime calls for a measure of understanding and flexibility of approach.

### *R v Todd* [1982] 1 NSWLR 517 per Street CJ

> Moreover, where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense as to what will happen to him when in due course he comes up for sentence on the subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach – passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner.

### *Sabra v R* [2015] NSWCCA 38

Delay "can be relevant at a number of levels, and that it can operate to mitigate an otherwise appropriate sentence in the absence of evidence that it caused a particular change in an offender's circumstances.": at [40], referring to ***Blanco v R* [1999] NSWCCA 121; (1999) 106 A Crim R 303**; ***Giourtalis v R* [2013] NSWCCA 216**.

At [45] the Court held:

> Delay which is not attributable to an offender may be relevant on sentence at a number of different levels. Ordinarily, such delay will be a mitigating factor if (as in the present case) it has resulted in significant stress to the offender, or has left him or her, to a significant degree, in a state of uncertain suspense. Where there is evidence that delay has led to consequences being visited upon an offender which are adverse to his or her circumstances and which are over and above stress and anxiety, be those consequences in the nature of interrupted rehabilitation or otherwise, then the weight to be given to such delay in the sentencing process will obviously be greater. But that is not to say that an offender must be able to establish

> consequences of that kind before delay can become relevant at all. To so conclude would be contrary to the weight of previous authority in this Court.

In this case, the sentencing judge found that 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].

See also ***R v Omar*** **[2015] NSWCCA 67**, where total rehabilitation from drug addiction during a period of delay was of great significance.

## EXPERT EVIDENCE

### *Nasrallah v R; R v Nasrallah* [2015] NSWCCA 188

Regarding voice identification and ad hoc experts:

> [21] On the present state of the law, it is accepted that, for the purpose of s 79 of the *Evidence Act*, an expert witness can be one who has acquired his or her specialised knowledge ad hoc (that is, for the very purpose of the legal proceedings in which the opinion evidence is relied upon): *R v Leung & Wong* [1999] NSWCCA 287; 47 NSWLR 405 at [40] per Simpson J (as her Honour then was); Spigelman CJ and Sperling J agreeing at [1] and [67] respectively. The correctness of that view was accepted in *Irani v R* [2008] NSWCCA 217 at [14] per Hoeben J (as his Honour then was) at [14]; McClellan CJ at CL and Harrison J agreeing at [1] and [34] respectively. …
>
> [26] It is important to be clear about the circumstances in which the witnesses in *Leung* and *Irani* were accepted as having ad hoc specialised knowledge (within the meaning of s 79) so as to warrant admitting evidence of their opinions concerning the voices in question.
>
> [27] In *Leung*, police had covertly recorded conversations between three men while they opened packages imported from Bangkok. Parts of the conversations were in foreign languages. At the trial, the recordings of the conversations (referred to as the DAT tapes) were admitted, together with a transcript of a translation prepared by a qualified interpreter. During the preparation of the transcript, the interpreter had discerned three different male voices, which he called M1, M2 and M3. His basis for distinguishing the three different voices was described in the judgment of Simpson J at [18] as follows:
>
>> He reached this conclusion by evaluating the pitch and the volume of the voices, and the speed of the language used. He said the speaker he nominated as “M1” was a Cantonese speaking person with a medium to high pitched voice and spoke relatively quickly. [In the evidence he gave before the jury, he described this voice of as medium pitch]. “M2” was a person who spoke accented Cantonese as though that language was not his mother tongue, also in a medium to high pitched voice, but at a relatively low

> volume. This speaker spoke some sentences in Mandarin. “M3” was a Cantonese speaker with a relatively high pitched voice.

[28] At a later point in time (a week before the trial), the interpreter was asked to listen to tape recordings of conversations between each of the three appellants and Federal police and to compare the voices on those tapes with those on the DAT tapes in order to express an opinion as to the identity of the voices on the DAT tapes. The interpreter concluded that the voice he had nominated as “M1” was the voice of Leung and the voice he had nominated as “M3” was the voice of Wong.

[29] Justice Simpson’s conclusion that the interpreter could give evidence as an ad hoc voice identification expert was subject to an important qualification expressed at [44] to [45] of her Honour’s judgment, as follows:

> 44. Voice comparison is not necessarily a question for expert evidence, although it may be. If the two sets of tape recordings in the present case had been in English, it would have been open to the Crown to have left it to the jury to make their own comparison and assessment of whether the voices on the DAT tapes (or any of them) corresponded to either of the voices on the police tapes. That course theoretically remained open but would have left the jury with a task immeasurably more difficult, given the reasonable assumption that no member of the jury understood either of the Chinese languages involved. The jury would, truly, have been comparing voices only, without the intrusion of language and speech patterns that are part of voice identification.
>
> 45. There is another aspect to the task undertaken by Mr Fung that should be mentioned. He was not asked to compare the voices until a few days before the commencement of the trial. There was no specific evidence as to the instruction he was given, but it is an obvious inference that he would have approached his task on the assumption that the two voices on the police tapes were in fact the same as two of the voices on the DAT tapes, and that his role was to determine which voice on the police tapes corresponded to voices identified as M1, M2 or M3 on the DAT tapes. This is a quite different task to determining <u>whether</u> either of the voices so corresponded. If there were any real basis to doubt the assumption, the manner in which Mr Fung was asked to perform the comparison might raise real questions of propriety. The situation is analogous to physical identification by photographs or by a police lineup, in which care must be taken not to suggest that a particular person is the suspect. However, for reasons which will appear below, I am satisfied that in this case the assumption was a valid one. It was therefore proper for Mr Fung to approach his task on the basis that two of the voices on the DAT tapes did in fact correspond to the two voices on the police tapes, and his function was to determine which was which.

[30] Although the decision in *Leung* stands as authority for the proposition that a person who has repeatedly listened to voice recordings can give evidence as an ad hoc voice identification expert, that conclusion was heavily qualified by those remarks. Further, as explained at [42] of the judgment, the task undertaken by the interpreter in that case was highly specialised, invoking the interpreter’s considerable specialised knowledge in foreign language and accent.

[31] The judgment of Simpson J provides a helpful analysis of the provenance of the notion of an “ad hoc expert” which Her Honour noted appears to have originated in the New Zealand decision of *R v Menzies* [1982] 1 NZLR 40. No question of voice identification arose in that case. Evidence had been admitted in the trial of tapes undoubtedly recording the voice of the appellant. The issue with which the relevant ground of appeal was concerned was the admissibility of a transcript of those tapes prepared by a police officer. The trial judge had initially refused to admit the

transcript. However, after listening to two tapes, the judge changed his ruling because, on being listened to only once or twice, the tapes were unintelligible. The police officer, who had listened to the tapes "over and over again", was accepted by the trial judge to have acquired "a special expertise in their interpretation". The judge allowed the jury to have the transcript. The Court of Appeal upheld that ruling. A premise of the Court's decision was that, in the case of a recording in a foreign language or where deficiencies in the recording "make it necessary to play tapes more than once to enable a better understanding", while there should normally be at least one playing of the tapes to the jury, "the evidence of an expert should be admissible as an aid". It was on that premise that the Court said "he may be a temporary expert in the sense that by repeated listening to the tapes he has qualified himself ad hoc."

[32] Justice Simpson noted that the idea of an ad hoc expert was subsequently endorsed by the High Court in *Butera v DPP* [1987] HCA 58; (1987) 164 CLR 180. Again, that was a case concerned with the admissibility of a transcript of a recording rather than with voice identification evidence. The appellant was convicted of conspiracy to traffic heroin. The Crown case included a tape recording of a conversation among some of the alleged co-conspirators which was mostly in Punjabi but partly in English and partly in Thai or Malay. Parts of the conversation were muffled and could only be made out after being listened to repeatedly by a person familiar with those languages. Applying *Menzies*, the High Court held that the transcript was admissible as a means of assisting the jury to understand the tape: at 187 per Mason CJ, Brennan and Deane JJ. In a separate judgment, Dawson J also cited *Menzies* as authority for the proposition that "an ad hoc expertise may be acquired by a witness by playing and replaying a tape so as to become more familiar with its contents than could be done by playing it only once or twice." …

[42] As already noted, the Crown acknowledged at the pre-trial directions hearing that the comparison of the 21 disputed DHL calls and the calls from the gaol was a task the jury could ("would have to") make themselves. Indeed, it appears at that point that the Crown did not consider Federal Agent Succar to have any relevant expertise. Leaving aside his putative specialised knowledge acquired as "an Australian with a Lebanese background", his assertion of identity was founded on material no different from the material available to the jury. To that extent, his evidence was irrelevant and should not have been received for the reasons explained by the High Court in *Smith v R* [2001] HCA 50; 206 CLR 650 at [10] to [12]."

# FACT FINDING AT SENTENCE

### *R v MacDonell* (unrep, 8/12/95, NSWCCA) per Hunt CJ at CL at 1

> The sentencing procedures in the criminal justice system depend upon sentencers making findings as to what the relevant facts are, accepting the principles of law laid down by the Legislature and by the courts, and exercising a discretion as to what sentence should be imposed by applying those principles to the facts found.

### *The Queen v Olbrich* (1999) 199 CLR 270

> [1] … Unless the legislature has limited the sentencing discretion, a judge passing sentence on an offender must decide not only what type of penalty will be exacted but also how large that penalty should be. Those decisions will be very much affected by the factual basis from which the judge proceeds. In particular, the judge's conclusions about what the offender did and about the history and other personal circumstances of the offender will be very important. …
>
> [27] As to the standard of proof that should be applied, we would adopt what was said by the majority in *R v Storey* - that a sentencing judge
>
>> "may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities."

### *GAS v The Queen* (2004) 217 CLR 198

Referring to *Cheung v The Queen* (2001) 209 CLR 1 and the passage from *Olbrich* extracted above, the majority stated:

> [30] … it is for the sentencing judge, alone, to decide the sentence to be imposed. For that purpose, the judge must find the relevant facts.

### *Leach v The Queen* (2007) 230 CLR 1

> [41] The particular questions considered by this Court in *Olbrich* concerned what consequences for sentencing followed when the offender asserted the existence of mitigating circumstances, but the sentencing judge was not persuaded that the assertion was true. The majority of the Court held that the accused bore the burden of proving the matters submitted in mitigation but had failed to do so. The majority also concluded that a sentencing judge may not take disputed facts into account in a way that is adverse to the interests of an accused unless those facts were established beyond reasonable doubt.
>
> …
>
> [45] … questions about the offender's likely conduct, if he or she were to be released into the community, may tender issues of fact for decision by the Court. Consistent with *Olbrich*, any disputed question of fact which is to be taken into account in a way that is adverse to the offender's interests would have to be resolved according to the criminal standard of proof.

***Filippou v The Queen* [2015] HCA 29 per French CJ, Bell, Keane & Nettle JJ**

This decision, in part, concerned findings of a sentencing judge following a judge-alone guilty verdict as to whether or not the judge could be satisfied either way whether it was the appellant or the deceased who brought the weapon to the scene.

The appellant argued that, where a finding adverse to the appellant (namely, that he had brought the gun to the scene) had not been established beyond reasonable doubt, and where a version of events favourable to the accused had not been proven on the balance of probabilities (namely, that it was one of the deceased who brought the weapon) in circumstances where those are the only two logical possible findings, the judge must sentence on the basis most favourable to the appellant. The High Court rejected that argument:

> [64] But, as was established in *R v Olbrich*, a sentencing judge may not take facts into account in a way that is adverse to an offender unless those facts have been established beyond reasonable doubt and, contrastingly, the offender bears the burden of proving on the balance of probabilities matters which are submitted in his or her favour. **Where, therefore, the prosecution fails to prove a fact or circumstance which is adverse to the offender, but the judge is not satisfied on the balance of probabilities of an alternative version more favourable to the offender, the judge is not bound to sentence the offender on a basis which accepts the accuracy of the more favourable version.** If the prosecution fails to prove beyond reasonable doubt a possible circumstance of the offending which, if proved, would be adverse to the offender but the offender fails to establish on the balance of probabilities a competing possibility which, if proved, would be favourable to the offender, **the judge may proceed to sentence the offender on the basis that neither of the competing possibilities is known.** (emphasis added)

## FACT FINDING FOLLOWING A GUILTY VERDICT

See:

- ***Savvas v The Queen* (1995) 183 CLR 1** at 8
- ***Cheung v The Queen* (2001) 209 CLR 1**

## FACT FINDING FOLLOWING A GUILTY PLEA

See:

- ***R v O'Neill* [1979] 2 NSWLR 582** at 588
- ***Duffy v R* [2009] NSWCCA 304** at 21
- ***GAS v The Queen* (2004) 217 CLR 198** at 30

## *Porter v R* [2015] NSWCCA 59

> [39] Where there are agreed facts for sentence it is desirable that the statement of agreed facts be signed by or on behalf of the offender and the Crown. Where there are disputed facts it is necessary that any dispute be described with some precision so that it can be recorded on the transcript, if not in a document. Any evidence relating to the disputed factual issue can then be adduced and the issue determined, if required, by the sentencing judge in the remarks on sentence. …
>
> [40] … Even if negotiations about the facts are continuing up until the time of the hearing, a typed draft brought to Court should be amended, by hand, if need be, and the changes initialled so as not to delay the proceedings. If this procedure is adopted, the sentencing judge and, in the event of an application for leave to appeal, this Court are in a position to know the extent of the agreement as to the facts.

# GUIDELINE JUDGMENTS

### *Legge v R* [2007] NSWCCA 244 per Spigelman CJ

> [58] … in the case of *R v Whyte* (2002) 55 NSWLR 252 this Court affirmed the basic nature of the guidelines as a check, a guide or an indicator or as a sounding board (see at [112]–[116].
>
> [59] … The authorities in this Court make it quite clear that a guideline is not a tramline.

### *In the Matter of the Attorney General's Application (No 1) under S26 of the Criminal Appeal Act; R v Ponfield; R v Scott; R v Ryan; R v Johnson* [1999] NSWCCA 435; 48 NSWLR 327

The Court declined to issue a guideline expressed in quantitative terms, by way of a starting point or sentencing range, principally because of the great diversity of circumstances in which the offence of break, enter and steal is committed: [43]

The Court noted that the overwhelming majority of cases of break, enter and steal are prosecuted in the Local Court where the maximum available penalty available is lower; thus, a guideline which indicated the relevant sentencing considerations without establishing a starting point or developing a range was considered the most appropriate.

### *Marshall v R* [2007] NSWCCA 24

> [37] Therefore, in determining whether the offence falls within the mid-range of seriousness, the court has to have regard to the nature of the offence committed in the premises, including its seriousness as against offences of its type generally. Where that offence is larceny, the guideline judgement in R v Ponfield (1999) 48 NSWLR 327 might assist in determining the relevant factors to be considered in the evaluation of the seriousness of the offence. So the type of premises entered, the nature and value of the property taken, and whether there is substantial damage to, or ransacking of, the contents of the premises will be relevant considerations.

### *Faleafga v R* [2016] NSWCCA 178

> [44] On my reading of his Honour's reasons with respect to the application of the *Henry* guideline, I am persuaded that his Honour failed to distinguish that guideline on the basis of the applicant's early plea, remorse and hardship. As Spigelman CJ said in *Legge v R* [2007] NSWCCA 244 at [59], "…a guideline is not a tramline." Exceptional circumstances need not be shown before a sentence less than the guideline may be imposed: *Legge* at [44] per Simpson J (as her Honour then was).

## *Dickinson v R* [2016] NSWCCA 301

[15] *Ponfield* was decided before the enactment of s 21A of the *Crimes (Sentencing Procedure) Act*, dealing with aggravating and mitigating factors on sentence, and before the examination by this Court of the relevance to sentence of a prior criminal history in *R v McNaughton* (2006) 66 NSWLR 566, [2006] NSWCCA 242 …

[16] More recently this Court had occasion to consider *Ponfield* in *Mapp v R* (2010) 206 A Crim R 497, [2010] NSWCCA 269. In that case Simpson J (as she then was) observed at [10] (502):

> "10 *Ponfield* is, in my respectful opinion, of limited utility. Although that matter came before the Court by way of an application by the Attorney General for sentencing guidelines in respect of offences against s 112(1) of the Crimes Act 1900, the Court declined to specify a numerical guideline, instead listing factors that "enhanced" ("aggravated") the seriousness of an offence against s 112(1). This was, in my view, little (if anything) more than a statement of the general sentencing principles that applied at the time. *Ponfield* was decided before the insertion into the Sentencing Procedure Act of s 21A, which, in statutory form, and somewhat more comprehensively, does the same thing (with general application to all offences, not only offences against s 112(1)). In my opinion, therefore, *Ponfield* has been largely overtaken by statute.""

## *Silvestri v R* [2016] NSWCCA 245

[17] Relevantly, the guideline is that where an offender's moral culpability is high, a full time custodial sentence for an offence involving grievous bodily harm of less than 2 years would not generally be appropriate: *Whyte* at [229] (287). The typical offender in cases such as this was described in *Whyte* at [204] (284) as follows:

> "A frequently recurring case of an offence under s 52A has the following characteristics.
>
> (i) Young offender.
>
> (ii) Of good character with no or limited prior convictions.
>
> (iii) Death or permanent injury to a single person.
>
> (iv) The victim is a stranger.
>
> (v) No or limited injury to the driver or the driver's intimates.
>
> (vi) Genuine remorse.
>
> (vii) Plea of guilty of limited utilitarian value."…

[19] In *Whyte* at [216]-[218] (286), Spigelman CJ reviewed and revised the aggravating factors described in *Jurisic* which may indicate that an offender has abandoned responsibility for his or her conduct. These are:

> (i) extent and nature of the injuries inflicted;
>
> (ii) number of people put at risk;
>
> (iii) degree of speed;

(iv) degree of intoxication or of substance abuse;

(v) erratic or aggressive driving;

(vi) competitive driving or showing off;

(vii) length of the journey during which others were exposed to risk;

(viii) ignoring of warnings;

(ix) escaping police pursuit;

(x) degree of sleep deprivation;

(xi) failing to stop.

…

[41] As to the examination of the features of the present case in the light of the guideline judgment in *Whyte*, the Crown prosecutor reminded us of the following passage from the judgment of Johnson J in the original judgment in *AB*, referred to above, at [103]:

> "It is important that the guideline judgment in R v Whyte does not become the undue focus of attention on the part of a sentencing Judge, with less attention being paid to the maximum penalty for each offence (in this case imprisonment for seven years). The guideline is a "guide" or "check" with the sentence to be imposed to be determined by the exercise of a broad discretion taking into account all relevant factors, including the maximum penalty: R v Whyte at 288 [232]. As Spigelman CJ said in Legge v R [2007] NSWCCA 244 at [59], "a guideline is not a tramline"."
>
> …

[43] As to those cases and the statistics, the limitations on the use of material of that kind, spelled out in *Hili and Jones v The Queen* (2010) 242 CLR 520, [2010] HCA 45, are familiar and have been recognised in numerous decisions of this Court before and after that High Court decision. The limited use of statistics, saying "nothing about why sentences were fixed as they were", was referred to by the High Court in *Hili* at [48] (535). As to other cases involving a sentence for the offence at hand, the High Court at [54] (537) cited with approval the judgment of Simpson J (as she then was) in *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1, at [303]-[305] (70-71), [2010] NSWCCA 194. The High Court summarised her Honour's observations as follows:

> "… As her Honour pointed out, a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits. As her Honour said: 'Sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated experience and wisdom of first instance judges and of appellate courts.' But the range of sentences that have been imposed in the past does not fix 'the boundaries within which future judges must, or even ought, to sentence.' Past sentences 'are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, *and stand as a yardstick against which to examine a proposed sentence*' (emphasis added). 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'."

## HENRY *GUIDELINE JUDGMENT*

Armed robbery is not simply a crime against property, it is a crime against people. Fear engendered by crimes of this type has continued, adverse affects on victims. Armed robbery, particularly with a knife, is clearly a serious crime and requires severe punishment. The courts of this State have said on many occasions, not the least in the guideline judgment of ***R v Henry*** **(1999) 46 NSWLR 346** that an offender convicted of an armed robbery offence should expect to receive a full time custodial sentence, save in the *"most exceptional circumstances".* The impetus for the decision in Henry was said to be, "*the inconsistency in sentencing practice and systematic excessive leniency in the level of sentences*", for offences of a similar type to the one committed here.

The guideline describes a category of case, which is unfortunately relatively common. That is one involving:

1. a young offender with no or little history;
2. a weapon like a knife, capable of killing or inflicting serious injury;
3. limited degree of planning;
4. limited, if any, actual violence but a real threat thereof;
5. victim in a vulnerable position, such as a storekeeper;
6. small amount taken; and
7. plea of guilty, the significance of which is limited by a strong Crown case.

In such circumstances, the Court in ***R v Henry*** noted that sentences should generally fall between four and five years for a full term. Those figures were based upon a late plea of guilty.

Sentencing however, is not a strictly mathematical exercise. The guidance offered by the Court of Criminal Appeal does not prevent the proper exercise of an individual judge's sentencing discretion. The guideline acts as a guide or check.

### *R v Hopoi* [2014] NSWCCA 263

The Court held that *Henry* is also the appropriate guideline in respect of offences contrary to s 96 of the *Crimes Act 1900* (NSW) – robbery with wounding.

> [53] … Most of the features identified in *Henry* at [162] were present in the offence under consideration. Although a weapon was not used, actual violence was employed. The maximum penalty for an offence under s 96 is 25 years imprisonment. The maximum penalty for an offence under s 97(1) with respect to which the Henry guideline judgment was concerned is 20 years imprisonment. In the

light of that matter and the decision in Thomas it should be accepted, therefore, that exceptional circumstances need to be shown for the imposition of other than a fulltime custodial penalty for an offence against s 96. Exceptional circumstances are not apparent on the materials placed before this Court.

### *Buxton v R* [2017] NSWCCA 169

[62] … However, in considering the use of the guideline and the contention that there was error in the manner it was taken into account by the sentencing judge, it must be remembered, as Spigelman CJ pointed out in Henry, that the guideline does not lay down a requirement or anything in the nature of the rule. The Chief Justice pointed out that the guideline is not a rule of universal application and failure to sentence in accordance with it is not itself a ground of appeal: (1999) 46 NSWLR 346 at [29]; see also *Bloomfield v R* [2013] NSWCCA 315 at [23].

### *R v Huynh* [2005] NSWCCA 220 per Simpson J

[29] Circumstances of aggravation are defined in s105A, and include that the offender is in company; that he/she is armed with an offensive weapon or implement; that he/she uses corporal violence on any person; that he/she maliciously inflicts actual bodily harm on any person; that he/she deprives any person of his/her liberty; and that he/she knows that there is a person (or persons) in the place where the offence is committed. Again, in my opinion, the assessment of objective gravity must be made by reference to the particular facts of the case. There is no gradation of the circumstances of aggravation set out in s105A. In saying this, I would accept that, generally speaking, certain of the circumstances of aggravation specified would, as a matter of common sense, appear to be more serious than others. One would expect that being armed with an offensive weapon, for example, or the use of corporal violence, or deprivation of liberty, would ordinarily, be regarded as more serious than committing an offence in company. But all depends upon the particular circumstances of the individual case.

## JUDICIAL MEMORY

### *MC v R* [2017] NSWCCA 316 per Hamill J

[68] I adopt the criticisms of the use of “judicial memory” made by Basten JA and Garling J in MPB v R. In my opinion, sentencing judges and judges of this Court should rely on the cases decided by this Court, reliable statistics and case summaries for the relevant period rather than their own recollection of events decades before. There is, by now, a body of appellate authority that supports the general propositions I set out above in paragraph [40]-[44]. It will be for the parties to provide the Judge with statistics and case summaries that allow the Judge to determine the patterns of sentencing at the relevant time for offences of a similar kind.

# PARITY

The doctrine of parity is a norm of equal justice and an essential element of the rule of law: ***Green v The Queen; Quinn v The Queen*** **[2011] HCA 49; (2011) 244 CLR 462** at [28]. The principle of equal justice requires, as far as the law permits, that like be treated alike and that differential treatment be meted out to reflect differences between those that are relevantly different: ***Green v The Queen*** at [28]; ***Wong v The Queen*** **[2001] HCA 64; (2001) 207 CLR 584** at 608.

Difficulties comparing sentences imposed on participants in the same criminal enterprise who have been charged with different offences with different maximum penalties see ***Green v The Queen*** at [30].

## *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584

> [65] Equal justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect [original emphasis].

## *Kelly v R* [2017] NSWCCA 256 per Beech-Jones J

> [32] It follows that *Postiglione* is not authority for the general proposition that a justifiable sense of grievance is established by merely identifying a substantial difference between the extra sentences that are served for the commission of a common offence by two equally culpable offenders where either both or one are also imprisoned for other unrelated offences. It was only Kirby J in *Postiglione* who approached the parity argument in that way and that was only in a context where both offenders were serving sentences for prior unrelated offences. …
>
> [38] *Postiglione* only requires that the actual period to be served by each offender for the common offence be "taken into account". Such a consideration might suggest that something is askew but it is not determinative.
>
> [39] In the end result what must be compared is all the components of the sentence for all the offences that each of the offenders is serving and the circumstances of the common and unrelated offending of the co-offender.

## *Afu v R* [2017] NSWCCA 246

> [13] Consistency in the punishment of offences against the criminal law finds expression in the parity principle. That principle requires that like offenders be treated in a like manner, but also allows for different sentences to be imposed for the same offences to reflect different degrees of culpability and/or different circumstances. Unjustifiable disparity is an infringement of the equal justice norm.

## *Miles v R* [2017] NSWCCA 266 per Leeming JA

> [9] … having now read what Hamill J wrote in *Cameron v R* [2017] NSWCCA 229 at [79]-[90], I think I was wrong, in *Tan v R* [2014] NSWCCA 96, to adhere to the

proposition that it is necessary for the disparity to be “gross, marked or glaring”. In *Cameron* at [86], Hamill J said that:

> “I am not convinced that the application of epithets such as ‘gross’ or ‘glaring’ to the asserted disparity is a necessary part of the process of reasoning when an intermediate appellant court is called upon to determine a ground of appeal where disparity (or, more usually, a lack of due proportion between sentences imposed on associated offenders) is asserted.”

I now share his Honour’s scepticism. Each of the three adjectives bears a different meaning: what might fairly be regarded as “marked” might fall short of being “gross” or “glaring”, yet the collocation of the three is apt to heighten the test and may distract from the underlying principle. … That said, there will always be differences in the objective and subjective elements in any case involving multiple offenders, such that mere difference in sentence alone cannot give rise to appellable error. The question is whether the sentence imposed on a co-offender is reasonably justified in light of those differences, bearing in mind the qualitative and discretionary judgments required of the sentencing judge.

### ***Sahyoun v R* [2020] NSWCCA 87** – *see summary of authorities at [86]-[89]*

## PARITY BETWEEN CHILDREN AND ADULTS

The different sentencing objectives and considerations applicable in the Children’s Court restrict comparison of the sentences handed down to co-offenders under the two regimes: ***R v Ho* (unrep, 28/2/1997, NSWCCA)**. But the sentence imposed on a person in the Children’s Court is not irrelevant as “… an individual sentenced as an adult may very well have a justifiable sense of grievance with respect to that very difference of the regimes”: ***R v Colgan* [1999] NSWCCA 292** per Spigelman CJ at [15], following ***R v Govinden* (1999) 106 A Crim R 314** at [36]–[38].

### ***R v Wong* [2003] NSWCCA 247 per Kirby J**

[35] The principles relating to parity, where the comparison is with a young offender, have been gathered by Wood CJ at CL *in R v Boney* [2001] NSWCCA 432. A number of propositions can be stated:

First, in fashioning a sentence for an adult involved in the same crime, it is relevant to have regard to a sentence imposed by the Children's Court upon a co-offender.

Second, the worth of that comparison, however, will be limited given the different sentencing objectives and other considerations in the Children's Court.

Third, in determining whether there is a justifiable sense of grievance, it must be recognised that a stage can be reached where the inadequacy of the sentence imposed upon a co-offender is such that any sense of grievance engendered by it cannot be regarded as legitimate (R v Diamond (NSW, CCA, 18.2.93, per Hunt CJ at CL).

Fourth, at an appellant level, where there is a justifiable sense of grievance in the adult offender, that does not oblige the court to intervene. It has a discretion to intervene. It should not intervene where to do so would produce a sentence which does not reflect the objective gravity of the crime.

# SENTENCING STATISTICS AND COMPARABLE CASES

## *Wong v The Queen* (2001) 207 CLR 584

Per Gaudron, Gummow and Hayne JJ:

> [59] … recording what sentences have been imposed in other cases is useful if, but only if, it is accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal. The production of bare statistics about sentences that have been passed tells the judge who is about to pass a sentence on an offender very little that is useful if the sentencing judge is not also told **why** those sentences were fixed as they were." (Emphasis in original).

Per Gleeson CJ:

> [6] … All discretionary decision making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.

## *Hili v The Queen* (2010) 520 CLR 537

> [54] In *Director of Public Prosecutions (Cth) v De La Rosa*, Simpson J accurately identified the proper use of information about sentences that have been passed in other cases. As her Honour pointed out, a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits. As her Honour said: **"Sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated experience and wisdom of first instance judges and of appellate courts"**. But the range of sentences that have been imposed in the past does not fix "the boundaries within which future judges must, or even ought, to sentence". Past sentences "are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, *and stand as a yardstick against which to examine a proposed sentence*". [Emphasis added.] 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".

## *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2 referring to *Hili*

> [40] … Consistency of sentencing is important. But the consistency that is sought is consistency in the application of relevant legal principles, not numerical equivalence.
>
> [41] … other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion.

### *The Queen v Pham* (2015) 256 CLR 550; [2015] HCA 39 per Bell and Gageler JJ

> [50] … comparable cases decided by the intermediate courts of appeal provide the most useful guidance to a sentencing judge. An appellate court's reasons reveal the mix of factors that were taken into account and will usually involve consideration of the appropriateness of the sentence imposed at first instance.

### *Director of Public Prosecutions (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428; [2017] HCA 41

> [83] Sentences are not binding precedents, but are merely 'historical statements of what has happened in the past'. As was said in *Hili v The Queen*, '[t]hat history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits' (emphasis added). Examination of sentences imposed in comparable cases may inform the task of sentencing but such examination goes beyond its rationale when it is used to fix boundaries that, as a matter of practical reality, bind the court.

### *Gavin v R* [2013] NSWCCA 99

> [41] It needs to be borne in mind that this statement of principle, like those in *Wong* and *Hili*, were made in the exercise of federal jurisdiction. In the state jurisdiction, s.8 *Judicial Officers Act 1986* (NSW) renders information, including reports, about sentencing disseminated by the Judicial Commission a relevant consideration to be taken into account in the interests of consistency. This statutory consideration may, therefore, extend the use which may be made of statistics and comparable sentences in the exercise of state jurisdiction. But strict limits remain. As Simpson J said in the extract above, sentencing is peculiarly individual: "It must be exercised by the individual judge, in respect of the individual offender". And, of course, in respect of the particular offending. As the High Court pointed out in *Muldrock v. The Queen* [2011] HCA 39; 244 CLR 120 at 132 [29], the sentencing task requires the judge to:
>
> > identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed

### *Brown v R* [2014] NSWCCA 215

> [81] In offences such as the one with which the Court is here concerned, the statistics from the Judicial Commission are a particularly blunt tool because the injuries which were actually inflicted are not described. Whether the sentences which were imposed upon offenders who had a prior criminal history, and what that criminal history was, are not described and, the range of possible factual circumstances involved in an offence such as this is broad.

### *Browning v R* [2015] NSWCCA 147

> [146] … the judgment of the High Court in *Barbaro* is not authority for the proposition that the obligation of a prosecutor to render assistance to the Court has been entirely removed. The contrary is the case. In CMB v Attorney General for New South Wales [2015] HCA 9; (2015) 89 ALJR 407, French CJ and Gaegeler J, said at [38]:

> "The Crown (by whomever it is represented) has a duty to assist a sentencing court to avoid appealable error. That duty would be hollow were it not to remain rare that an 'appellate court' would intervene on an appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing Judge to avoid error.": R v Tait (1979) 24 ALR 473 at 477.

## *Newman v R* [2015] NSWCCA 270

[19] The circumstances which give rise to the offence of wounding with intent to cause grievous bodily harm vary widely and the range of culpability for the offence is vast. Whilst recognising that sentences passed in other more or less comparable cases cannot be treated as confining the sentencing discretion within boundaries different from those laid down by Parliament (*Hili v The Queen* (2010) 242 CLR 520 at [54]), some consideration of sentences imposed on other occasions is essential if consistency is to be achieved.

[20] In order to take into account, at all, a sentence passed upon a different offender for an offence against the same section but arising out of unrelated circumstances, regard must be had to all of the factors which the sentencing court had before it on that other occasion. That is, the objective circumstances of the commission of the offence, whether sentence was passed following a plea of guilty or after a trial, the antecedents and personal attributes of the offender, whether a standard non-parole period was applicable and so on. …

## *Denham v R* [2016] NSWCCA 309

[46] Prior to the introduction of the Sentencing Act, a system of remissions operated such that the head sentence could be reduced by executive act by up to a half: see MPB v R at [26] and Rosenstrauss v R [2012] NSWCCA 25 at [11]. It was not until 1984 that the Probation and Parole Regulation 1984 (NSW) provided that remissions were to be applied to the non-parole period as well: MPB v R at [27]. It was as a result of the operation of the remissions system prior to 1984 that courts would generally fix the non-parole period as being between a third and a half of the head sentence; if they did not, the prisoner would be released before the expiration of the non-parole period: R v Maclay (1990) 19 NSWLR 112 at 117-118; 46 A Crim R 340 at 345 - 346.

…

[49] It is clear from the authorities cited above that sentences imposed during the period with which the present case was concerned involved the imposition of non-parole periods comprising between 35% and 50% of the head sentence: MPB v R at [26] and [93]; Henderson at [46].

…

[109] The application of principle, it seems to us, means that while it is necessary to take into account the fact that non-parole periods of between 35-50% of the head sentence were fixed in relation to sentences imposed between 1968 and 1986, no mere mechanical or mathematical transposition of that percentage approach to the task required by the Crimes (Sentencing Procedure) Act is warranted. It remains critical that the non-parole period fixed by this Court represents the minimum period of imprisonment required to be served by an offender having regard to all of the purposes of justice.

### *Kannis v R* [2020] NSWCCA 79

Erroneous use of comparable cases to determine “sentencing range” where facts different from subject case.

> [269] It will be apparent immediately that none of the six decisions involved sentencing an immature 18-year old offender, let alone one with a mental condition which served to reduce moral culpability and ameliorate the roles of specific and general deterrence.
>
> [270] On the other hand, it was the case that the Applicant’s offences involved real victims and not undercover police pretending to be young persons, as was a feature in four of the … cases …
>
> [284] In the unusual circumstances of this case, I am satisfied that the Applicant has made good this ground of appeal. The sentencing Judge has used, as measuring sticks for determination of a sentencing range, a series of cases which are materially and significantly different from the Applicant’s case. No explanation was given by her Honour as to the features of these cases which served to furnish a range to be applied to the Applicant’s case. …
>
> [286] This Court should not place unwarranted burdens upon sentencing Judges to say more than is necessary when sentencing an offender. However, where, as in this case, a limited selection of quite different cases is treated as providing a sentencing range, without any explanation or elaboration being given as to what features supported that conclusion, it is difficult to see how this had come about without error infecting the sentencing process.

# VICTIM IMPACT STATEMENTS

### *R v Hines (No. 3)* [[2014] NSWSC 1273]

Hamill J considered recent amendments to s 28 of the *Crimes (Sentencing Procedure) Act*. Although his Honour was sentencing an offender for murder, the principles ring true in respect of any offence with a victim:

> [77] It is appropriate that I say something, briefly, about the amendments to s 28 Crimes (Sentencing Procedure) Act. The legislation is in the following terms:
>
> > "28. When victim impact statements may be received and considered
> >
> > (1) If it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts, but before it sentences, an offender.
> >
> > (2) A victim impact statement may also be received and considered by the Supreme Court when it determines an application under Schedule 1 for the determination of a term and a non-parole period for an existing life sentence referred to in that Schedule.
> >
> > (3) If the primary victim has died as a direct result of the offence, a court must receive a victim impact statement given by a family victim and acknowledge its receipt, and may make any comment on it that the court considers appropriate.
> >
> > (4) A victim impact statement given by a family victim may, on the application of the prosecutor and if the court considers it appropriate to do so, be considered and taken into account by a court in connection with the determination of the punishment for the offence on the basis that the harmful impact of the primary victim's death on the members of the primary victim's immediate family is an aspect of harm done to the community.
> >
> > (4A) Subsection (4) does not affect the application of the law of evidence in proceedings relating to sentencing.
> >
> > (5) A court may make a victim impact statement available to the prosecutor, to the offender or to any other person on such conditions (which must include conditions preventing the offender from retaining copies of the statement) as it considers appropriate.
> >
> > (6) Despite any other provision of this section, a court must not consider or take into account a victim impact statement under this section unless it has been given by or on behalf of the victim to whom it relates or by or on behalf of the prosecutor."
>
> [78] Nothing in the legislation explains how a sentencing Judge is to determine when it is "appropriate" to take into account the harmful impact on a victim's family the "determination of the punishment" in a homicide case. Nor does it shed any light on when a victim's suffering is "an aspect of harm done to the community". I have read the second reading speeches and find no guidance there. Those speeches make it clear that the amendment is designed to "change the law" as it was declared by Hunt CJ at CL in R v Previtera (1997) 94 A Crim R 76. However, the second reading speeches did not address the observation by his Honour (at 86) that:

> "It is regarded by all thinking persons as offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another".

[79] This statement reflects the notion that all human life is precious and goes back to biblical times. The Bible said (Galatians 3:28):

> "There is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are alone in Christ Jesus."

[80] Pope Francis said in September last year "there is no human life more sacred than another".

[81] All civilised societies treat all life and all people as equal. As Thomas Jefferson put it in drafting the United States' Declaration of Independence:

> "We hold these truths to be self evident that all men are created equal ... and endowed with certain inalienable rights: that among these are life, liberty and the pursuit of happiness."

[82] This became the cornerstone of Dr King's "I have a dream" speech in 1963.

[83] In R v Dang [1999] NSWCCA 42 Adams J contemplated the position of a friendless man without a family and said at [25]-[26]:

> "Assume the deceased was friendless; assume the deceased had no family. It would be monstrous to suggest that that meant for some reason killing her should attract a lesser sentence than would be the case if, as is the situation here, she had a loving family and grieving relatives. Essentially, then, the reason that victim impact statements in cases involving death are not taken into account in imposing sentence is that law holds, as it must, that in death we are all equal and the idea that it is more serious or more culpable to kill someone who has or is surrounded by a loving and grieving family than someone who is alone is offensive to our notions of equality before the law."

[84] The reality is that homicide and other crimes where people are killed have devastating and long-term effects in every case. The exception may be a friendless or homeless member of the community. Is the law to regard a homeless, unloved person's life as less valuable than another's? This strikes me as being philosophically offensive.

## *R v Tuala* [2015] NSWCCA 8

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:

> "[77] Almost invariably the aggravating factor in question is that specified in s 21A(2)(g). It is to be remembered that such aggravating factors must be proved beyond reasonable doubt."
>
> [78] … such statements are admissible by statute, but that does not preclude argument as to the weight to be attributed to them.
>
> [79] Further, where the statement tends to be confirmatory of other evidence (either in a trial, or in the sentencing proceedings) or where it attests to harm of the kind

> that might be expected of the offence in question, there is little difficulty with acceptance of its contents.
>
> [80] Difficulties can arise, for example, 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.
>
> *RP* is an example of the third of these.
>
> [81] In these cases, considerable caution must be exercised before the victim impact statement can be used to establish an aggravating factor to the requisite standard.

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].

### *EG v R* [2015] NSWCCA 36

A child sexual assault offence was held to be at the bottom of the range of seriousness but the consequences described in the VIS, in relation to their effect on the complainant and their family, went beyond that which would normally be expected. For full weight to be given to matters described there needed to be more than just uncritical acceptance of the victim impact statement.

### *Muggleton v R* [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.

> [40] The degree of emotional harm suffered by the victim can be established by victim impact statements …
>
> [41] Such statements can be used to establish the extent of the harm suffered by the victim and, accordingly, whether it amounts to substantial emotional harm within the meaning of s 21A(2)(g) of Crimes (Sentencing Procedure) Act. …
>
> [44] … While s 30A of the Crimes (Sentencing Procedure) Act does not appear to envisage that the author of the statement will be cross-examined, the position might be otherwise where the author of a so-called victim impact statement is an expert, rather than a victim. …

# 12. COMMONWEALTH OFFENCES

## PURPOSES OF SENTENCING

Section 16A(1) of the *Crimes Act 1914* (Cth) provides that "a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances".

Although general deterrence is not specifically referred to, it is a factor a sentencing court must consider when sentencing Commonwealth offences: ***Putland v The Queen* (2004) 218 CLR 174** at [12]; ***DPP (Cth) v El Karhani* (1990) 21 NSWLR 370** at 377**;** ***R v Paull* (1990) 20 NSWLR 427** at 434.

## PLEA OF GUILTY

### *Xiao v R* [2018] NSWCCA 4

The Court held that, on its proper interpretation, s 16A(2)(g) of the *Crimes Act 1914* (Cth) requires a sentencing judge to take into account the "utilitarian value" of a guilty plea. Per Bathurst CJ; Beazley P; Hoeben CJ at CL; McCallum J; Bellew J:

> [277] In providing for the fact of a plea to be taken into account, in our opinion, the legislature intended the encouragement of guilty pleas not only to provide evidence for remorse or contrition but to assist in the administration of justice. The principle of legality should not affect the attainment of that object.
>
> [278] In these circumstances it is our opinion that in sentencing proceedings governed by s 16A, a sentencing judge is entitled to take the utilitarian value of a plea into account in sentencing. To the extent that Tyler and the cases which followed it provide to the contrary, they should not be followed.
>
> …
>
> [280] Section 16A(2)(g) neither requires nor prohibits the specification of a discount. However, once it is accepted that s 16A allows a sentencing judge to give a discount to the sentence which would otherwise be imposed, it seems to us desirable that, in the interests of transparency, such discounts be specified. However, there is no obligation on the sentencing judge to do so, and a failure to do so would not of itself amount to error.

### *Jinde Huang aka Wei Liu v R* [2018] NSWCCA 70 per Bathurst CJ

> [9] Because somewhat divergent views have been expressed on the issues raised in this appeal, it may be of assistance to specify the approach which should be taken by sentencing judges in dealing with the utilitarian value of a plea of guilty in respect of Commonwealth offences having regard to the decision in Xiao v R and the judgment handed down in the present case:

(1) Sentencing judges should take into account the utilitarian value of a plea in Commonwealth sentencing offences. Failure to do so constitutes error.

(2) It is desirable that any discount given for the utilitarian value be specified. However, a failure to do so would not of itself constitute error.

(3) It is an error to specify a range of percentage discounts as distinct from a specific percentage.

# ASSISTANCE TO AUTHORITIES

### *Weber v R* [2020] NSWCCA 103 per Bellew J

[64] There is no dispute that the applicant pleaded guilty at the first available opportunity. The plea is some evidence of remorse, and of an acceptance of responsibility. A discount of 25% should be allowed to reflect the utilitarian value of the plea.

[65] The nature and extent of the applicant's co-operation with police has already been set out. In my view, naming others who were involved in the importation, one of whom had actually provided the quantity of drug which was the subject of the importation, was significant. Moreover, as counsel for the applicant pointed out, the information was provided spontaneously. There is no suggestion that in deciding to assist the police in that way, the applicant was motivated by a desire to secure a discount. Indeed, there is no indication that the applicant even knew that a discount may be available to him at some later stage.

[66] The Crown pointed out that there was no evidence before the Court as to whether the information provided by the applicant to police was of any use. Whilst that is clearly true, it must be emphasised that s 16A(2)(h) of the Act simply mandates that the Court take into account "the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences". In that respect, s 16A(2)(h) may be contrasted with s 23 of the Crimes (Sentencing Procedure) Act 1999 (NSW) which mandates that when exercising the power to reduce penalties on account of assistance rendered by a State offender, the Court must have regard to the significance and usefulness of the assistance provided.

# GOOD CHARACTER

### *Section 16A(2)(m) Crimes Act 1914 (Cth)*

(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court …

> (m) the character, antecedents, age, means and physical or mental condition of the person

The terms of 16A(2)(m) make it clear that "character" and "antecedents" are viewed by the Parliament, as by the common law, as separate considerations: ***Weininger v R* [2003] 212 CLR 629** per Kirby J (in dissent)

If a sentencing judge considers an offender's antecedent criminal history of little relevance, those prior offences should not then be relied on to establish bad character: ***Pfeiffer v The Queen*** **[2009] NSWCCA 145**

### *Elomar v R; Elomar v R* [2018] NSWCCA 224

> [116] A distinction should be drawn between persons who claim good character because of an absence of criminal activity and those who go beyond that, demonstrating a positive contribution to society and a consistent history of philanthropy directed to their fellow citizens. The applicants met the latter criteria and their previous good character was a significant mitigating factor.

## COMPARABLE CASES

### *Hili v The Queen* (2010) 242 CLR 520

The Court criticised the idea that past sentences can establish an appropriate range for future sentences in Commonwealth matters and emphasised that the sentencing task should focus on the factors set out in Pt 1B of the *Crimes Act 1914* (Cth):

> [54] In **Director of Public Prosecutions (Cth) v De La Rosa**, Simpson J accurately identified the proper use of information about sentences that have been passed in other cases. As her Honour pointed out, a history of sentencing can establish a range of sentences that have in fact been imposed. That history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits. As her Honour said: "Sentencing patterns are, of course, of considerable significance in that they result from the application of the accumulated experience and wisdom of first instance judges and of appellate courts." But the range of sentences that have been imposed in the past does not fix "the boundaries within which future judges must, or even ought, to sentence". **Past sentences "are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence"** (emphasis added). 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".

### *The Queen v Pham* (2015) 256 CLR 550; [2015] HCA 39

> [26]…As was explained in Hili, the point of sentencing judges and intermediate appellate courts having regard to what has been done in other comparable cases throughout the Commonwealth is twofold: first, it can and should provide guidance as to the identification and application of relevant sentencing principles[15]; and, secondly, the analysis of comparable cases may yield discernible sentencing patterns and possibly a range of sentences against which to examine a proposed or impugned sentence.
>
> [27] It does not mean that the range of sentences so disclosed is necessarily the correct range or otherwise determinative of the upper and lower limits of sentencing discretion. As was emphasised in Hili[17], and again more recently in Barbaro v The

Queen[18], the sentencing task is inherently and inevitably more complex than that. But it does mean that to prefer one State's sentencing practices to sentencing practices elsewhere in the Commonwealth, or at least to prefer them for no more reason than that they are different, is contrary to principle, tends to exacerbate inconsistency and so ultimately is unfair.

# SENTENCING OPTIONS

Section 20AB of the *Crimes Act 1914* (Cth) provides that State sentence alternatives (such as intensive correction orders) can be imposed in Commonwealth cases.

## *Zaky v R* [2015] NSWCCA 161

[21] A matter that received little attention either at first instance or on the hearing of the appeal was the fact that the sentencing options available to the District Court were not determined, directly at least, by the provisions of the *Sentencing Act*. In spite of the prominence that the matter took on appeal, a "suspended sentence" under s 12 of the *Sentencing Act* was not (in terms) an available sentencing option. Because the District Court was exercising federal jurisdiction in relation to offences committed contrary to a Commonwealth statute, the sentencing options were governed by Part 1B of the *Crimes Act*. Section 20AB(1) of the *Crimes Act* provides:

> "Where under the law of a participating State or a participating Territory a court is empowered in particular cases to pass a sentence or make an order known as a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention or an attendance order, or to pass or make a similar sentence or order or a sentence or order that is prescribed for the purposes of this section, in respect of a State or Territory offender, such a sentence or order may in corresponding cases be passed or made by that court or any federal court in respect of a person convicted before that first-mentioned court, or before that federal court in that State or Territory, of a federal offence."

[22] The sentences or orders "prescribed for the purposes of this section" are found in clause 6 of the Crimes Regulations 1990 (Cth). The table in clause 6 does not include a suspended sentence.

[23] However, this distinction has no bearing on the outcome of the present appeal. A "suspended sentence" effectively exists under another name in the *Crimes Act*. Section 20(1)(b) provides:

> "(1) Where a person is convicted of a federal offence or federal offences, the court before which he or she is convicted may, if it thinks fit:
>
> (a) …
>
> (b) sentence the person to imprisonment in respect of the offence or each offence but direct, by order, that the person be released, upon giving security of the kind referred to in paragraph (a) either forthwith or after he or she has served a specified period of imprisonment in respect of that offence or those offences that is calculated in accordance with subsection 19AF(1)."

[24] I propose to deal with the grounds of appeal on the basis that the views expressed by the Sentencing Judge applied equally to an order under s 20(1)(b) as they did to a suspended sentence.

# 13. SPECIAL HEARING SENTENCES

***R v Mailes* (2004) 62 NSWLR 181 at [32]**

The purpose of a limiting term:

> … is not to punish the person who has not been convicted of any crime, but to ensure that he or she is not detained in custody longer than the maximum the person could have been detained if so convicted following a proper trial …

***R v AB* [2015] NSWCCA 57**

In determining the limiting term for a particular offence, the purposes of sentencing under s 3A *Crimes (Sentencing Procedure) Act 1999* are applicable: at [41].

The purposes of general deterrence and denunciation under s 3A may be irrelevant in sentencing an offender with a mental illness or disability: at [42], [45].

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* was dismissed. The CCA made these observations regarding the application of s 3A in this case:

- s 3A(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].
- s 3A(g) – 'Recognition of the harm done to the victim and community' had a place in the sentencing exercise and was not overlooked: at [45].