Supreme Court of New South Wales 2024 Annual Conference

Criminal Law Review

The Honourable Acting Justice R A Hulme

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SCOPE OF PAPER

The purpose of this paper is to provide brief notes to serve as a reminder of the range of issues that have been considered in appellate criminal decisions up to 26 August 2024.

Case citations are hyperlinked to the unreported but publicly available publication of the judgments.

Where reference is made to the author of a judgment it should be taken that the other members of the Court agreed unless otherwise indicated.

The editor is most grateful for assistance in the compilation of this paper provided by Mr Torey Politis BMedSc, LLB (Hons) and Ms Tasfia Kabir B Psych (Hons).

APPEAL

Disqualification for bias decision amenable to appeal as an interlocutory judgment or order

There were cases which held that a decision on an application for disqualification for bias was not an interlocutory judgment or order amenable to appeal under s 5F of the *Criminal Appeal Act 1912*: *Barton v Walker* [1979] 2 NSWLR 740 and *R v Rogerson* (1990) 45 A Crim R 253. It was held in ***Maules Creek Coal Pty Ltd v Environmental Protection Authority* [2023] NSWCCA 275; (2023) 112 NSWLR 507** that these cases were no longer good law and should not be followed. Such a decision is an interlocutory order that is amenable to an application for leave to appeal under s 5F(3).

Juror misconduct as a ground of appeal – the test to be applied

A juror reported post-verdict that another juror had carried out internet searching of sentences imposed in cases involving the charges the subject of the trial and had shared the research with other jurors. It became necessary for the High Court to decide whether, to conclude that a procedural irregularity did not give rise to a miscarriage of justice, an appeal court must be satisfied that the irregularity had not affected the verdicts; that the jury would have returned the same verdicts if the irregularity had not occurred.

It was held in ***HCF v The Queen* [2023] HCA 35; (2023) 97 ALJR 978** by Gageler CJ, Gleeson and Jagot JJ, Edelman and Steward JJ dissenting, that the test in *Webb v The Queen* (1994) 181 CLR 41 must apply. Their Honours said (at [13]): "Accordingly, in all cases of jury or juror misconduct, what is required to establish a miscarriage of justice, and what will also establish a substantial miscarriage of justice, is that a fair-minded and informed member of the public might reasonably apprehend that the jury (or juror) might not have discharged or might not discharge, its function of rendering a verdict according to law, on the evidence, and in accordance with the directions of the judge."

Miscarriage of justice (or wrong decision on question of law) by jury misdirection

In a Queensland jury trial, a witness gave evidence for the prosecution that was inculpatory of one accused, it being the only evidence against him. Accordingly, the judge directed the jury that they must be satisfied beyond reasonable doubt that her evidence was truthful, reliable, and accurate. However, her evidence was helpful to another accused who contended it provided the basis for a reasonable hypothesis consistent with his innocence of murder. His complaint on appeal to the Queensland Court of Appeal that there had been a misdirection in respect of his case failed but he had success with a majority in the High Court (Gordon, Steward and Gleeson JJ) in ***Huxley v The Queen* [2023] HCA 40; (2023) 98 ALJR 62**. Their Honours held that in the context of the whole summing up the jury would have understood the judge's direction only applied to their consideration of the case against the co-accused and not to the case of the appellant.

The majority set out the principles governing miscarriage of justice by misdirection to a jury (or a wrong decision on a question of law) (see [40]-[44]). They referred to *Hargraves v The Queen* (2011) 245 CLR 257;[2011] HCA 44 at [46] in which it was said that "in every case, the ultimate question must be whether, taken as a whole, the judge's instructions to the jury" deflected the jury "from its fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt". Further, "whether there has been on any … ground whatsoever a miscarriage of justice must always require consideration of the whole of the judge's charge to the jury".

Question of law on case stated pursuant to s 5B of Criminal Appeal Act need not have been specifically articulated below

In ***Department of Education v Trad* [2023] NSWCCA 329** a question of law pursuant to s 5B of the *Criminal Appeal Act 1912* was stated at the request of the prosecution by the District Court following an acquittal on appeal from the Local Court. The question was whether an offence making provision in the *Children (Education and Care Services) National Law (NSW) 2010* was one of absolute liability. Before the District Court, however, the prosecutor had contended the offence was one of strict liability which allowed for a defence of honest and reasonable mistake of fact. An initial question for the Court was whether the question was one "arising on the appeal", thereby engaging s 5B.

Ward P held that the question was one which did arise on the appeal. The status of the offence (whether it be strict or absolute, on the one hand, or neither strict or absolute, on the other), did arise on the appeal, although the contention that it was an absolute liability offence was not expressly articulated at that time.

Kentwell re-sentencing – having regard to original sentence

Errors were conceded in the sentencing of the offender in ***Tenenboim v R* [2024] NSWCCA 1** which the court accepted and moved to re-exercise the sentencing discretion afresh in accordance with *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37. Harrison CJ at CL said in approaching this task that "it is obviously artificial to expect this Court to have no regard to the sentence imposed in the Court below or, in general terms, to the

reasonableness or otherwise of the sentencing judge's findings and conclusions. Such matters necessarily form part of the store of information that is available to this Court when resentencing". N Adams J agreed but added the qualification that she did "not understand his Honour to be suggesting that this Court is permitted to simply adjust the sentence imposed below to take into account the error. To do so would clearly be inconsistent with *Kentwell*." Stern JA agreed with both.

What to do when offence carrying life imprisonment is erroneously included on a Form 1

A judge took into account an offence of supplying a large commercial quantity of MDMA which has a maximum penalty of life imprisonment when sentencing for an offence of supplying a commercial quantity of cocaine. Section 33(4)(b) of the *Crimes (Sentencing Procedure) Act 1999* prohibits an offence carrying life being taken into account. In ***Zycki v R* [2024] NSWCCA 9** Adamson JA resolved that the best course was to remit the matter to the District Court pursuant to s 12(2) of the *Criminal Appeal Act 1912*. That would allow the DPP an opportunity to decide whether and how to proceed in respect of the offence.

The "correctness standard" of appellate review applies to civil and criminal proceedings involving decisions to permanently stay

The standard of appellate review to be applied in criminal proceedings concerning applications to permanently stay was considered in ***Koschier v R* [2024] NSWCCA 24**. Previous cases, including in the High Court, had held that the power to permanently stay criminal proceedings was "discretionary" and that the applicable standard of appellate review was that stated in *House v The King* (1936) 55 CLR 499 but Bell CJ held that this characterisation was no longer correct. Following the High Court's decision in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; (2023) 97 ALJR 857 the applicable standard of review to determine whether to permanent stay criminal proceedings was the same "correctness standard" derived from *Warren v Coombes* (1979) 142 CLR 531 at 552 which applied to civil proceedings. In cases like Mr Koschier's which concerned interlocutory decisions of a judge, Bell CJ held that the correctness standard of appellate review would not be engaged unless and until leave to appeal had been granted and that the appeal would be by way of rehearing.

Failure to prosecute a case with due diligence

In 2007, Mr Riddell was convicted and sentenced to imprisonment. Between 2012 and 2017, he made unsuccessful attempts to appeal against his conviction and sentence. Mr Riddell once again sought leave to appeal against his conviction and sentence in 2022 and filed over 4,200 pages of submissions and annexures to support his application. ***Riddell v R* [2024] NSWCCA 46** concerned an attempt to appeal against orders which had been given on three separate occasions directing Mr Riddell to limit his submissions to 200 pages in default of which the application for leave to appeal would be dismissed.

Stern JA dismissed the application to quash the orders, holding that it was not in the interests of justice that the orders be reconsidered, vacated or amended. Of most

significance was Mr Riddell's failure over a period of 18 months to comply with the orders, which suggested a blatant and deliberate failure to prosecute his application for leave to appeal with due diligence. Stern JA held that other circumstances, including the fact that there had been no material changes in Mr Riddell's circumstances and the fact that Mr Riddell had sought to challenge his conviction and sentence on three occasions, indicated that the interests were strongly supported by the orders made.

Kentwell re-sentencing – not required where error was arithmetical

In ***JA v R* [2024] NSWCCA 130** the sentencing judge imposed a sentence of 14 years, 6 months and, after finding there should be a "very minor adjustment" upon finding special circumstances, imposed a non-parole period of 11 years. Without a finding of special circumstances, 75% of the head sentence would have been 10 years, 10½ months. The judge gave commencement and conclusion dates for the head sentences which suggested he had initially proposed a sentence of 15 years, 6 months but had subsequently changed it to one of 14 years, 6 months. With a sentence of 15 years, 6 months, a NPP of 11 years would represent 71% which is consistent with the type of adjustment the judge had described.

Despite the Crown's contention that a complete re-exercise of the sentencing discretion was required in accordance with *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37, it was concluded by Basten AJA, N Adams J agreeing with additional reasons, Huggett J agreeing with both, that there was no discretionary exercise of power involved as it was simply an arithmetical error which the Court could correct. It re-sentenced by imposing the same head sentence but with a NPP which was 71%, namely 10 year, 4 months.

Kentwell re-sentencing – not every mistake of fact requires full re-sentencing

In a dangerous driving causing grievous bodily harm case a sentencing judge referred to the injuries sustained by the victim and observed that "surgical intervention was required". That was not the case. The applicant in ***Rigby v R* [2024] NSWCCA 134** contended that this (and another issue) indicated the judge had erred in the assessment of the objective seriousness of the offence. It was held by Adamson JA (at [49]) that the factual error was slight and of no consequence and as such did not require the court to re-exercise the sentencing discretion pursuant to *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37.

Kentwell re-sentencing – necessary where error concerns an exercise of discretion

The error of the sentencing judge in ***Brown v R* [2024] NSWCCA 136** was to impose a sentence which, when considered with an earlier sentence upon which it was partially accumulated, had a non-parole period that was slightly more than 75% of the total effective sentence. The judge had refused to find special circumstances and had imposed a sentence which on its own had a NPP that was precisely 74% of its head sentence. Nothing was said by the judge about intentionally extending the overall statutory ratio, even though it was only slightly more than 75% (77.5% or "a couple of months"). As to whether the error required the Court to re-exercise the sentencing discretion afresh, Dhanji J held (at [106]) that it did. It involved a consideration of totality where one sentence was being partially

cumulated upon another and a discretion was involved in determining whether to find special circumstances and make an adjustment to the non-parole period being imposed. If the primary judge had properly considered the consequences of cumulation and totality the approach he may have taken was not apparent.

Kentwell re-sentencing – not required upon finding an indicative sentence manifestly excessive

An aggregate sentence of 16 years was imposed for murder (indicative sentence 14 years, 3 months) and causing grievous bodily harm with intent (Indicative sentence 7 years, 6 months). It was contended on appeal that the indicative sentence for the GBH offence was manifestly excessive. Although it was not contended that the aggregate sentence was manifestly excessive, it was submitted that the error concerning the indicative sentence required the Court to re-exercise the sentencing discretion afresh.

In ***KS v* R [2024] NSWCCA 147** the Court (Adamson and Stern JJA, Wright J) held that latent error alone in respect of an indicative sentence does not invoke the need to re-sentence. For that to occur there would need to be manifest excess in the aggregate sentence or patent error in relation to the assessment of an indicative sentence.

What is a "question of law" for referral to the CCA for determination?

***Western Sydney Local Health District v SafeWork NSW* [2024] NSWCCA 153** grappled with great alacrity with the most fascinating of issues, having heard the case on a Wednesday and handing down judgment on Thursday. Leeming and Payne JJA and Chen J referred to and applied what had been said by the former Chief Judge at Common Law in *Orr v Hunter Quarries Pty Ltd* [2022] NSWCCA 39 at [12] and [14]. It would not do it justice to attempt o summarise. Their Honours found the question posed was one of mixed law and fact and declined to answer it.

BAIL

Powers of police to take action to enforce bail compliance

The *Bail Act 2013* provides in s 77 that if a police officer believes on reasonable grounds that a person has failed, or is about to fail, to comply with their bail there are certain courses of action available, one of which is to arrest without warrant but there are others such as taking no action and issuing a warning. Sub-s (3) provides that, "The following matters are to be considered by a police officer in deciding whether to take action, and what action to take …". There is then a list which includes matters such as "the relative seriousness or triviality of the failure or threatened failure" and "whether the person has a reasonable excuse for the failure".

It was held in the Supreme Court that the s 77(3) list of matters did not impose a mandatory requirement upon police that limits the power to arrest for breach of bail. The Court of Appeal took a different view in ***Bugmy v Director of Public Prosecutions (NSW)* [2024]**

NSWCA 70. It was held that the lawfulness of the exercise of the power of arrest under s 77(1) depended upon the officer complying with the requirements of s 77(3). As that had not occurred, Ms Bugmy's arrest was unlawful.

COMPLICITY

Knowledge of a circumstance rendering an act an offence not required for criminal complicity in Victorian law

The *Crimes Act 1958* (Vic) provides in ss 323-4 for "Complicity in commission of offences". It generally reflects the common law. ***The King v Rohan (a pseudonym)* [2024] HCA 3; (2024) 98 ALJR 429** was concerned with three aspects of the provisions that together provided that if an offence is committed, a person who entered into an agreement, arrangement or understanding with another person to commit that offence is taken to have committed that offence.

The respondent was convicted of supplying a drug of dependence to a child and sexual penetration of a child under 12. Three men had been involved in the joint commission of these offences against two children. Knowledge that the victims were of a certain age or were under a certain age was not an element of either offence but it was an essential fact that made the conduct an offence. The Victorian Court of Appeal set aside the convictions on the basis that the prosecution was required to prove the appellant knew when entering into the agreement, arrangement or understanding that the complainants were under 12 for the sexual penetration offences and under 18 for the drug supply offences. The Court acknowledged that this meant it may be necessary to prove that the person "involved" knew more about the facts constituting the offence than the principal offender.

It was unanimously held that the prosecution did not have to prove the essential facts that made the proposed conduct an offence where that knowledge or belief was not an element of the offence itself.

The doctrine of extended joint criminal enterprise and the aggravating circumstance of being "in company" can stand together

***Ardestani v R* [2024] NSWCCA 31** considered the legal doctrine of extended joint criminal enterprise and the aggravating circumstance of being "in company". Mr Ardestani had been convicted of an offence of specially aggravated break, enter, and commit assault occasioning actual bodily harm. A ground of appeal was that the verdict was unreasonable or unsupported by the evidence in support of which Mr Ardestani submitted that the legal doctrine of extended joint criminal enterprise and the aggravating circumstance of being "in company" could not be combined. Button J dismissed the appeal, holding that the legal concept of extended joint criminal enterprise and being "in company" could stand together. His Honour held that it was sufficient that the applicant committed the offence of common assault and performed the acts of breaking and entering in company (the basal elements of the alleged offence). In addition, he was present when the actual bodily harm arising from the assault was inflicted and foresaw it as possible. It was open to the jury to return a verdict of guilty.

Doctrine of transferred malice does not apply to the "non-actor" in a joint criminal enterprise

The Crown alleged that Mr Fan and two co-offenders travelled to a location where they intended to kill X but when they arrived, one of the co-offenders shot and killed the wrong person, Y. The Crown alleged liability by way of basic joint criminal enterprise: that Mr Fan was a participant in a JCE to kill X; that between the three they committed all the elements of murder; and Y was killed in furtherance of the JCE to kill X. The Crown also alleged liability by way of extended JCE: that Mr Fan was a participant in a JCE to intimidate X with a loaded firearm; that a co-offender committed all the elements of murder; that Mr Fan foresaw the possibility that a co-offender would commit all the essential elements of murder; and with that foresight Mr Fan continued to participate in the JCE to intimidate. In response to a jury question about who the specific intention to kill must be directed to, the trial judge said that it did not matter as it was sufficient to establish the gun was discharged with an intention to kill X but Y was killed.

On appeal in ***Fan v R* [2024] NSWCCA 114** it was contended that while the longstanding doctrine of transferred malice applied to the shooter ("the actor") it did not apply to the "non-actor" participant in a JCE. Button J rejected the contention (at [50]-[65]). In a basic JCE each participant was imbued with the physical acts of the shooter and bore primary liability. In an extended JCE, the liability of a non-actor is derivative and depended upon the criminal responsibility of the shooter being established (which it was in this case by the jury's finding that the co-accused shooter was guilty of murder). In short, nothing extra needed to be proved against Fan above and beyond the elements of murder and the elements of the two forms of JCE. The fact that counsel could not find any authority for his proposition is consistent with this result as are policy considerations; holding otherwise could only produce injustice and absurdity.

COSTS

Costs certificate available even if defence funded by Legal Aid

***Rodden v R* [2023] NSWCCA 202; (2023) 112 NSWLR 162** confirmed that an acquitted person may succeed in obtaining a certificate under the *Costs in Criminal Cases Act 1967* despite having been entirely funded by Legal Aid.

District Court has no power to award costs in favour of recipients of Crown subpoenas

The respondent in ***R v DK* [2023] NSWCCA 281** was prosecuted for engaging in conduct intending to pervert the course of justice. It was alleged he recruited acquaintances to provide false information to solicitors acting for him in relation to sexual assault charges. The DPP issued subpoenas to solicitors who had acted at various times for the respondent but on the basis of client legal privilege they each applied to the District Court to either set aside the subpoenas or to refuse the DPP access to the documents. A judge made orders that the DPP pay the costs incurred by the recipients of the subpoenas. The Crown appealed.

Simpson AJA held (at [76]-[81]) that there was no power, either by statute or implication, for the District Court to order the Crown to pay such costs.

Costs certificate appropriately refused when Crown case could have succeeded

The applicant in **Luo v R [2024] NSWCCA 58** was acquitted of manslaughter by criminal negligence following a judge-alone trial. The trial judge found that five of the six elements of criminal negligence had been proved beyond reasonable doubt but was not satisfied as to the final element, this being that Mr Luo's conduct was so wicked as to amount to criminal negligence. Mr Luo thereafter made an application for a certificate under s 2 of the *Costs in Criminal Cases Act 1967*. This application was refused by the trial judge and formed the basis of his appeal. Wilson J upheld the findings of the trial judge and dismissed the appeal, holding that the facts required to establish the first five elements of the offence were proved beyond reasonable doubt and that the Crown only failed in respect to the value judgment on whether Mr Luo's negligence was so wicked as to call for criminal sanction. On the basis that a contrary conclusion could conceivably have been reached on the facts, it was not unreasonable for the Crown to commence and continue proceedings against Mr Luo. It followed that there was no error in the decision of the trial judge to decline to grant Mr Luo a costs certificate.

DEFENCES

Duress – elements of the common law defence

Ms Carr was convicted following a judge-alone trial of seven carjacking, firearm and assault with intent to rob in company offences committed over an 18-hour road trip. She was in a coercive relationship with her partner/co-offender. She gave evidence that when she told him that she did not want to leave Dubbo he threatened her with a firearm, saying if she did not leave with him, he would shoot everyone in the house. There was no evidence of any other threatening words or conduct during the course of the journey. It was contended in ***Carr v R* [2023] NSWCCA 269** that the judge erred by concluding the Crown had negatived duress because there was no evidence of a specific demand made by the co-offender requiring Ms Carr to commit the various offences.

Davies J (Fagan J agreeing, Dhanji J dissenting) reviewed a number of cases before concluding (at [64]) that "the authorities are clear that a particular request or demand in relation to the specific offence charged is required even if, in some circumstances it can be inferred … The trial judge's conclusion … about what was required was correct". In the present case there were no demands or requests made of the appellant to involve herself in the individual offences and the Crown had negatived her claim to have acted under duress.

Consent no defence to infliction of grievous bodily harm

The offender in ***Russell v R* [2023] NSWCCA 272; (2023) 112 NSWLR 533** was an "extreme body modification artist". He carried out "abdominoplasty" (a "tummy tuck") involving

removing skin from a woman's abdominal area but she suffered adverse consequences and required emergency corrective surgery leaving significant scarring. An appeal against conviction for causing grievous bodily harm with intent to do so was brought against the trial judge's refusal to accept that consent is a defence to such a charge.

Bell P, Stern JA and N Adams J engaged in an extensive review of authorities on the subject and (at [87]-[92]) concluded that, subject to well-established exceptions, a person cannot consent to the infliction of grievous bodily harm. This was consistent with the approach of Lord Burnett CJ in *R v M(B)* [2018] EWCA 260 at [21]-[22]; [40]-[44]. The exceptions referred to included those which were *productive of* discernible social benefit such as sporting activities, tattooing and piercing and perhaps those with a religious hue, including ritual male circumcision.

Doli incapax – *evidence of mental illness or other disorder not relevant*

A 13-year-old boy was on trial for murder and there was an issue about whether the Crown could rebut the presumption of *doli incapax*. The defence tendered and the trial judge ruled admissible psychiatric and psychological reports which included opinions about the accused suffering from certain mental conditions and that these adversely affected his ability to understand that his act of stabbing the deceased was seriously wrong. The Crown appealed pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*. The appeal was allowed.

The Court held in ***R v IP* [2023] NSWCCA 314** at [26]:

> "A mental illness or other disorder may have an impact upon the child's ability actively to access the knowledge of serious moral wrongfulness at the moment the relevant act is performed, or to be restrained by it, but that is a separate question. Evidence of a disorder that has or may have that effect could be relevant to a defence of mental health impairment, or substantial impairment, or it may be relevant to the capacity to form the necessary intent; it is not relevant to *doli incapax* (unless the disorder of itself prevents the child from reaching a state of moral and intellectual development where the serious moral wrongfulness of the conduct can be understood)."

Duress – nature of the threat made to induce the commission of crime

In ***The King v Anna Rowan – a pseudonym* [2024] HCA 9; (2024) 98 ALJR 508** the High Court was required to consider the nature of the threat said to have been made in order to induce a person to commit a crime. The respondent had been convicted of committing sexual offences with her partner against two of their daughters. She successfully appealed to the Victorian Court of Appeal against the trial judge's ruling that the defence of duress was not available. There was evidence the respondent, who had a mild intellectual disability, was subject to her partner's financial and social control, was unable to leave the farm without his permission and suffered emotional abuse, intimidation and sexual abuse at his whim. He would hit her during sex and he displayed extreme anger towards her which made her afraid. She admitted having sexual intercourse with him in the presence of the children but said he made her: "I tried to say no, but he made me"; "I only knew what I was told".

The Court affirmed the elements of the defence of duress derived from the judgment of Smith J in *R v Hurley* [1967] VR 526. While there was no immediate threat to the respondent if she failed to commit the offending acts, the majority in the Court of Appeal were correct to find that:

> "For all of the offences, it would be open to the jury to conclude that there was a reasonable possibility that the [respondent] would not have been present or undertaken the specific acts that constituted the offending had it not been for an unstated demand from JR that she do so, otherwise he would physically and sexually abuse her."

and

> "In relation to element (iii) [per Smith J in *R v Hurley*], the jury could find that there was a reasonable possibility that, as the threat was ongoing throughout the period of the offending, it was present and continuing, imminent and impending at the time each offence was committed."

Immunity in s 211 of the Native Title Act 1983 (Cth) does not extend to indirect satisfaction of needs

Section 211 of the *Native Title Act* (Cth) provides immunity to native title holders who carry out certain activities, including fishing and gathering, without a licence or permit if such activities are done for the purpose of satisfying their personal, domestic, or non-commercial communal needs and in exercise of their native title rights and interests. The respondent in ***Moriarty v Nye* [2024] NSWCCA 116** was convicted of an offence contrary to the *Fisheries Management Act 1994* (NSW) for the act of taking and selling a commercial quantity of abalone caught by the men of his nation to the owner of a Chinese restaurant without a licence or permit. The issue before the Court was whether Mr Nye's conduct in collecting abalone caught by others in his community for sale outside of that community could be characterised as done "for the purposes of satisfying their personal, domestic, or non-commercial communal needs". Kirk JA, Wilson and Yehia JJ answered the issue raised by a stated case by holding that the provision referred to the needs of the relevant classes of persons which could be directly satisfied by undertaking the activities in question. Their Honours determined that Mr Nye's purpose in receiving and assembling the abalone and transporting it for sale did not meet this requirement and could not fall under one of the activities permitted by the provision.

Self-defence in a murder case based upon JCE and eJCE liability

In a murder trial involving six accused, the Crown alleged that two were accessories before the fact and four were participants in either a basic joint criminal enterprise (to inflict grievous bodily harm) or an extended joint criminal enterprise (to assault with foresight of the possible infliction by a co-participant(s) of grievous bodily harm). When the four arrived at an arranged meeting place, one of them approached the car in which the deceased was seated, pulled him out and put him on the ground with the four then proceeding to carry out a very violent assault. That accused gave evidence that as he approached the car he called out, "he's got a gun". The trial judge left self-defence only on the basis that the jury

should acquit (outright) if there was a reasonable alternative to the Crown's JCE and eJCE that the accused acted in the perceived need to defend themselves. One of the others involved in the assault contended on appeal that the judge erred in refusing to leave excessive self-defence as a pathway to an alternative verdict of manslaughter: **Robertson v R [2024] NSWCCA 99**. In separate judgments and for varying reasons, Harrison CJ at CL and Dhanji J, Cavanagh J dissenting, upheld the appeal.

Harrison CJ at CL said (at [22]-[23]) the trial judge was correct to conclude there was no evidence capable of supporting an alternative verdict of manslaughter. The evidence did not establish Robertson's acts were sufficient by themselves to have been a substantial cause of death so the only way he could be guilty was if he was acting with others in a JCE. Further, (at [25]-[32]) it was fanciful to consider that the evidence established the assailants had agreed to act in self-defence. However, having left self-defence as a matter for the Crown to negative, the judge should have left manslaughter by reason of excessive self-defence.

Dhanji J said (at [144]) that the judge's directions involved a false dichotomy; that if the applicant was acting in self-defence this was inconsistent with participation in a JCE. There was no reason why the acts of the others could not be attributed to an accused who was participating in the JCE pursuant to a belief that it was necessary to do so in self-defence (at [148]). The applicant was entitled to rely upon self-defence and excessive self-defence pursuant to ss 418 and 421, *Crimes Act 1900*.

EVIDENCE

Tendency evidence — a methodical process for considering admissibility

In ***Burns-Dederer v R* [2023] NSWCCA 191** at [43]-[57], Simpson AJA, with reference to relevant authority, once again provided a methodical template for a consideration of the admissibility of tendency evidence. The case concerned allegations of child sex offences against an 11-year-old boy with evidence of similar conduct by the accused towards a friend of the complainant being admitted to establish a tendency to have a sexual interest in 11-year-old males and to sexually touch them.

On appeal it was argued that the evidence was general, lacked significance, and had a probative value that was outweighed by its prejudicial effect. One basis for this was that the evidence came from a single witness but her Honour held (at [66]) that the lack of evidence of the same or similar conduct from other witnesses did not diminish the probative value of evidence of the complainant's friend.

Expert evidence under the common law

Queensland is a non-uniform evidence law jurisdiction out of which the appeal against conviction for murder in ***Lang v The King* [2023] HCA 29** arose. It concerned in part the admissibility of a forensic pathologist's evidence that the deceased's wounds were more likely to have been inflicted by another person than self-inflicted (as the defence case suggested). The appellant accepted that the question whether the wounds were self-

inflicted or not was something capable of being the subject of expert evidence if it was based on the witness's training, study, or experience. It was also accepted that the doctor was an expert in a recognised field of expertise, forensic pathology, by reason of which he could give evidence as to the manner in which the knife wounds were inflicted. He contended, however, that the evidence was inadmissible under common law principles as the doctor was giving an opinion as to the likelihood of the deceased acting in a particular way which was not an opinion based on expertise as a forensic pathologist.

Jagot J, Kiefel CJ and Gageler J agreeing, Gordon and Edelman JJ dissenting, dismissed the appeal, concluding (at [469]) that the doctor's "evidence was based on his specialist knowledge and reflected the combined effect of that knowledge brought to bear on multiple facts that he could ascertain only by reason of his specialist expertise".

Impropriety in obtaining admissions from indigenous, intellectually disabled suspect at a police station

***Mann v R* [2023] NSWCCA 256** concerned the erroneous admission of evidence that the accused had made admissions in a recorded interview at a police station. He was an intellectually disabled indigenous man suspected of having committed child sex offences. As a "vulnerable person" he was entitled to the protections in Pt 3 Div 3 of the Law Enforcement (Powers and Responsibilities) Regulation 2016. He had received and accepted advice from an ALS solicitor by phone that he should not agree to be interviewed and should not enter an interview room. A detective who was aware of this took him to an interview room and conducted a recorded interview.

A judge accepted that the admissions were obtained "improperly" pursuant to s 138 of the *Evidence Act 1995* but held that the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in the way it was. Section 138(3) lists mandatory considerations, one of which is "the difficulty (if any) of obtaining the evidence without impropriety …". In relation to this the judge referred to it being notoriously difficult "to get the full story from a young child in cases of suspected sexual assault" and "to the extent that the accused acknowledges the [child's] statements are true", the desirability of admitting the evidence was very high and would prevail. However, Kirk JA held that the judge should have regarded the difficulty in obtaining the admissions by legal means as weighing against admissibility rather than in favour of it. Any willingness to "cut corners" to obtain such evidence should be deterred. The convictions were quashed.

Evidence Act, s 135 – co-accused is a "party" – evidence for accused can be used against a co-accused

Glen McNamara's defence was that it was Roger Rogerson and not himself who had shot and killed a man. He claimed he helped Rogerson dispose of the body because he was subjected to duress which included Rogerson telling him about murders he had previously committed. Rogerson objected, arguing that pursuant to s 135(a) of the *Evidence Act 1995* the court should refuse to admit the evidence because its probative value was substantially outweighed by the danger it might be unfairly prejudicial "to a party", the party being McNamara's co-accused in the trial. The trial judge upheld the objection but on appeal

McNamara contended that there was no power to exclude the evidence under s 135(a) because as a co-accused, he was not a "party" in Rogerson's trial. He claimed he had a common law right to adduce evidence probative of his innocence without the evidence becoming evidence against a co-accused.

The contention failed in the Court of Criminal Appeal and again failed in the High Court: ***McNamara v The King* [2023] HCA 36; (2023) 98 ALJR 1**. The following emerges in the joint reasons of Gageler CJ, Gleeson and Jagot JJ.

There are strong reasons of principle and policy weighing in favour of a joint trial even though there may be some risk of forensic prejudice to an accused that would not be present in a separate trial (at [42]). Applying the terminology of the *Evidence Act* a joint trial is "a proceeding" to which the Crown ("the prosecutor") is "a party" and to which each co-accused ("a defendant") is also "a party" (at [62]). Sections 55(1) and 56(1) combine to produce the result that evidence probative of the existence of one fact in issue in a proceeding is admissible in the totality of the proceeding and this can be no different in a multi-party criminal proceeding (at [67], [69]). Sections 135, 136 and 137 use similar terminology to provide for a complementary set of exclusions and limitations. The danger of unfair prejudice to "a party" which is able to be considered by a court in determining whether to exclude or limit the use of evidence under s 135(a) or s 136(a) … is unfair prejudice to any co-accused (at [70]-[71]).

"Identification" and "recognition" evidence

A woman complained of being sexually assaulted by a man in a dark bedroom. There were four men in the house at the time: her boyfriend, with whom she had engaged in sexual activity and who had just left the room; the boyfriend's father and brother who were in other bedrooms in the house with their respective partners, unaware the complainant was in the house; and Mr Marco who was supposedly sleeping on the couch at the conclusion of a social gathering during the course of which the victim perceived he had been flirting and making sexual advances. The trial judge gave the jury an "identification" warning but it was contended on appeal in ***Marco v R* [2023] NSWCCA 307** that the jury should have been warned about the dangers of "recognition" evidence.

Ward P (at [62]-[64]) doubted that the evidence amounted to "recognition evidence". The complainant did not see her assailant and did not give evidence that she recognised him. She formed the opinion it was him from a number of features: his hair and arms did not feel like her boyfriend's; the earlier flirting and sexual advances; he was the only male known to her to be in the house when she went to bed; and her observation of him when she went out to the lounge to confront him after the assault. A recognition direction was not necessary. Fagan J agreed and in additional reasoning referred to these features as being the content of the circumstantial case by which the Crown established the assailant was the applicant.

Circumstantial cases – only indispensable facts require proof beyond reasonable doubt

It was contended in ***Carbone v R (No 2)*** **[2024] NSWCCA 7** that a trial judge erred in reaching important factual findings on the civil standard and not the criminal standard of proof even if the facts were not indispensable in accordance with *Shepherd v The Queen* (1990) 170 CLR 573. It was said that where findings were of high significance to the ultimate conclusion of guilt there should be satisfaction to the standard of beyond reasonable doubt.

Simpson AJA rejected this contention as being contrary to authority. She referred (at [75]) to the judgment of Dawson J in *Shepherd* who had emphasised (at [580]) that "the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately".

Account of sexual activity a child would otherwise be unaware of may support truth of the child's account of sexual assault

Following a trial by judge alone, the applicant in ***GN v R*** **[2024] NSWCCA 39** was convicted of 21 offences of child sexual assault. One of the complainants was the applicant's granddaughter, KN, who was interviewed about the offences when she was aged 11. KN also provided evidence at trial to describe one of the offences where the applicant ejaculated in her presence. The trial judge noted that "a child of the age of KN at the time of the interview simply should not have known about ejaculation". The applicant sought leave to appeal against his conviction on grounds which included that the trial judge improperly took judicial notice of that fact that an 11-year-old would not know about ejaculation, and in so doing, contravened s 293 of the *Criminal Procedure Act 1986* (now s 294CB of the Act).

Adamson JA held that the trial judge was entitled to infer that it was unlikely that KN could provide such a detailed and graphic description of ejaculation unless she had seen the act herself. Further, KN's naïve descriptions supported the conclusion that she was only aware of ejaculation in the context of the commission of the offence; such reasoning did not rely on judicial notice but the common sense and life experience entitled to be relied upon by a trial judge. Adamson further held that s 293 was not contravened simply because KN's recorded interview was used to indicate her awareness of ejaculation at the time of offending. If the contention were correct, it would have the effect that a tribunal of fact could never use a complainant's evidence as an indication of a lack of sexual experience since it would always be given after the alleged offending. The appeal failed.

Tendency evidence – charged and uncharged acts need not be proved beyond reasonable doubt before use for tendency reasoning

The respondent in ***Director of Public Prosecutions v Benjamin Roder (a pseudonym)*** **[2024] HCA 15; (2024) ALJR 644** was charged with 27 counts of sexual offence committed against his former partner's two children. A tendency notice indicated the prosecution relied upon evidence of charged and uncharged acts to establish the asserted tendency. The trial judge and the Victorian Court of Appeal ruled that the charged acts had to be proved beyond reasonable doubt before they could be used for tendency reasoning.

The Crown's application for special leave to appeal was referred to the Full Court of the High Court of Australia which held that the principles in *R v Dennis Bauer (a pseudonym) v The Queen* (2018) 266 CLR 56 extended to evidence of charged acts relied upon as tendency evidence. In *Bauer* the High Court held that trial judges should not direct a jury that before acting on evidence of uncharged acts to support an alleged tendency, they must be satisfied of proof of the uncharged acts beyond reasonable doubt. In the present case the Court (at [25]-[28]) endorsed subsequent NSW authority, specifically *JS v R* [2022] NSWCCA 145, which applied the principles from *Bauer* to evidence of charged acts relied on to support an alleged tendency.

To avoid the risk of "circular reasoning" that had concerned the Victorian Court of Appeal the Court said (at [37]) that the jury should not be directed to make findings in respect of charged conduct, but instead directed to consider whether they are satisfied of the alleged tendency and then advised that if they were, they could then use that in considering whether it is more likely that the accused committed the specific offences charged.

Tendency evidence – presumption in s 97A of significant probative value in child sexual offences

There is a prima facie presumption in s 97A of the *Evidence Act 1995* that tendency evidence about a defendant will have significant probative value in child sexual assault cases if it concerns a tendency to have a sexual interest in children or a tendency to act upon such an interest. The applicant in ***Davidson (a pseudonym) v R* [2024] NSWCCA 60** challenged the admission of tendency evidence against him following his conviction for having sexual intercourse with his 15-year-old niece. The tendency evidence comprised text messages of a sexual nature he had sent to his stepdaughter when she was aged 16 and 17. The applicant contended, (1) the evidence was not relevant; (2) the presumption of significant probative value in s 97A was rebutted; and (3) in any event the probative value was outweighed by the danger of unfair prejudice under s 101.

As to Ground 1, Adamson JA held that the tendency evidence showed that the applicant had a sexual interest in his stepdaughter who shared common characteristics to the complainant and this could rationally affect the probability of the applicant having a sexual interest in the complainant and was, therefore, relevant. Further, s 97A(3) of the Evidence Act and the authorities pre-dating the provision, establish that it is not necessary that the tendency evidence amount to a sexual interest or conduct towards a single child or children.

As to Ground 2, Adamson JA did not accept that there were sufficient grounds per s 97A(4) to rebut the presumption simply because the evidence derived from a single witness. The difference between the applicant's conduct towards the complainant and the step-daughter were not sufficient to amount to "exceptional circumstances" under s 97A(5) to enable it be taken into account in determining whether there were sufficient grounds under s 97A(4).

As to Ground 3, Adamson JA held the trial judge had ameliorated the possibility of unfair prejudice to the applicant with a jury direction as to proper use of the tendency evidence so the evidence was not inadmissible under s 101. The appeal was dismissed.

Erroneous use of lies as evidence of consciousness of guilt

The applicant in ***Dawson v R* [2024] NSWCCA 98** was convicted for the murder of his wife Lynette in January 1982. The Crown case was that Dawson had murdered his wife in order to continue his relationship with JC, a teenager and student at the school where Dawson was a teacher. The evidence in the judge-alone trial was wholly circumstantial and involved the Crown relying on five clearly identified lies told by Dawson as demonstrating consciousness of guilt (*Edwards* lies). Other lies were only relied upon to impugn his credit (*Zoneff* lies).

On appeal, Adamson JA (at [146]-[149]) found that the trial judge fell into error by regarding all of the lies as evincing a consciousness of guilt where some had not been relied upon by the Crown for that purpose and where the conditions for using lies for that purpose according to *Edwards v The Queen* (1993) 178 CLR 193 were not met. Further error was occasioned by the trial judge's failure to separately address each of the five lies that were relied upon by the Crown for a consciousness of guilt inference and failing to state why the *Edwards* conditions were satisfied in respect of each, and if so, why. This was a failure to comply with s 133(2) of the *Criminal Procedure Act 1986* and the common law obligation to give reasons. The appeal was dismissed by application of the proviso (there was no substantial miscarriage of justice).

Erroneous failure to allow further cross-examination of complainant in a retrial

In new trial proceedings (a retrial following the quashing of a conviction on appeal) a complainant's evidence may be given by tendering a recording of their original evidence and the complainant is not compellable to give further evidence but may do so if they choose to, provided the court grants leave (ss 306B-306D, *Criminal Procedure Act 1986*). The court may grant leave if satisfied that it is "necessary" for the further evidence to be given for one of three specified purposes (to clarify anything in the original evidence; to canvas material that subsequently became available; or it is in the interests of justice). In Jarryd Hayne's second retrial he sought to further cross-examine the complainant, inter alia about certain messages she had sent subsequent to the incident giving rise to two charges of sexual intercourse without consent. The complainant consented to giving further evidence. The Crown opposed the application but conceded the defence could make a submission without having cross-examined on it. Leave was refused.

In ***Hayne v R* [2024] NSWCCA 97** it was held by Sweeney J ([486]-[487]) in her agreement with Rothman J, Meagher JA dissenting, that it was necessary in the interests of justice that the complainant be cross-examined on those subjects to permit the accused to present his case fairly and fully about the credibility of the complainant. Her Honour also said (at [497]) that in light of the Crown's concession and where no questions were asked because of the judge's refusal of leave to cross-examine, it was erroneous for the judge to effectively tell the jury it was unfair for counsel to make submissions about the complainant's dishonesty because she had not had an opportunity to respond.

No error in admitting coincidence evidence in drug importation case

The applicant in ***Shah v R* [2024] NSWCCA 113** was found guilty of attempting to possess a marketable quantity of a border-controlled drug. It was alleged at trial that he had attempted to obtain possession of a parcel sent from South Africa which contained cocaine in its interior walls. The parcel was addressed to a person living in the same apartment building as the applicant with an identical name and phone number, save for one vowel and digit respectively. The sole issue at trial was whether the applicant either knew or had foresight of the possibility that the parcel contained cocaine. The Crown relied on coincidence evidence that was admitted by the trial judge of an uncharged consignment that had been intercepted two weeks earlier from South Africa with the same alterations to the consignee's name, address and phone number. The applicant contended on appeal that the trial judge erred in admitting the coincidence evidence.

Button J dismissed the appeal, holding that the coincidence evidence had significant probative value and was correctly admitted. His Honour said that the similarities between the two consignments had the potential to prove a disputed fact in the case, this being whether the appellant knew, or foresaw the real possibility that the charged consignment contained a border-controlled drug. Without the coincidence evidence, it could be thought possible that the applicant was innocently seeking to collect a parcel from the post office having become aware of the collection notice delivered to his apartment block with addressee details similar to his own.

Tendency evidence – directions involving both charged and uncharged acts

The applicant in ***Astill v R* [2024] NSWCCA 118** committed numerous sexual offences against female inmates while working as a Senior Correctional Officer. It was contended (only) on appeal that the trial judge's directions to the jury in respect of tendency evidence led by the Crown were inadequate and occasioned a miscarriage of justice. Bell CJ dismissed the appeal. His Honour applied *Director of Public Prosecutions v Roder (a pseudonym)* [2024] HCA 15; (2024) 98 ALJR 644 (a case arising from Victoria) and rejected a submission that the jury should have been directed that evidence given by one complainant could not be used to establish a tendency to support any of that complainant's own counts in the indictment. His Honour said that a further direction would have further complicated the jury's task and produced the vices identified in *Roder*.

His Honour rejected another submission that the jury should have been directed that insofar as tendency evidence included the same allegations as in the indictment, lack of satisfaction at the tendency stage would require a verdict of not guilty in relation to that count(s). Bell CJ said that a direction of such kind would detract from the approach mandated by *Roder* and conflate standards of proof. His Honour rejected the applicant's final submission that a direction in accordance with s 161A(3) of the *Criminal Procedure Act 1986* that satisfaction beyond reasonable doubt was required before finding a tendency established. His Honour said a direction was not required where other evidence was available such that the tendency evidence was not "indispensable" in the sense that failure to prove the existence of the tendency would mean that there was no case to go to the jury.

Tendency evidence – rejected in a child sexual assault trial with multiple complainants

The Crown alleged sexual offences were committed against three complainants. It also alleged the accused had a tendency (a) to have a sexual interest in girls aged 14-16 and (b) to act upon that interest by continuing to engage in sexual touching and digital penetration of such girls where they indicated it was unwelcome. There were 17 counts in the indictment and in respect of complainant T there was alleged an act of digital penetration (count 16) and penile/vaginal intercourse (count 17). The trial judge rejected the Crown's contention for complete cross-admissibility, ruled that the probative value of tendency evidence based upon count 17 did not outweigh the danger of unfair prejudice, and severed counts 16 and 17.

In ***Stenner-Wall v R* [2023] NSWCCA 163**, an interlocutory Crown appeal under s 5F(3A) of the *Criminal Appeal Act 1912*, the Crown accepted that count 17 could be used in support of the first tendency but not the second. Beech-Jones CJ at CL held it was inconceivable that the jury could use the evidence of penile/vaginal intercourse in count 17 in relation to the sexual interest tendency but then completely disregard it in relation to an alleged tendency to sexually touch and digitally penetrate. The rejection of cross-admissibility and severance of counts 16 and 17 was correct.

(This judgment was released from publication restriction in July 2024 after the conclusion of proceedings in the District Court.)

Tendency evidence – wearing particular clothing when committing armed robberies

A trial judge ruled that tendency evidence concerning what an accused wore during previous armed robberies was admissible in a trial in which it was alleged he wore the same type of clothing during a home invasion during which an occupant was shot dead. In the home invasion Mr Coskun wore a high visibility short-sleeved shirt over a black top. Over a four-month period in 2013 he committed six armed robberies in three of which he was wearing a high visibility t-shirt over a jumper. The tendency alleged that he did so "for the purpose of assisting him carry out that offence". No actual reason for doing so was alleged aside from the Crown suggesting some speculative possibilities. It was held in ***Coskun v R* [2024] NSWCCA 67** that the evidence was correctly admitted.

Despite the reasons for wearing the high vis top, the probative value of the evidence lay in the unusual nature of the conduct suggesting that in Mr Coskun's mind there was some reason for doing so while committing robberies. This served to link the events together. Taken with other evidence in the case there was significant probative value and, although it presented the defence with some difficult forensic choices as to how to deal with it, it outweighed any unfair prejudice.

Admissibility of evidence of prior sexual experience or activity

In ***Cook (a pseudonym) v The King* [2024] HCA 26** the issues concerned a majority judgment in *Cook (a pseudonym)* v R [2022] NSWCCA 282 to the effect that in a child sexual assault trial evidence of the complainant having disclosed to the appellant sexual offences committed against her in Queensland by another family member was correctly ruled inadmissible. The exception to the admissibility of evidence concerning prior sexual experience or activity relied upon was that in s 293(4)(b) (see now s 294CB(4)(b)) of the *Criminal Procedure Act 1986*, that "the evidence relates to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant". It was common ground that the trial judge had ruled the evidence inadmissible by mistakenly considering the relationship between the complainant and the Queensland offender. Nevertheless, the majority in the CCA considered the evidence was rightly excluded.

Gordon A-CJ, Edelman, Steward and Gleeson JJ (Jagot J dissenting) said (at [49]) that the first task was to identify the nature and scope of the relationship. There was a wide range of possibilities. If the trial judge had not erred in his identification of the parties to the relationship, he might have found that the appellant and complainant had a relevant relationship and that some of the Queensland evidence may have related to it (at [52]). The evidence before the Court was not sufficient to determine whether there was a relevant relationship to which the evidence sought to be adduced "relates to". That, and if necessary the proviso in s 293(4) that the probative value of the evidence outweighs any distress etc that the complainant might suffer as a result of its admission, will be a matter for a judge to determine at the retrial (at [54]).

Admissibility of evidence of prior sexual experience or activity

A chiropractor was found guilty of 13 sexual offences committed against one of his patients. She was alleged to have been working at a brothel at about the time of at least some of the offences. A ground of appeal against conviction was that the evidence of the complainant engaging in sexual activity in the course of her work in a brothel was wrong excluded under s 293 (now s 294CB) of the *Criminal Procedure Act 1986*. The exception relied upon was that in s 293(4)(a) (now s 294CB(4)(a)): it was evidence of sexual activity at or about the time of the commission of alleged offences and it concerned events that were alleged to "form part of a connected set of circumstances in which the alleged prescribed sexual offence[s were] committed".

In ***Behi v R* [2024] NSWCCA 89**,Ward P held that the evidence was capable of coming within the first limb of the exception but not the second. She referred to *Cook (a pseudonym) v The King* [2024] HCA 26 at [44] for the proposition that this exception is narrowed "to near-contemporaneous events that [are] sufficiently integrated with the alleged offending so that it can be said that the events are part of the circumstances of the alleged occurrence of the sexual offence". That test was not met in this case.

Expert evidence as to children's reactions to sexual assault

A complaint about Assoc Prof Shackel straying into giving opinion evidence about the behaviour of perpetrators of child sexual assault, rather than about children's responses to and disclosure of such conduct was rejected in *BQ v R* [2023] NSWCCA 34. It was 7-0 in the High Court on essentially the same point: ***BQ v The King* [2024] HCA 29**.

JUDGE-ALONE TRIALS

A judge-alone trial does not necessarily provide a basis for a reduced sentence for facilitating the administration of justice

Mr Dukagjini sought and obtained a judge-alone trial on a charge of murder allegedly committed with particular savagery and in the context of a housebreaking. The parties agreed that there was a risk of a jury misusing evidence that would be led of the accused's long history of burglary offences. The trial had an estimate of 3 weeks but concluded in 7 days with much of the evidence comprising witnesses' statements being tendered in lieu of them being called.

In ***Dukagjini v R* [2023] NSWCCA 210** the Court (Harrison and Wilson JJ, N Adams J dissenting) rejected a complaint that the sentencing judge erred in declining to award a discount for facilitation of the administration of justice pursuant to s 22A of the *Crimes (Sentencing Procedure) Act 1999* on the basis that the mode of trial was neutral and that it had benefited the defence to dispense with a jury. It was held that s 22A is a discretionary provision and there was no requirement to allow a discount on account of the mode of trial.

Rejection of accused's evidence despite positive findings including impressive character evidence required explanation

Good character evidence may be relevant to whether an accused committed the charged offence(s) and to their credibility generally. A *Liberato* direction in relation to an accused's evidence includes that if the tribunal of fact believes the accused's evidence, or thinks it might be true, the accused must be acquitted. If it is not believed, then it must be put aside.

In ***Barwick v R* [2023] NSWCCA 139** there had been a judge-alone trial concerning an accused charged with child sexual offences committed years before against his granddaughter. He gave evidence denying the allegations and called character witnesses. The judge made favourable findings about both his and their evidence. She also directed herself comprehensively about the pertinent law, including the *Liberato* direction and the dual relevance of good character evidence. Despite that, she simply said, "I do not accept parts of his evidence", without explaining which parts and why, and was satisfied of his guilt beyond reasonable doubt.

In *Fleming v The Queen* (1998) 197 CLR 250; [1997] HCA 68 it was said (at 30] that if a judge does not refer to their have applied a relevant principle, either the judge applied it but breached the requirement in s 133(2) of the *Criminal Procedure Act 1986* to give reasons, or the judge failed to apply it and there has been error of law. It was concluded that unless the

judgment shows expressly or by implication that the principle was applied, it should be taken that it was not. In Mr Barwick's case, Wright J upheld the appellant's complaint and the appeal was allowed and a retrial ordered.

(The judgment was only released from publication restriction in mid-2024 following the conclusion of proceedings in the District Court.)

OFFENCES

Sexual offences – inconsistencies in accounts by complainants

***Arizabaleta v R* [2023] NSWCCA 217** concerned an unreasonable verdict ground of appeal where the applicant placed reliance upon the inconsistencies in the complainant's various accounts as to what had occurred. Rothman J, in agreeing with McNaughton J that the verdicts were not unreasonable, made an observation that implicit inconsistency by omission of important detail in sexual offence cases does not mean that such detail did not occur. He explained:

> [204] All criminal offences are, to the victim, traumatic. The trauma has different effects on different people. In sexual offence cases, in particular, where there is a misplaced sense of guilt from quite innocent victims, failure to detail all of the occurrences is common and a well-known aspect of the effect of sexual assault. There is also an embarrassment factor.

Leeming JA, in dissent, made observations (at [101]-[103]) about the plasticity of human memory.

Sexual offences – responses of sexual assault complainants

Adamson JA collated a number of observations of courts dealing with conviction appeals concerning the responses of sexual assault complainants that are relevant both to such appeals but also to the determination of guilt at first instance in ***Duncan v R* [2023] NSWCCA 223**:

> [94] The observations of courts (which can be expected to accord with the collective experience of juries), which do not constitute legal principles may also be relevant to the factual assessment whether a verdict is unreasonable. For example, courts have observed as follows:
>
> 1. it is not uncommon for victims to remember specific details about the assaults but not peripheral or tangential details: *Reed v R* [2006] NSWCCA 314 at [64] (Spigelman CJ, McClellan CJ at CL and Sully J agreeing) and *AS v R* [2022] NSWCCA 291 at [137];
>
> 2. it is not uncommon for children to be imprecise about time: *BCM v The Queen* [2013] HCA 48; (2013) 303 ALR 387 at [45]-[47];

3. variations in the terms in which a complainant discloses sexual assault or abuse may be explained by context: *Manojlovic v R; R v Manojlovic* [2020] NSWCCA 315 at [82]ff (Hoeben CJ at CL, Button and N Adams JJ agreeing); and

4. a complainant who bears no, or little, responsibility for something may apologise, either because of an instinctive reaction, insecurity or for some other reason: *Maughan* at [12] (Adamson J).

Accessory after the fact – the common law test

In ***Quinn v R* [2023] NSWCCA 229** an intruder to the home occupied by Ms Quinn and her boyfriend, Mr Davis, stole Ms Quinn's handbag and fled. They chased after him. She caught up with him first and struggled to recover her handbag as he threatened her with a gun. Mr Davis soon arrived and struck the deceased with a sword, killing him. Ms Quinn and Mr Davis then fled, staying in various hotels and paying cash for their needs, she being of considerable assistance to him in evading arrest. A jury found Mr Davis guilty of manslaughter on the basis of excessive self-defence and Ms Quinn guilty of being an accessory after the fact.

Ms Quinn's conviction was quashed on appeal. Bell CJ (at [103]) noted the absence of any statutory definition of the offence and referred to common law authorities by virtue of which the mental element of being an accessory after the fact is that "at the time of providing such assistance" the accused was "aware of the essential facts and circumstances that made up [the principal offender's] offence". The Crown had failed to exclude the reasonable possibility that Ms Quinn's belief after the fact when providing assistance to Mr Davis was that he had seen her being threatened with the handgun and his response was a reasonable one in the circumstances as she perceived them, namely that it was necessary to strike the intruder with the sword in order to defend her.

Cannabis leaf is not cannabis plant

The applicant for leave to appeal against an aggregate sentence in ***Fear v R* [2023] NSWCCA 238** imposed for offences including supplying cannabis plant contrary to s 23(1)(b) of the *Drug Misuse and Trafficking Act 1985* must have been pleasantly surprised when the Crown drew attention to the fact that the charge should have been one of supplying cannabis leaf contrary to s 25(1) of the Act. He could not in law have been convicted of supplying cannabis plant and the Court accepted the Crown's concession that the conviction should be quashed.

Homicide – causation principles

The principles concerning causation in homicide cases were thoroughly reviewed and succinctly summarised by Beech-Jones CJ at CL in ***Baker v R* [2023] NSWCCA 262** at [54]-[59].

Female genital mutilation offence applies only to child victims

The offence of female genital mutilation in s 45(1) of the *Crimes Act 1900* is not expressly confined to any age group of female victims. However, in ***Russell v R* [2023] NSWCCA 272** the Court was persuaded that it should be confined to child victims after reading down the statutory provision to conform with the seriously considered dicta in *The Queen v A2* (2019) 269 CLR 507. Accordingly, an "extreme body modification artist" had his conviction quashed for having performed a labioplasty procedure upon an adult female at her request for cosmetic purposes, notwithstanding she suffered adverse consequences.

Larceny as a clerk or servant – meaning of "clerk or servant"

***Day v R (No 2)* [2023] NSWCCA 312** was an appeal against convictions for 34 counts of embezzlement as a clerk or servant contrary to s 157 of the *Crimes Act 1900*. "Clerk or servant" is defined in s 155. Mr Day was the sole director and shareholder of a management company which managed the professional activities of Guy Sebastian, a performer and recording artist. The Crown contended he had misappropriated income received into his company's trust account which he was obliged to remit to Mr Sebastian. One of three grounds of appeal was that the Crown had not proved that he was a "clerk or servant" for three reasons. First, it was necessary that he was employed under a contract of service, not a contract for services. Second, and alternatively, the term did not apply to persons who received money in the course of business or commerce as here. Third, it was the management company, not the applicant, who had a contractual relationship with the complainant.

It was held by Dhanji J at (129]) that the term "clerk of servant" did not require proof of a master and servant relationship or that the applicant was bound by a contract of service. The evidence could establish the applicant was a "collector of moneys" which brought him within the s 155 definition, deeming him to be a "clerk or servant".

(The appeal was allowed on another ground concerning inappropriate comments made in the prosecutor's closing address.)

Indecent assault on a male (repealed s 81) offence confined to male perpetrators

It was held in ***Lam v R* [2024] NSWCCA 6** that the offence of indecent assault upon a male contrary to s 81 of the *Crimes Act 1900* (which was repealed in 1984) only applied to males indecently assaulting males. Upon Ms Lam's appeal pursuant to s 5F(3)(a) of the *Criminal Appeal Act 1912*, a demurrer was upheld and the indictment quashed.

Driving with prescribed illicit drug is an offence of absolute liability

Mr Narouz claimed that he had not consumed cocaine in the days or weeks prior to a positive oral fluid test but had taken a sip from a bottle of energy drink that had been left on the floor of a car he had borrowed from a friend. A magistrate had accepted the defence was available to a charge of driving whilst there was present in oral fluid a prescribed illicit

drug but rejected the defence version of events. A judge of the District Court on appeal had held the defence was not available because the offence was one of absolute liability.

In ***R v Narouz*** **[2024] NSWCCA 14** there was an extensive review of various considerations which all led Chen J to conclude that the offence is one of absolute liability.

Maintain unlawful sexual relationship with child contrary to s 66EA – new offence created in 2018

The offence in s 66EA of the *Crimes Act 1900* was recast in 2018. It formerly required proof of the accused engaging in conduct constituting a sexual offence against a child on three or more separate occasions on separate days. It became an offence of maintaining an unlawful sexual relationship with a child constituted by two or more unlawful sexual acts over any period. There were other differences between the former and current version of the section including that the maximum penalty was increased from 25 years to life imprisonment.

In ***Xerri v The King*** **[2024] HCA 5; (2024) 98 ALJR 461** it was held that the 2018 iteration of the offence is new and accordingly s 19 of the *Crimes (Sentencing Procedure) Act 1999* did not preclude a sentencing court having regard to the increased penalty when sentencing for offences committed before the increase.

Assault/resist police in the execution of duty – lawfulness of purported arrest - failure to consider alternative courses of action

Bugmy v DPP (NSW) **[2024] NSWCA 70** considered the lawfulness of the arrest power granted to a police officer under s 77(1) of the *Bail Act 2013* (NSW*).* Ms Bugmy was convicted of resisting a police officer in the execution of his duty. It was undisputed that Ms Bugmy was arrested for being in breach of a bail condition and that the arresting officer was exercising the powers conferred by s 77(1) of the *Bail Act.* What Ms Bugmy contended was that in exercising the arrest power, the police officer had failed to have regard to the mandatory considerations listed in s 77(3) of the *Bail Act* and such a failure rendered her arrest unlawful. Leeming JA held that the lawful exercise of power under s 77(1) is one where the police officer complies with the requirements of s 77(3). The police officer's failure to consider any of the matters under s 77(3) before arresting Ms Bugmy rendered the arrest unlawful, and as such, Ms Bugmy had not resisted a police officer in the lawful execution of his duties. Her appeal was allowed and her conviction was quashed.

Drug offences – s 4 of the Drug Misuse and Trafficking Act 1985 captures the bulk material containing the drug

In ***Jenkinson v R*** **[2024] NSWCCA 34** the applicant was convicted of supplying a commercial quantity of a prohibited drug, named psilocybin, contrary to the *Drug Misuse and Trafficking Act 1985* after police found 98 grams of mushrooms in his car. Section 4 of the Act provides that "a reference to a prohibited drug includes a reference to any preparation, admixture, extract or other substance containing any proportion of the prohibited drug". The sole issue at trial was whether the weight of psilocybin included the weight of the mushrooms in which

psilocybin was naturally found. The trial judge concluded that it did. The quantity of psilocybin was the 98 grams of bulk vegetable matter. On appeal, Mitchelmore JA held that s 4 does not focus on human involvement in the mixing of substances, but was intended to capture mixed contents, any proportion of which was a prohibited drug. This construction is consistent with the purpose of the provision, which is to put beyond doubt that if a material contains any proportion of a prohibited drug, the entirety of that material would be treated as a prohibited drug. It followed that the trial judge was correct to conclude that Mr Jenkinson was in possession of a quantity of psilocybin that was not less than the commercial quantity.

Sexual assault in medical examination – no requirement for direct evidence of lack of consent – erroneous directed acquittals

The respondent in ***R v GAT*** **[2024] NSWCCA 32** was tried for 40 sexual offences committed against 19 different women while working as a gynaecologist and obstetrician. The Crown case was that when a patient saw GAT their consent was only given for an examination carried out for a proper medical purpose. The trial judge directed the jury to return verdicts of not guilty on all counts because there was no evidence of a lack of consent to the relevant sexual act from any complainant. The Crown sought leave to appeal on the ground that the trial judge was in error to direct acquittals on this basis. The appeal was allowed and a new trial was ordered. Button J held that the absence of any direct evidence of consent was not determinative; the state of mind of the complainants was a fact which could be proved by indirect and direct evidence. His Honour held that the Crown merely needed some evidence of lack of consent, and having regard to the circumstances, this evidence came from the mistaken belief that the act in question was for medical or hygienic purposes from which it could be presumed that there was lack of consent.

Conspiracy to import commercial quantity of cocaine – no requirement for knowledge of quantity

The respondent in ***Director of Public Prosecutions (Cth) v Kola*** **[2024] HCA 14; (2024) 98 ALJR 632** was found guilty of conspiracy to import a commercial quantity of a border-controlled drug contrary to ss 11.5(1) and 307.1(1) of the *Criminal Code* (Cth) after he, and several others, conspired to import cocaine from Panama to Australia. The principal issue that arose for the High Court of Australia was whether the trial judge improperly directed that one of the elements of conspiring to import a commercial quantity of a border-controlled drug was that the substance imported pursuant to the agreement was of a commercial quantity, but it did not have to be proved that the accused *intended* to import a commercial quantity. The South Australian Court of Appeal held this was an error in that the trial judge failed to direct the jury that they had to be satisfied that Mr Kola had agreed with others to import cocaine, and that if that agreement had been executed, that would have been a commercial quantity. The High Court set aside the orders of the Court of Appeal, holding that there was no error in the trial judge's directions.

One unlawful attempt to arrest does not render a subsequent arrest also unlawful

***Kershaw v R* [2024] NSWCCA 27** concerned an appeal against conviction on two counts of resisting a police officer in the execution of duty contrary to former s 58 of the *Crimes Act*. Mr Kershaw had assaulted two Senior Constables as they tried to arrest him which prompted the arrival of two more Constables who effected an arrest. In a judge-alone trial, there was an acquittal for the assault upon each of the Senior Constables while they were in the execution of duty on the basis that they had failed to state their reasons for arrest and so they were not acting in the "execution of duty". Mr Kershaw had pleaded guilty to other offences, including offences of resisting the two Constables who arrived after the initial attempt to arrest by the Senior Constables. There was an appeal against conviction for resisting the Constables, it being contended that the trial judge could not accept the guilty pleas because of the finding that the earlier attempted arrest by the Senior Constables was unlawful. The appeal was dismissed.

Leeming JA held that the two subsequent police officers were exercising a separate power to prevent a breach of the peace and Mr Kershaw's acts of resistance to each officer were separate acts; characterisation of their conduct was wholly independent of the arrest which the previous officers sought to effect. The reality is that they knew that an intoxicated man had assaulted, and was continuing to assault, their colleagues. They had heard reports of this in the minutes before they arrived at the scene, and they saw the struggle on arrival. They were duty-bound to quell the struggle, and they were well entitled to form the view that they should arrest him themselves.

Constructive murder – no mental element – self-defence must be exclusive of the foundational offence

Mr Coskun and another man carried out a home invasion to steal drugs and money whilst either or both were armed. Shots were fired resulting in one occupant being killed and another wounded. The Crown relied upon joint criminal enterprise, extended joint criminal enterprise and constructive murder with the latter based upon a foundational offence of attempted robbery whilst armed with a dangerous weapon. Constructive murder occurs when the act causing death is "done in an attempt to commit … a crime punishable by imprisonment for life or for 25 years" (s 18(1)(a), *Crimes Act 1900*).

The trial judge's directions on constructive murder included, in conformity with *R v Sharah* (1992) 30 NSWLR 292, that the Crown had to prove that while participating in a JCE to commit the foundational offence the accused was aware that a gun might be fired by either himself or the other intruder. The defence case was that the firing of the fatal shot was an act done in self-defence and not part of an attempted robbery. The judge directed the jury that the Crown would not have proved constructive murder if the act causing death was not part and parcel of the attempted robbery but was solely for the purpose of self-defence.

It was contended on appeal that the Crown had to prove that the act causing death was within the scope of the JCE to commit the foundational offence. It was also contended that the directions on self-defence rendered it unavailable unless the "only" purpose of firing the gun was self-defence.

In ***Coskun v* R [2024] NSWCCA 67**, the Court (Kirk JA, Wilson and Ierace JJ) held (at [50]-[51]) that the contention as to the act causing death being within the scope of the JCE was beyond what was required to establish constructive murder and would undermine the nature and rationale for it. The direction given was also beyond what was required in perceived compliance with the case of *R v Sharah* which should no longer be followed in this respect. It did not cause a miscarriage as it only served to place an additional hurdle in the way of the Crown proving guilt.

As to the second contention, their Honours held (at [73]) that the doctrine of constructive murder is not vitiated if an offender becomes fearful of some personal harm during the course of (or immediately after) the commission of the serious crime and responds to violent resistance by taking action for their own protection.

Constructive murder – accessorial liability cannot apply

Mr Batak was alleged to have supplied a loaded pistol to Mr Coskun for use in a planned home invasion (see above). He was tried separately and convicted on the basis of being an accessory before the fact to constructive murder.

It was held by Kirk JA, Wilson and Ierace JJ in ***Batak v R* [2024] NSWCCA 66** that the requirement for an accessory before the fact to have knowledge of the acts constituting the offence is inconsistent with the very nature of constructive murder where the act or omission causing death is not something that needs to be planned or contemplated. If there was evidence of that being the case, the murder would be in the first category in s 18(1)(a) of the *Crimes Act 1900*. Accordingly, accessorial liability cannot coherently apply to a charge of constructive murder. A retrial was ordered.

This judgment includes a very thorough survey of the law relating to constructive murder as well as the evolution of accessorial liability and principles of complicity.

Child sexual assault – assessment of the evidence of complainants

Adamson JA has made helpful observations on the manner in which the evidence of complainants in child sexual assault trials should be considered with the avoidance of stereotypical and outmoded misconceptions in:

> ***Davis v R* [2024] NSWCCA 120** at [144]-[149]; [162]-[166] (with the agreement of Price AJA and Garling J)
>
> ***SS v R* [2024] NSWCCA 128** at [160]-[164] (with the agreement of Stern JA and Faulkner J)

Sexual assault – knowledge of the absence of consent where complainant substantially intoxicated

In issue in Mr Smee's trial was whether the complainant did not consent to the sexual intercourse and his state of mind as to her claimed lack of consent in circumstances where she was substantially intoxicated. Section 61HE(8) of the *Crimes Act 1900* applied in the period 1 December 2018 to 31 May 2022 and provided that "the grounds on which it may be established that a person does not consent to a sexual activity include … if the person consents to the sexual activity while substantially intoxicated by alcohol or any drug". The trial judge directed the jury in part that "the law provides that a person does not consent to sexual intercourse if the person consented while substantially intoxicated by alcohol".

Kirk JA observed in ***Smee v R* [2024] NSWCCA 121** that the provision was not a model of drafting but the direction was wrong and could have led the jury to understand that the complainant did not consent if she was substantially intoxicated. He suggested that a direction should be along the lines of:

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

The appeal was upheld and a retrial ordered.

(The Criminal Trial Courts Bench Book is being amended accordingly.)

Sexual assault – recklessness as to consent

***Tuuholoaki v R* [2024] NSWCCA 135** was another case which concerned directions on the element of consent in a sexual assault trial where s 61HE applied. It provided in sub-s (3) that a person knows the complainant does not consent if the person knows there is no consent, or the person is reckless as to whether there is consent, or the person has no reasonable grounds for believing there is consent. The trial judge directed the jury about each of these three states of mind. On recklessness, they were directed that the accused would be reckless if "he realised there was a possibility she did not consent" or "he did not even think about whether she consented, but went ahead, not caring or considering it was irrelevant whether she consented". It was contended on appeal that these directions were erroneous because they invited the jury to convict the accused on a purely inadvertent state of mind. The judge should have directed that there was a risk that the complainant did not consent which would have been obvious to someone with the accused's mental capacity, if they had turned their minds to it.

Adamson JA rejected the submission. A jury must be directed that recklessness is subjective and concerns the accused's state of mind at the relevant time. The distinction is between subjective and objective recklessness, not advertent and inadvertent recklessness. There was no complaint at trial about the directions given. Leave to rely upon this ground was refused.

Child sexual assault – alternative verdicts depending upon child's age

The offender in ***RM v R* [2024] NSWCCA 148** was convicted of child sexual assault offences including an offence against s 66C(2) of the *Crimes Act 1900* of sexual intercourse with a child of or above the age of 10 and under the age of 14. The victim gave evidence that she was aged "13 or 14" at the time. It was accepted on appeal that there was a reasonable doubt about the age element of the offence. There was an alternative offence in s 66C(4) of sexual intercourse with a child of or above the age of 14 and under the age of 16. The issue was whether a verdict of guilty for that offence could be substituted even though it was possible the child was under 14. The provision designed to overcome such a problem (s 80AF of the *Crimes Act 1900*) was not available as the trial had commenced prior to it commencing operation.

Adamson JA resolved the issue by reference to caselaw which was to the effect that it was inappropriate to acquit a person who had obviously been found by a jury to have committed one offence or another. The remedy is to substitute a conviction for the offence with the lesser maximum penalty. Dhanji J resolved the issue on a statutory construction basis. He concluded that the words "of or above the age of 14" do not create an element of the s 66C(4) offence; they only served to provide a demarcation from the offence in s 66C(2) for the purposes of penalty. If the s 66C(2) offence could not be proved only due to an inability to prove the complainant was under 14, the accused will be guilty of an offence against s 66C(4), provided it could be proved the complainant was under 16. Sweeney J agreed with both.

Knowingly take part in drug supply – directions where accused allegedly taking part in supply activity of co-occupant of premises

In ***Rabieh v R* [2024] NSWCCA 154** the accused was alleged to have knowingly taken part in the drug supply activity of her husband. Two lots of large commercial quantities of methylamphetamine were found in their premises of which she claimed to have no knowledge. She also claimed that even if she did have such knowledge, there was nothing she would have been able to do about it given the nature of their relationship. It was contended at trial and on appeal that the judge should have directed the jury about the accused's capacity to prevent her husband storing the drugs on the premises.

Basten AJA held that the judge's directions were sufficient and correct. He had directed the jury that the Crown had to prove that she was a knowing and willing participant. What she could have done, or might have been able to do, if she was not a willing participant was irrelevant. His Honour observed that the correct directions to give in cases such as this depend upon the evidence and the issues.

Environmental offences – special executive liability can extend to the general manager of a local council

It was held in ***Environment Protection Authority v McMurray* [2024] NSWCCA 160** that the special executive liability provisions that apply to some offences against the *Protection of*

the Environment Operations Act 1997 can apply to an executive, in this case the general manager, of a local council. That is because of the provision in s 220(4) of the *Local Government Act* 1993 that provides:

> A law of the State applies to and in respect of a council in the same way as it applies to and in respect of a body corporate (including a corporation).

PRACTICE AND PROCEDURE

Child complainant's evidence and whether in the "interests of justice" it not be given by JIRT interview

An accused charged with child sex offences argued it was "not in the interests of justice" that a complainant give evidence in chief at a pre-recorded evidence hearing by way of her JIRT interview. The complainant initially denied allegations of impropriety by the accused and subsequent disclosures were made following sustained and inappropriate questioning which created an environment in which she thought she could not leave until she had made some form of allegation. The Crown accepted there were some shortcomings in how the interview was carried out but contended that these were for the jury to assess. And in any event, even if the evidence was given orally, the content of the interview and the manner in which it occurred would necessarily emerge in cross-examination. The trial judge rejected the application. The matter was raised as a ground of appeal against conviction in ***LF v R* [2023] NSWCCA 232** but rejected. Meagher JA held (at [68]) that it could not be in the "interests of justice" to require the child to give her evidence orally at the pre-recorded evidence hearing and then be cross-examined by reference to the JIRT interview.

Obligations of the Crown to investigate matters raised by defence and to call witnesses at trial

In seeking leave to appeal against conviction, the applicant in ***HO v R* [2023] NSWCCA 245** complained that there had been a miscarriage of justice because of the failure of the police to investigate matters he had raised when they interviewed him, and because of the Crown having failed to call witnesses favourable to him. Wilson J (at [89]) helpfully set out principles drawn from relevant authorities on the obligations of the Crown with respect to leading evidence, calling witnesses, and treating an accused person fairly.

Error in failing to discharge a jury due to unresponsive but prejudicial statements by a witness

A witness in a bank robbery trial gave evidence unresponsively that one accused was known to have robbed a bank before and that a police officer had told her that this particular accused was "some bank robber". On both occasions she was stopped and told to say nothing further. The trial judge refused an application to discharge the jury and told the jury to disregard what the witness said she had been told by police whose opinions were irrelevant, as were the unresponsive answers given by the witness. The judge also excised the evidence from transcript later provided to the jury.

Dhanji J, Lonergan J agreeing, Beech-Jones CJ at CL dissenting, allowed the appeal in ***Ilievski v R; Nolan v R (No 2)*** **[2023] NSWCCA 248; (2023) 112 NSWLR 375**. Notwithstanding the actions taken by the trial judge, it is not a universal rule that directions will cure any irregularity. His Honour regarded the prejudice was compounded by the evidence of the police interest in the accused by their use of tracking devices and telephone interception. For the co-accused, although the prejudicial evidence did not directly impugn his character, the evidence established a close connection between the pair. There was a miscarriage of justice in relation to both of them.

Dhanji J provided a summary of principles relating to a complaint as to the admission of unfairly prejudicial material (at [89]).

Prosecutors may sometimes impugn the credit of Crown witnesses without cross-examining them

Members of the complainant's family gave evidence for the Crown in a child sexual assault prosecution which included matters the defence relied upon as rendering some of the allegations of the complainant improbable. It was contended on appeal in ***ZL v R*** **[2023] NSWCCA 279** that because the Crown had not sought leave under s 38 of the *Evidence Act 1995* to cross-examine the witnesses, their evidence was unchallenged thereby leaving open a reasonable hypothesis consistent with innocence.

Adamson JA reviewed a number of cases in which a prosecutor had impugned the evidence of Crown witnesses where no leave to cross-examine had been sought under s 38. She concluded (at [136]) that they showed that whether a prosecutor can do so in such circumstances "depends on the basis upon which the credibility (in the sense which includes reliability) is sought to be impugned and the circumstances of the trial, including the other evidence". Her Honour discussed some guiding principles against which a prosecutor needs to consider whether to make an application under s 38: [137]-[147].

Prosecutor's address caused miscarriage by comment on failure of accused to give evidence

Mr Day's counsel put exculpatory propositions and used documents in the course of cross-examining the complainant in his client's embezzlement trial. He told the judge the documents would be tendered through other witnesses and undertook that if they were not, they would be tendered through the accused. Ultimately the accused did not give evidence and the documents were not tendered. In his closing address the prosecutor made submissions about there being "no explanation" or "no evidence" with respect to propositions put to the complainant.

Simpson AJA upheld a ground of appeal in ***Day v R (No 2)*** **[2023] NSWCCA 312** that contended (in part) that the prosecutor impermissibly commented on the applicant's failure to give evidence contrary to s 20(2) of the *Evidence Act 1995*. She said (at [85]) the comments "were, in many cases, made in a context in which the only person who could have given evidence (or, at least, the obvious person to give that evidence) was the applicant".

There was a substantial miscarriage of justice which required the convictions to be quashed and a new trial ordered.

Publication of deceased child's name permitted as it would not identify child offender

A 13-year-old child was charged with the murder of another child. After the trial concluded with an acquittal a question was raised as to whether a previously restricted CCA judgment concerning an interlocutory issue could be published with the deceased child being named. The senior available next of kin gave consent for this but the accused child objected on the basis that it would lead to identification of himself. In ***R v IP*** **[2024] NSWCCA 16** Harrison CJ at CL made the point that it was irrelevant that people familiar with the events that led to the child's death already knew who was alleged to have been responsible. The test was whether a stranger to the events would learn who that person was upon reading the judgment. There was nothing in the judgment that would lead to this so the identification of the deceased child was permitted.

Caution expressed about discharging juries unnecessarily

It was claimed in ***Khoury v R*** **[2024] NSWCCA 19** that there had been a miscarriage of justice as a result of a judge's refusal to discharge the jury after the jury had seen an interaction between a witness and the accused as the witness left the courtroom. Adamson JA held that the trial judge had dealt with the matter appropriately, including by the ameliorating directions given to the jury.

Her Honour (at [53]) cautioned about the negative potential effects upon the administration of justice that may follow the unnecessary discharge of a jury. They included the accused spending more time in custody on remand; jurors becoming disgruntled by being discharged for no apparent reason; counsel becoming unavailable; trials already listed having to be deferred; witnesses becoming reluctant to return; the jury in a new trial only having pre-recorded evidence of a complainant; and the general cost to the public.

Temporary stay of proceedings as a result of Crown misconduct

Witness C was a former solicitor and the principal Crown witness in a prosecution of two accused for perverting the course of justice. He made a statement annexing potentially privileged documents. Resolution of the privilege issue took about a month because of difficulties associated with obtaining legal representation for the client in relation to whom the privilege may have pertained. On two occasions the trial judge asked the Crown to consider funding the legal representation given the importance of Witness C to its case. The Director declined. Ultimately the judge ruled that no privilege attached to the documents.

One of the accused sought and obtained a temporary stay of proceedings until the Crown paid his costs thrown away by the delay. The Crown appealed pursuant to s 5F(2) of the *Criminal Appeal Act 1912*. It was held in ***R v Abu-Mahmoud*** **[2024] NSWCCA 21** that there was no error in the judge having regard to the Director's decision not to fund legal

representation, the judge did not err in finding that the Crown was at fault in respect of the delay and that the accused had suffered unfairness as a result.

Doctrine of merger does not extend to interlocutory issues

Mr Sayer-Jones sought a permanent stay of a prosecution for perverting the course of justice which was refused. He was then convicted at trial but while sentence proceedings were pending, he brought an out-of-time application for leave to appeal against the refusal of the stay. In ***Sayer-Jones v R* [2024] NSWCCA 54** the Crown countered by arguing that the court had no jurisdiction to hear the appeal based on the doctrine of merger, in accordance with which the applicant's interlocutory application to stay was extinguished upon conviction. Ward P and Kirk JA refused leave to appeal, holding that under these circumstances, the doctrine of merger had no relevance to interlocutory decisions. Their Honours had regard to the origins of the doctrine of merger and its application, concluding that it did not extend to operate such that an interlocutory decision merges into the conviction.

The applicant's case for a permanent stay was founded upon his grievance about the Crown charging him with perverting the course of justice after had been successful in having fraud charges quashed on a legal point. Their Honours observed that the applicant had chosen to depart from the implied terms of an earlier plea bargain and so it was no abuse of process in the Crown's conduct.

Legitimate forensic purpose required for defence subpoenas to prosecution lawyers to give evidence on sentence

Following some delays by the Office of the Director of Public Prosecutions, the applicant in **Sayer-Jones v R [2024] NSWCCA 73** was convicted of an offence of doing an act with the intention of perverting the course of justice. It was common ground that delays by the Crown as well as the long procedural history of the proceedings would be mitigating factors on sentence, but the applicant contented he was entitled to additional mitigation on the basis that ODPP officers had acted "unconscionably" and with "moral delinquency". To establish this, he had issued subpoenas to two prosecution solicitors and sought leave to issue a third to a former Crown Prosecutor who was now a sitting District Court judge. The appeal to the Court of Criminal Appeal concerned a decision to set aside and refuse leave in relation to the subpoenas on the basis of there being no legitimate forensic purpose.

N Adams J held that there was no error in the decision, the applicant having failed to demonstrate an error of principle and the possibility of substantial injustice. Her Honour observed that the applicant's submission that he had been denied the opportunity to present evidence relating to the reasons for delay was misconceived in circumstances where the primary judge had already indicated that she would not be assisted by the evidence of the witnesses and where other sources of information to establish delay were available. Campbell J, also agreeing, rejected the applicant's contention that he had a right to run "the case of my choice at first instance", saying such wide propositions were startling and would deprive the expression "legitimate forensic purpose" of any practical meaning and take case management considerations outside of the hands of judges and into the hands of parties. Leave to appeal was refused.

Leave to amend a s 247E notice of prosecution case needs consideration of the interests of both parties

Section 247E of the *Criminal Procedure Act 1986* provides that in summary jurisdiction of higher courts (which includes the Land and Environment Act) a prosecutor is to give notice of their case in respect of certain matters, including where an expert witness is proposed to be called at the hearing by the prosecutor, a copy of each witness report relevant to the case. Some 4-5 months before the first of three substantive hearings of charges of unlawful clearing of native vegetation was to commence the prosecutor sought to rely upon supplementary expert evidence (from experts whose initial reports had been served well before) and in that respect to file an amended s 247E notice. The defendants objected and a judge refused to grant the prosecutor leave "in the light of the great potential for prejudice to the defendants": ***Secretary, Department of Planning and Environment v Harris* [2024] NSWCCA 88** at [44].

The CCA's jurisdiction under s 5F(3)(a) depended upon the impugned decision being an "interlocutory judgment or order". Contrary to the respondents' submission it was held by Sweeney J that the primary decision was an interlocutory order. Her Honour concluded that fairness and justice required the primary judge to take into account the interests of both parties, including the prejudice to the prosecution by the decision, especially where the primary judge was informed that the expert opinions were important or essential to prove the elements of the offences charged. Her Honour further observed that the defendants had a sufficient and fair amount of time to absorb and understand the prosecutor's new evidence which was filed four months before the commencement of the first trial. Her Honour ultimately concluded that the interests of justice required intervention by the Court and the appeal was allowed.

Reasonable use of the investigation period after arrest does not render detention unlawful

The appellant in ***Reeves v State of New South Wales* [2024] NSWCA 125** had been arrested without a warrant pursuant to s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* for the offence of stalking. After the criminal proceedings were dismissed, he brought a civil claim for wrongful arrest. This was dismissed but damages of $5000 were awarded for his claim for "false imprisonment". This related to the period that he was detained in an interview room by a police officer after he had indicated he did not wish to answer questions.

In accordance with ss 114 and 115 of LEPRA, a person can be detained after arrest for an "investigation period" which commences when the person is arrested and ends at the time that is reasonable in all the circumstances, not exceeding 6 hours or such longer period as may be extended by a detention warrant. Matters to be considered pursuant to s 116 to determine a "reasonable time" include whether a person under arrest has indicated a willingness to answer any questions. The substantive appeal concerned that part of the claim that failed but the State sought to cross-appeal. The primary issue on the cross-appeal was whether the period of 12 minutes during which the applicant was kept in the interview

room after indicating he did not want to answer questions was beyond what was reasonable, thereby ending the investigation period.

In upholding the cross-appeal, Bell CJ found that most of the 12 minutes in the interview room was spent by the detective reading the complainant's statement to the applicant so as to appraise him of the complaints made against him which led to his arrest. His Honour concluded that this was a permissible use of the investigation period as it anticipated the possibility that the applicant might revisit his decision not to answer any questions once he was aware of the allegations made against him.

Limitation period for WHS Act prosecution determined from time notice is given

Following the death of two employees in 2021, Safework NSW commenced proceedings against Prime Marble by way of summonses in 2023. The summonses declared that Prime Marble had a duty under s 19(1) of the *Work Health and Safety Act 2011* to ensure the health and safety of its workers and was in breach of this duty pursuant to s 32 of the Act because its failure to comply with health monitoring had exposed the deceased workers to a risk of death or serious injury.

In ***Prime Marble & Granite Pty Ltd & Safework NSW* [2024] NSWCCA 10** it was contended that the summonses were not filed within the limitation period prescribed by s 232(1)(a) of the Act, being more than "2 years after the offence first came to the notice of the regulator". Harrison CJ at CL allowed the appeal and dismissed both summonses, holding that the limitation period was determined from the time that the regulator had notice of the alleged offence. The offence was complete when the alleged failure exposed an individual to *a risk* of death or serious injury or illness and not when such consequence occurred. This reading was consistent with the object of the Act, being to "secure the health and safety of workers and workplaces". The regulator became aware of Prime Marble's failure to comply with its duty and the resulting exposure of workers to a relevant risk in 2017. It followed that the summons in each case were filed outside the limitation period.

SENTENCING – GENERAL ISSUES

Strong criticisms of Justice Health for "neglectful" and "inhumane" treatment of inmate

The Court (Stern JA, Fagan and Yehia JJ) in ***R v R E* [2023] NSWCCA 184** found no error on a Crown appeal against a deliberately lenient sentence imposed upon an offender who committed sex offences against two subjects of his professional photography sessions six years apart. The leniency was justified because of the respondent's strong subjective case and his ill health which had made, and would continue to make, custody significantly more onerous for him than for other prisoners. He had been diagnosed with throat cancer prior to being charged. He underwent chemotherapy and radiotherapy and was found to have developed gastric lymphoma. Evidence concerning these conditions and the treatment necessary for them was tendered in the sentence proceedings.

The evidence before the Court showed the respondent's medical care had been neglected. It could not take at face value a claim by Justice Health that its "Integrated Care Services" had an aim to "monitor chronic/complex including cancer patients from entry at reception through custody and post release into the community ensuring they receive seamless, timely, appropriate and effective health care". Material before the sentencing judge indicated a delay of more than 4 months without certain procedures being conducted or even an appointment made with an external service provider. This was "medically neglectful" and "inhumane". Even if it had concluded that the sentence was manifestly inadequate the Court would have exercised its discretion to decline intervention because of the continued failure to provide essential and urgent medical attention in the months since sentencing.

Youthful offenders and the assessment of their moral culpability

The offender in ***TM v R* [2023] NSWCCA 185** was sentenced to imprisonment for 3 years for robbery inflicting grievous bodily harm. He was 15 years, 3 months at the time of the offence in which, as part of a large group of juveniles and young adult, he participated in attacking a man late at night and inflicting serious injuries. His involvement included kicking the victim who was lying on the ground as others stomped on his head. The sentencing judge noted how "a 15-year-old is sentenced very differently from an adult" whilst referring to the principles of s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW). He determined that moral culpability of the offender was high and objective seriousness of the offence was in the mid-range. However, he found that the offender had a deprived background which warranted a reduction of moral culpability "to an extent". The judge's only reference to general deterrence was by stating that the sentence "has to be an example to others". On appeal, it was successfully argued that the judge failed to have regard to the offender's young age in assessing moral culpability and the emphasis to be given to general deterrence.

Assistance to authorities can be in relation to an unrelated offence

Section 23 of the *Crimes (Sentencing Procedure) Act 1999* provides for a lesser penalty being imposed where an offender has provided assistance to authorities in relation to "the offence concerned or any other offence". One of the mandatory considerations in determining whether to impose a lesser penalty is "whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence": s 21(2)(i).

In ***Owens v R* [2023] NSWCCA 198** it was held by Wright J (Fagan J agreeing, Wilson J dissenting) that a judge erred by saying, in effect, that the offender would receive a discount for assistance in respect of sentencing for a murder charge where he had given an undertaking to give evidence against a co-offender in relation to that offence but was "not entitled" to a discount for such assistance in relation to unrelated firearms offences.

Procedure for imposing an intensive correction order for a federal offence

A pharmacist was sentenced for unlawfully obtaining pharmaceutical payments contrary to the *National Health Act 1953* (Cth). A submission was made that an intensive correction order be imposed. Section 20AB of the *Crimes Act 1914* (Cth) picks up the power to impose an ICO for federal offences and the procedural steps governing the operation of the State provision. The judge said because she was dealing with a Commonwealth offence she had regard to the matters listed in s 16A of the *Crimes Act 1914* (Cth) ("Matters to which court to have regard when passing sentence etc.--federal offences") but not to the matters in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("Purposes of sentencing"). She assessed a term of imprisonment of 2 years but declined to order it be served by way of an ICO, ordering it to be served on a full-time basis with a recognizance release order.

The pharmacist appealed on grounds including that the judge erred in not considering s 3A when determining whether to impose an ICO. This ground was upheld in ***Chan v R* [2023] NSWCCA 206**. With separate but consistent reasoning, Kirk JA, Rothman and N Adams J described the process for considering an ICO for a Federal offence as involving a three-step determination:

1. whether no penalty other than imprisonment is appropriate;
2. if so, the length of the sentence; and
3. if the sentence imposed is less than two years for a single offence or three years for an aggregate sentence, whether an ICO should be imposed.

The sentencing judge was required to have regard to s 16A of the *Crimes Act 1914* (Cth) for the purposes of the first two steps, but then have regard to the purposes of sentencing in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) when considering whether to impose an ICO. On re-sentencing the Court imposed a sentence to be served by way of an ICO.

Immigration detention considered as pre-sentence custody

An offender awaiting sentence for a federal offence had been granted bail but because his visa had been cancelled he was held in immigration detention. For the first part of the time in such detention he was an unlawful non-citizen liable to deportation, a person in respect of whom the Commonwealth DPP had made a request for a criminal justice stay certificate for the purpose of finalising the criminal proceedings but which had yet to be determined by the Department of Home Affairs, and a person who had an appeal to the Administrative Appeals Tribunal against the cancellation of his visa pending. In the latter part of the period in detention he was held pursuant to the granting of the criminal justice stay certificate. Submissions were made on sentence that the time spent in detention should be taken into account but the judge did not do so or provide reasons for not doing so. It was held in ***Marai v R* [2023] NSWCCA 224** that there was error in failing to provide reasons.

On re-sentencing, each member of the Court accepted that some credit by way of further backdating the sentence should be allowed. Sweeney J (Kirk JA agreeing) held that it should be for the entire period. Fagan J considered that only the period subsequent to the grant of the criminal justice stay certificate should be allowed.

Further backdating of a sentence to take into account onerous conditions experienced in that time

An offender spent 199 days in custody before he was sentenced. He asked the judge to take into account various ways in which that custody was more onerous, including COVID-19 restrictions and lockdowns. The judge took those factors into account by backdating the commencement of the sentence by a further 30 days, thus allowing a total backdate of 229 days. On appeal, the offender contended that he was disadvantaged by the judge taking this approach; the onerous nature of pre-sentence custody should have been taken into account in mitigation of the sentence overall.

Sections 24 and 47 of the *Crimes (Sentencing Procedure) Act 1999* require "any time" for which an offender has been held in custody in relation to an offence to be taken into account, including in considering whether to backdate a sentence. In dismissing the appeal in ***Kljaic v R* [2023] NSWCCA 225**, Wright J construed "any time" not to be limited to the actual period of pre-sentence custody. The ordinary English meaning of "time" includes what occurred or the conditions experienced during an event. For example, in the question, "did you enjoy your time at the beach?" the word "time" refers to what occurred or the conditions experienced during the period when the person was at the beach. His Honour also held that the approach taken by the primary judge was within a permissible exception to the instinctive synthesis approach generally favoured: *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [39]. This approach is also consistent with how quasi-custody is usually taken into account.

The care required in sentencing children

An offender was 16½ years of age when he did an act in preparation for a terrorist act. He pleaded guilty and a significant focus in the sentence proceedings was upon his youth and mental state. There was expert evidence he suffered from a major depressive disorder and there was link between it, his experience of bullying, withdrawal, low self-esteem, loss of identity and his susceptibility to extremist views. He appealed against his sentence on a number of grounds including that insufficient attention had been given to his subjective case and there had been a failure to make findings concerning certain features of it.

It was held in ***AH v R* [2023] NSWCCA 230** by Leeming JA, N Adams and Dhanji JJ (at [70], [76]) that the judge had failed to have explicit regard to mandatory considerations of the offender's prior good character and whether his moral culpability was reduced by his youth and mental illness. The Court referred generally to the need for a court in sentencing a juvenile offender for such an offence to have regard to s 16A(2)(m) of the *Crimes Act 1914* (Cth) (the need to take into account "the character, antecedents, age, means and physical or mental condition of the person"), s 6 of the *Children (Criminal Proceedings) Act 1987* (principles concerned with sentencing children), or general principles concerned with sentencing children such as set out in *KT v R* [2008] NSWCCA 51; (2008) 182 A Crim R 571 at [22]-[26].

Offender denied credit for time served previously for offences of which he was acquitted

In ***Dib v R* [2023] NSWCCA 243** there was an unsuccessful attempt to overturn a principle Simpson AJA described (at [52]) as "well – and consistently – established that, in this State, offenders will not be given quantified reductions in sentence to take account of periods spent in custody other than those referable to the offence or offences for which sentence is to be imposed and neither will sentences be backdated to achieve the same result". The NSW authority is sourced to *R v Niass* (unrep, 16/11/88, NSWCCA). Her Honour's survey of the approach taken in other States and Territories led her to conclude (at [81]-[82]) there was no established common law principle which the Court would be obliged, or should, follow.

A failure to take into account a submission on sentence is a failure to take into account a material consideration

A sentencing judge failed to deal with a submission made to the effect that a custodial sentence was likely to be more onerous for the offender than for the theoretical "average" inmate because of the offender's mental condition. It was accepted that he had the mental condition but the judge did not consider whether it had the mitigatory effect of making the custodial experience more onerous. The appeal in ***Ney v R* [2023] NSWCCA 252** was upheld. Campbell J said (at [74]) that it was not to the point that if the judge had dealt with the issue he may have concluded that it was cancelled out by a concern for the sentence to provide for adequate specific deterrence and protection of the community.

Charge negotiation certificates under s 35A of the Sentencing Procedure Act

Section 35A of the *Crimes (Sentencing Procedure) Act 1999* prohibits a court taking offences listed on a Form 1 into account unless the prosecutor files a certificate verifying whether any consultation has occurred with victims and police officers and whether any statement of agreed facts arising from plea negotiations constitutes a fair and accurate account of the objective criminality of the offender. After an appeal against sentence had been dismissed in the Court of Criminal Appeal an offender unsuccessfully made an application to the District Court to reopen proceedings and set aside the sentence because it had been imposed contrary to law. It was contrary to law because an offence on a Form 1 had been taken into account and no s 35A certificate had been filed. After a judge ruled she had no jurisdiction, the offender sought review in the Court of Appeal.

In ***Corliss v Director of Public Prosecutions (NSW)* [2023] NSWCA 263** Adamson JA said the rationale for the s 35A certification requirement is to involve the victim and officer in charge of the investigation in the process of charge negotiations by consulting with them. Having regard to this statutory purpose, the conclusion was compelling that there was no legislative intention to invalidate a sentence when there has been a breach of s 35A. The summons was dismissed.

Moral culpability for importation offence not reduced because of facilitation by undercover police

Mr Masri was involved in arranging the importation of molasses tobacco and cigarettes with intent to defraud the revenue. He and his syndicate unwittingly engaged with undercover operatives who assisted in significant ways in facilitating the importation. For example, he travelled to Dubai to meet a UCO and paid him $650,000 to arrange the consignment of cigarettes by container and to have them released from the wharf in Sydney without payment of duty. The sentencing judge rejected an argument that his moral culpability was reduced because of the involvement of the authorities.

Fagan J dismissed the appeal in ***Masri v R* [2023] NSWCCA 266**. The judge's finding that the offender was an energetic and willing participant was open to him. It was highly likely that absent the UCOs assistance, other means would have been found to import the cigarettes without paying duty. He accepted the assistance of the UCOs without being urged to commit the offence. The role played by the UCO who took a significant part in arranging the consignment was "mechanical".

De Simoni error in sentencing child sex offender on basis he was in a "position of authority"

In ***HA v R* [2023] NSWCCA 274** it was erroneous for a judge to take into account as a circumstance of aggravation that the offender was in a "position of trust" when that was an element that would have elevated his offence against s 66A(1) of having sexual intercourse with a child under the age of 10, which had a maximum penalty at the time of the offence of imprisonment for 25 years, to the then aggravated form of the offence in s 66A(2) which had a maximum penalty of imprisonment for life. The appeal was allowed and the sentence of 9 years reduced to one of 8 years 3 months. (All offences of sexual intercourse with a child aged under 10 have since been made the subject of a maximum penalty of life imprisonment.)

Calculation of pre-sentence custody should be simplified

***Mattiussi v R* [2023] NSWCCA 289** involved confusion over the calculation of pre-sentence custody where the offender had been refused bail from the date of his arrest but had served the non-parole period of a sentence imposed by the Local Court part of the way through the remand period and had remained in custody bail refused for the index offences when he became entitled to statutory parole in respect of the Local Court sentence. Rather than advising the judge of the range of dates between which it was open to him to backdate the sentence, the Crown advised the judge of pre-sentence custody in terms of years, months and days and persisted with this even on the appeal. The Director of Public Prosecutions subsequently indicated that the pro forma "Crown Sentence Summary" form would be amended in light of the Court's comments.

Intoxication cannot be taken into account to find facts mitigating objective seriousness

Section 21A(5AA) of the *Crimes (Sentencing Procedure) Act 1999* provides self-induced intoxication being taken into account as a mitigating factor. The offender in ***Pender v R* [2023] NSWCCA 291** contended that excluded that factor for sentencing purposes but did not extend to findings as to the knowledge of the lack of consent element of a sexual offence (formerly in s 61HE but now s 61HK of the *Crimes Act 1900*) for the purpose of determining objective seriousness on sentence. The sentencing judge considered he should make that finding on the same basis as the jury were directed; that pursuant to s 61HE(4)(b) (now s 61HK(5)(b) it was necessary to put aside self-induced intoxication. As a result he rejected a submission that the element was constituted by recklessness and found that the offender had actual knowledge.

Simpson AJA discussed the issue by reference to relevant authority at some length, concluding (at [54]) that there was no error in the approach of the sentencing judge. She then (at [55]) was critical of the applicant's proposition that it was less objectively serious and he was less morally culpable because the offences were committed on the basis of an honest, but unreasonably based and drug-induced, belief that the complainant consented, rather than with actual knowledge that she did not consent.

Standard non-parole periods do not apply to conspiracy to manufacture or supply a commercial quantity of drugs

It was clarified in ***Vu v R* [2023] NSWCCA 315** that a sentencing judge was mistaken in having regard to a standard non-parole period of 10 years for an offence of conspiracy to manufacture a commercial quantity of methylamphetamine. Basten AJA pointed out that the offence of manufacturing a commercial quantity of a drug is provided for in s 24 of the *Drug Misuse and Trafficking Act 1985* with penalties for it and other offences in s 33. Section 26 provides that a person who conspires to commit an offence in the same Division of the Act is guilty of an offence and is liable to the same punishment etc.

His Honour concluded (at [18]-[20]) for a number of reasons that while there is a standard non-parole period for the offence in s 24(2) there is not for the separately created offence in s 26.

Court quashing or varying a sentence may varying commencement date of another sentence

An offender was subject to a 6 year sentence for dangerous driving offences and then received a 27 month sentence for an arson offence which was ordered to commence 7 months prior to the expiry of the non-parole period for the dangerous driving offences. On appeal the sentence for the dangerous driving offences was reduced to 5 years 6 months which had the effect that there was now only 3 months concurrency with the arson sentence. Section 59 of the *Crimes (Sentencing Procedure) Act 1999* provides for a court when quashing or varying a sentence to vary the date of commencement of any other sentence that has been imposed upon the offender. No-one appeared to realise this as there

was a lengthy delay before the offender brought an application to the Court for such a variation to be made and which the Crown opposed.

Ultimately, the Court in ***Zreika v R* [2023] NSWCCA 317** granted the application. In doing so it had regard to the totality principle, the separate nature of the offences, the different victims involved, and the implications of any variation of non-parole period ratios. Noting that there was no one approach that was necessarily preferable or correct it backdated the arson sentence a further 3 months to restore 6 months of concurrency with the non-parole period for the dangerous driving sentence.

Mental health impairment – question is whether it contributed to the commission of the offence in a material way

An 83-year-old man was sentenced for inciting his 57-year-old son to commit acts of bestiality with a dog and acts of incest with his sibling. A report of a clinical psychologist included an opinion that the man suffered multiple health problems and symptoms of major depression and anxiety, including suicidal ideation, sleep disturbance, appetite disturbance and weight loss. The sentencing judge did not accept these opinions as he was not persuaded there was any causal connection between mental health and the offending conduct. He made no other findings as to the role mental illness had in the determination of sentencing.

It was held in ***DB v R* [2023] NSWCCA 323** (by Lonergan J at [50]) that although the judge was not required to accept the expert opinion, there must be a good reason if it is to be rejected. Her Honour referred to *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1; [2010] NSWCCA 194 at [177] and *Aslan v R* [2014] NSWCCA 114 at [33]-[34] before stating (at [52]) that "the question was not whether there was a "causal link" between the mental health condition and the offending, but whether the mental health condition *contributed to the commission of the offence in a material way*".

Assessment of prospects of rehabilitation is a question of fact; expert opinions are not binding

Dr Furst, forensic psychiatrist, provided a report in which, based upon a diagnostic risk assessment test as well as his clinical experience, he expressed an opinion that an offender's prospects of rehabilitation were average to below average. The sentencing judge found his prospects were moderate. It was submitted in ***Brown v R* [2023] NSWCCA 330** that the difference was important and the judge was bound to provide some explanation for making a different finding to that suggested by the doctor.

Cavanagh J said (at [36]-[40]) that the issue involved a finding of fact. The judge was not bound by the doctor's opinion. She had regard to other evidence bearing on the subject in addition to the doctor's report. Her finding was open to her and she did not fail to adequately explain why her conclusion differed.

Bugmy Bar Book is not evidence concerning a particular offender

Simpson AJA (McNaughton J agreeing) gave detailed consideration to the "Bugmy Bar Book" in ***Baines v R* [2023] NSWCCA 302**. Portions of it had been handed up in a sentence hearing but it was contended on appeal that the judge treated it as irrelevant to the task of a sentencing court which was inconsistent with the notion of individualised justice.

Her Honour (at [85]) described it as "a useful compilation of material relevant to an understanding of social disadvantage and deprivation" but that "does not necessarily make it a useful tool for sentencing purposes. Alone it says nothing about any individual offender (whether Aboriginal or non-Aboriginal)." She continued (at [86]), "General propositions drawn from research of the kind collated and analysed in the Bugmy Bar Book do not and cannot substitute for specific evidence with respect to those issues". Dhanji J dissented in relation to this ground of appeal, saying (at [151]) the material was capable of assisting in understanding the opinion of the author of a psychological report.

Intensive correction orders – attempt to circumvent approved sequence of considerations rejected

The applicant in ***DG v R (No 1)* [2023] NSWCCA 320** was sentenced to an aggregate term of imprisonment of 3 years, 6 months for drug supply and firearms offences. It was contended that the sentencing judge erred by backdating the sentence by 12 months to take into account pre-sentence custody rather than reducing the sentence by that period which would then have enabled her to consider whether to impose an ICO. (The maximum sentence for which an aggregate sentence may be served by way of an ICO is 3 years and for a single sentence is 2 years: s 68(3), *Crimes (Sentencing Procedure) Act 1999*.)

The Court (Wilson, Fagan and Sweeney JJ) concluded that the applicant was seeking to circumvent principles referred to in *R v Zamagias* [2002] NSWCCA 17, *Mandranis v R* [2021] NSWCCA 97; (2021) 289 A Crim R 260, *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3; (2023) 97 ALJR 107, and *Zheng v R* [2023] NSWCCA 64 and was untenable. First, it is settled practice that where a period on remand is referable to the offence for which sentence is to be passed, credit for the time served should be given by backdating, not shortening the term. Second, it would circumvent the 3-years-or-less prerequisite in s 68(3). To engage in such manipulation would have been an impermissible exercise of her Honour's discretion and would involve acting upon an irrelevant and impermissible consideration. The suggestion by Simpson AJA in *Mandranis v R* at [63] that such an approach might be available was, as she said, unnecessary to decide in that case.

Unlikelihood of reoffending is not concerned with certainty

A judge erred when sentencing in the Land and Environment Court by saying that the court was unable "to be certain that future inadvertent offending" would not occur. In ***ACE Demolition & Excavation Pty Ltd v Environment Protection Authority* [2024] NSWCCA 4**, Leeming J said (at 57]) that while this finding was open to the judge he had neglected to address whether the company had established the *likelihood* which was sufficient to establish the mitigating factor in s 21A(3)(g) of the *Crimes (Sentencing Procedure) Act 1999*.

Disqualification orders and pre-sentencing licence suspension

The appellant in ***Wells v R* [2024] NSWCCA 8** was sentenced to imprisonment for an offence that required an order for disqualification for an automatic period of 3 years or some other period not less than 1 year. The judge said that the automatic period would apply and asked the licensing authority to take into account the period of time the appellant's licence had been suspended prior to sentencing. The *Road Transport Act 2013* provides in s 206B(2) that a court take into account the period of suspension in deciding on any period of disqualification to impose upon conviction.

It was held by Ward P that the judge had misapplied the provision and should have made an adjustment rather than asking the licensing authority to do so.

ICO – taking into account State purposes of sentencing in Commonwealth cases

It was held in *Chan v R* [2033] NSWCCA 205 that in considering the operation of s 66(3) of the *Crimes (Sentencing Procedure) Act 1999* it is necessary to have regard to s 16A of the *Crimes Act 1914* (Cth) when deciding whether to impose a sentence of imprisonment and, if so, its length but whether it may be served by way of an intensive correction order requires regard being paid to the purposes of sentencing in s 3A of the *Crimes (Sentencing Procedure) Act 1999*. In ***AM v R* [2024] NSWCCA 26** it was held that a judge erred by not considering the purposes of sentencing in s 3A in that her Honour mentioned those set out in Part IB of the Commonwealth Act but not those in the State Act.

Evidence in a trial may be taken into account on sentence

After there were "hung juries" in two trials the Crown accepted a plea of guilty to manslaughter. During the sentence hearing the judge expressed dissatisfaction about perceived inadequacies in a statement of agreed facts and made reference to evidence in the second trial. Counsel joined in making references to trial evidence. There had been no formal tender of that evidence in the sentence hearing which gave rise to a complaint on appeal that the judge had regard to evidence which was not before the court.

It was held in ***Lupton v R* [2024] NSWCCA 29** that the evidence at the second trial that had been referred to was part of the evidence on sentence given counsel had implicitly agreed to it being available by making submissions about it without qualification.

ICO – imposition of ICO not mandatory after favourable s 66(2) finding

When Mr Khanat was sentenced for possessing imported tobacco products with intent to defraud the revenue under Commonwealth legislation the sentencing judge found pursuant to s 66(2) of the *Crimes (Sentencing Procedure) Act 1999* that his risk of reoffending was best addressed if an intensive correction order were to be made. However, the judge then found that general deterrence must be given significant weight because of the serious nature of

the offending and its prevalence in the community. He concluded that a full-time sentence of imprisonment should be imposed. It was contended in ***Khanat v R (Cth)*****[2024] NSWCCA 41** that the judge erred.

The Court unanimously found that a positive finding that the risk of reoffending was best addressed if an offender served a sentence in the community did not mandate or require an intensive correction order to be made. The assessment remains discretionary in accordance with sentencing principles and s 66 of the Act. However, Cavanagh J, Ierace J agreeing and Wilson J dissenting, found that the judge erred in failing to give paramountcy to community safety. The appeal was upheld by the majority and a reduced sentence with a recognizance release order was imposed.

Minimum sentences of imprisonment prescribed for certain offences in the Crimes Act (Cth)

Section 16AAB of the *Crimes Act 1914* (Cth) provides for a minimum term of imprisonment, subject to limited exceptions, for offences including possession of child abuse material under s 474.22A(1) of the *Criminal Code* (Cth). In *R v Delzotto* [2022] NSWCCA 117 it was held that the minimum term of imprisonment prescribed the bottom of the range of appropriate sentences in the same way as the maximum penalty is used to prescribe the upper limit of the range of appropriate sentences. In other words, it is a pre-determined base line for cases which involve the least serious offending. The Court of Criminal Appeal rejected an alternative construction that sentences are to be assessed in the traditional fashion but if that results in a sentence below the minimum the sentence must be increased to that level. This construction of the provision was endorsed by the High Court in ***Hurt v The King; Delzotto v The King*** **[2024] HCA 8; (2024) 98 ALJR 485**.

ICO - community safety the paramount consideration

The statutory obligation imposed on sentencing judges under s 66 of the *Crimes (Sentencing Procedure) Act 1999* was emphasised in ***SR v R*** **[2024] NSWCCA 43.** It provides that community safety is the paramount consideration when a court decides whether to make an intensive correction order. This requires an assessment of whether an ICO or full-time detention is more likely to address the offender's risk of reoffending. Although it had been submitted that an ICO was an appropriate sentencing option, the applicant was ultimately sentenced to a term of imprisonment notwithstanding the judge having found that there was no need for "great emphasis to be laid on personal deterrence", that "protection of the community does not loom at all large", and that the offender had "taken steps to promote his own rehabilitation". The judge made no explicit reference to the provisions of s 66.

On appeal it was contended that the judge had failed to consider the mandatory considerations in s 66. Ierace J held that it was not reasonably possible to infer that the sentencing judge had engaged with the paramount consideration. Harrison CJ at CL agreed with additional reasons, holding that it is not necessary for a sentencing judge to specifically refer to s 66 of the Act nor would a failure to do so be a reliable basis for concluding that s 66 had been completely overlooked. However, failure to reconcile the judge's conclusion that "the protection of the community does not loom at all large" and his decision to impose

full-time custody indicated that the paramount consideration had not been reckoned with. The appeal was allowed and SR was re-sentenced to a 12 month ICO.

Procedural fairness after having reserved judgment on sentence

***Smith v R* [2024] NSWCCA 59** concerned a failure to afford procedural fairness. In sentence proceedings in a regional court the Crown tendered two sentence assessment reports which included that Mr Smith continued to use drugs while receiving abstinence treatment in custody. This was in conflict with a report of Dr Gerald Chew tendered by the defence which indicated that Mr Smith was "substance free" during the same period. Dr Chew diagnosed PTSD in the context of significant trauma which was complicated by Substance Use Disorder. These diagnoses were considered to be linked to the offending behaviour and constituted a mental health impairment and a cognitive impairment. The Crown took no issue with Dr Chew's report and Dr Chew was not called for cross-examination. In a reserved judgment, the sentencing judge noted the inconsistency and found this impacted the weight to be attributed to the latter. She rejected Dr Chew's findings as to the causal link and did not accept that the offender's moral culpability was reduced, nor that reduced weight should be given to general deterrence.

Basten AJA held that in circumstances where there had been no objection to Dr Chew's report and he was not sought to be cross-examined, it was inferred there was no dispute as to Dr Chew's opinions. The parties should have been advised the judge was considering taking a different view and been given opportunity to respond. Adamson JA and Wilson J agreed and suggested some practical measures that could have been adopted (Adamson JA at [4] and Wilson J at [69].

Procedural fairness and having regard to earlier sentencing of same offender

The applicant in ***Tasker v R* [2024] NSWCCA 57** was sentenced for various property crimes by a judge who had sentenced him in 2018 for similar offences. During the course of submissions, the judge read a passage from his remarks on sentence in 2018 in which he had summarised the applicant's subjective circumstances and referenced the history the applicant had provided to a psychologist. Counsel neither requested a copy of the remarks nor sought an adjournment. Mr Tasker contended on appeal he had been denied procedural fairness because the judge had taken into account material that was not before the Court. He submitted that a psychologist report referring to a 2017 report had been tendered in the current proceedings, but that it was unclear whether this report had been before the judge in 2018, or whether the summary that was read out by the judge was taken from another psychological report. The applicant submitted that if the latter was the case, then the judge would have had regard to material that was not before the Court.

McNaughton J held that it would have been preferable for the sentencing judge to hand down to the parties the 2018 sentencing remarks but a failure to do so did not result in denial of procedural fairness. Further, the portion which the sentencing judge had read out to the parties and the material underlying it was available to the applicant at the time of the 2023 proceedings.

Taking into account pre-sentence custody

***Huynh v R* [2024] NSWCCA 61** concerned an appeal against sentence in which it was contended there was error in not allowing for all of the time the offender had spent in custody and thereby backdating the sentence by an equivalent period. The matter was complicated by Mr Huynh having spent 62 days of that period in custody in respect of unrelated offences for which he ultimately received community correction orders in the Local Court. There was no evidence before the sentencing judge as to whether the magistrate had taken into account the 62 days of pre-sentence custody in deciding to impose non-custodial sentences. The Crown told the judge that it was open for him to backdate the sentence from "anywhere" between 311 and 372 days. The judge backdated the sentence by 330 days but did not explain why.

Adamson JA noted the provisions in ss 24 and 47 of the *Crimes (Sentencing Procedure) Act 1999*, requiring regard being had to pre-sentence custody and empowering a court to backdate sentences. She held (at [24]) that absent evidence that the 62 days had been taken into account by the Local Court the offender should have been allowed credit for the entire 372 days.

Objective seriousness findings required for all offences for which sentence to be imposed

In ***Baydoun v R* [2024] NSWCCA 65** the offender was sentenced for various Commonwealth and State fraud-related offences. There was also an offence contrary to s 3LA(6) of the *Crimes Act 1914* (Cth) of failing to comply with an order requiring him to provide police with access to data on a mobile phone found in his possession. It was contended on appeal that the sentencing judge erred in relation to assessing the objective seriousness of the s 3LA offence and also by failing to provide adequate reasons for the indicative sentence for it.

Chen J allowed the appeal, holding that the sentencing judge failed to make any finding as to objective seriousness for the s 3LA(6) offence, an omission that his Honour said was readily apparent by the fact that an express finding on objective seriousness had been made for all other offending. Contrary to a Crown submission, there was no agreed position on the subject so a finding as to objective seriousness was still required to be made. His Honour also found that there was a failure to provide adequate reasoning in relation to this offence; all that had been done was a recitation of the agreed facts and the maximum penalty, omitting the critical step of explaining how those facts informed the sentence imposed. The appeal was allowed but on re-sentence the only variation was to make allowance for the applicant's pre-sentence custody.

Sentencing judges entitled to receive accurate information from practitioners

The sentencing judge in ***WP v R* [2024] NSWCCA 77** was given inaccurate information by the parties as to the statutory entitlement to a discount for a plea of guilty and the applicable maximum penalties and standard non-parole periods for some offences. Wilson J upheld the grounds but ultimately concluded that no lesser sentence was warranted. She urged practitioners appearing before sentencing courts to exercise care in the information

provided to judges. This was particularly the case where child sexual assault offences are concerned because of the many legislative changes over the years. She acknowledged that checking the statutory version which was in force and ascertaining the correct maximum penalties and standard non-parole periods that applied was time-consuming but necessary.

It was coincidentally Wilson J who encountered another case of a sentencing judge being provided with inaccurate information, on this occasion as to whether one of the charges before the court came to it by way of committal or as a related offence, the latter of which would require regard to the jurisdictional sentencing limit of 2 years applying for summary disposition. In ***Brown v R* [2024] NSWCCA 72**, her Honour emphasised the need for judges to be provided with correct information especially in a very busy regional list court where time-poor judges depend upon this.

Finding "exceptional circumstances" per s 20(1)(b)(ii) and (iii) of the Crimes Act 1914 (Cth)

Section 20(1)(b)(iii) of the *Crimes Act 1914* (Cth) provides that where a person has been convicted of at least one Commonwealth child sex offence, the court may order a suspended sentence only if satisfied that there are exceptional circumstances. In ***R v Bredal* [2024] NSWCCA 75** the Crown contended that the making of such an order resulted in the respondent's sentence being manifestly inadequate. Dhanji J dismissed the appeal and concluded (at [58]) that a finding of exceptional circumstances was a matter for the court to determine. His Honour said (at [59]-[63]) that the purpose of the amendments to Pt IB of the Act, which included s 20(1)(b) by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) was to impose heavier penalties on child sex offenders. It followed that the exercise of the court's sentencing discretion as to exceptional circumstances, which was based on an assessment of all of the usual sentencing factors, was to be considered in this context. On this basis, Dhanji J held (at [99]-[118]) that the matters were such that it was open for the sentencing judge to find the case was exceptional and, therefore, sufficient to warrant a suspension of the sentence of imprisonment.

Significant submissions must be explicitly engaged with by sentencing judge

It was contended in ***Whipp v R* [2024] NSWCCA 79** that a submission made on the applicant's behalf had failed to be properly engaged with by the sentencing judge. An expert report had been tendered during sentence proceedings that diagnosed the applicant with complex post-traumatic stress disorder along with substance use disorder and a suspected intellectual disability. The author attributed the complex PTSD to the applicant's experience in a juvenile detention centre where he had been victim to "grave offending" which was said to be both physically and psychologically damaging. The applicant also suffered from trauma-related flashbacks which were sometimes triggered by interactions with other inmates and correctional staff. It was submitted that the cumulative effect of these matters made custody more onerous for the applicant.

Button J held that the sentencing judge failed to explicitly engage with this submission which, his Honour observed, accounted for a significant proportion of the oral submissions. An important matter which arose on these facts was that the applicant was being placed in

a custodial setting identical to the one where he previously experienced psychological and physical damage. On this basis, Button J held that it was incumbent upon the sentencing judge to refer to the matter, and either accept it had some mitigatory role in sentence or explain why it had been rejected. The appeal was allowed and the applicant was re-sentenced.

Pre-sentence custody must only be taken into account once

The applicant in ***McMillan v R*** **[2024] NSWCCA 83** was in custody for a period of 258 days for an armed robbery charge for which he was refused bail. He was thereafter arrested and held in custody for a period of 86 days for unrelated summary offences until community correction orders were imposed for them. There was a further 93 days of custody until sentencing for the armed robbery. The sentencing judge was told by the Crown that only 258 days were solely referable to the armed robbery but it conceded the error on appeal.

McNaughton J upheld the appeal, concluding that the entire period in custody for the subject offence, namely the 258 days and 93 days, should have been taken into account. In re-sentencing, the Court was provided with the Local Court transcript which indicated that the magistrate had taken into account the 86 days' custody in deciding to impose community correction orders. As a result, it was held that this period of dual custody should not be taken into account again in sentencing for the armed robbery.

Totality principle must be considered when there is pre-sentence custody that includes service of other sentences

The applicant in ***Murray v R*** **[2024] NSWCCA 107** had been in continuous custody prior to being sentenced in the District Court but for part of that period he was also serving some sentences imposed in the Local Court. The sentencing judge backdated his sentences in the District Court only for custody that was solely referable to the offences which the applicant was being sentenced but made no mention of having regard to the principle of totality in relation to the Local Court sentences. It was contended and accepted on appeal that the judge erred in this respect. The totality principle extends to a consideration of any offences for which an offender is or was serving and is not limited to those for which the offender is being sentenced. Yehia J provided a summary of relevant principles at [56]-[60].

Making a recognizance release order follows determination of length of sentence

Section 19AC(1) of the *Crimes Act 1914* (Cth) requires that a recognizance release order (RRO) be made when federal sentence(s) do not exceed 3 years. A RRO of 18 months was made in ***Curle v R*** **[2024] NSWCCA 117** which was to commence 21 months after the commencement of the effective term of 29 months imprisonment. It was contended on appeal that s 19AC(1) required the sentencing judge to take into account the period of the RRO when determining whether the sentence or sentences imposed exceeded a period of 3 years, and in this case it was 39 months.

Stern JA said (at [40]) that the language of s 19AC(1) stood strongly against the applicant's contention and that as a matter of logic, it was clear that the sentence (or total effective or aggregate sentence) was already determined when it came to consider whether to make a RRO (if 3 years or less) or a non-parole period (if in excess of 3 years). At [41] Stern JA said this was also apparent from Parliament's use of the words "in respect of that sentence" at the end of the subsection and by s 19AC(1)(b) which directed attention to the period of the aggregate federal sentence or sentences.

Findings must be expressed about matters which are in issue

***Pauls v R* [2024] NSWCCA 123** concerned sentencing in which there were disputed issues concerning remorse, likelihood of reoffending and prospects of rehabilitation. The judge referred to the evidence and submissions but it was contended in an application for leave to appeal that he failed to make findings. The Crown had responded that it could be inferred that the judge did consider each matter and was unable to reach positive findings in mitigation. Mitchelmore JA did not accept this. The judge had described the applicant as having a substantial subjective case but how the three potentially mitigating matters were factored into the sentencing process, if they were at all, was opaque.

The judgment of Mitchelmore JA is particularly useful for her concise discussion of authorities in relation to the duty of a judge to provide reasons and appellate consideration of complaints about an inadequacy or failure to do so: see [40]-[43].

Error in finding bail conditions amounted to quasi-custody

In sentencing for aiding and abetting the attempted possession of a commercial quantity of cocaine a judge backdated the sentence by 6 months to allow credit for the offender having been subject to onerous bail conditions amounting to quasi-custody. For 18 months he had been required to report daily to police, to live with his mother rather than alone in his own home, and he was subject to a 12-hour overnight curfew except when attending work or children's activities. After 18 months the reporting was reduced to 5 days/week, he was allowed to return to live in his own home, and the curfew hours were reduced to 9 hours.

In ***R v Butler* [2024] NSWCCA 133**, Campbell J acknowledged that the question was one of fact and degree and that judges have a wide discretion. However, he observed that most grants of conditional bail involve some restrictions on the person's liberty. For serious charges such as the case here the conditions were of a type commonly imposed by the Supreme Court. Curfews, frequent reporting, and residence conditions are almost "standard conditions of bail". Most people charged with strictly indictable offences would be entitled to make the same claim if this was regarded as "quasi custody". The Crown's ground of appeal was upheld, although the appeal was dismissed in the court's discretion.

Juvenile criminal histories and the constraint upon their admissibility

Section 15 of the *Children (Criminal Proceedings) Act 1987* provides, in effect, that a Children's Court criminal history is not admissible in subsequent proceedings if the person

has not in the 2 years prior to commencement of the subsequent proceedings been subject to punishment for some other offence. (When a conviction was recorded for a matter dealt with on indictment the prohibition does not apply.) A criminal history that was conceded to be the subject of this prohibition was tendered in the sentence proceedings for sexual assault offences considered in ***Dennis v R* [2024] NSWCCA 137**.

The judge had made favourable findings that the record did not include any sexual offences and that there was a period of non-offending which augured well for prospects of not reoffending and rehabilitation. The Crown sought to support admissibility by reference to the judgment of N Adams J in *Dungay v R* [2020] NSWCCA 209 at [88] in which her Honour referred to such criminal histories being of relevance for a variety of reasons, e.g. to demonstrate a disadvantaged childhood. Garling J however held (at [62]-[63]) that nothing her Honour said there was in derogation of the unqualified prohibition in s 15, even where the contents may be useful in an attempt to mitigate sentence.

Motivation for offending relevant to objective seriousness as well as moral culpability

A mother saw her daughter lying face up, motionless on the ground in a shopping centre car park with an assailant leaning over her and punching her repeatedly. She drove her car at them to try and nudge the assailant off her daughter but caused the death of both. She was found guilty by a jury of two counts of manslaughter. It was contended on appeal in ***Britton v R* [2024] NSWCCA 138** that the sentencing judge erred in taking into account the offender's motivation only in relation to her moral culpability and not in relation to the assessment of the objective seriousness of the offence. The ground of appeal was upheld by Stern JA, Rothman and Yehia JJ. Per Stern JA (at [3]) the fact that the offender was not seeking to engage in violence but was motivated by an overwhelming desire to assist her daughter had a serious bearing on her decision to act as she did. Accordingly, the sentencing judge failed to have regard to a material consideration.

Being subject to an ADVO when offending is an aggravating factor
Non-parole periods for indicative sentences should not be set arbitrarily

In the Crown appeal in ***Director of Public Prosecutions (NSW) v Wolinski* [2024] NSWCCA 139** it was contended that the sentencing judge erred by failing to take into account that some of the child sex offences were committed while the respondent was subject to an apprehended domestic violence order made to protect the victim. Another complaint was that in specifying non-parole periods for indicative sentences where a standard non-parole period applied, the judge said this was "just a technicality" and arbitrarily set NPPs at 50% of the head sentence. For the aggregate sentence the NPP was set at 67%.

Price AJA held that the prohibitions imposed on the respondent's behaviour amounted to him being on conditional liberty and operated as an aggravating factor under s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999* as it would be under the general law. It was no different to offending whilst on a bond, suspended sentence, or parole.

Section 54B(4) of the Act obliges a court to "indicate … the non-parole period" that would have been set if a separate sentence had been imposed. This is not a mere "technicality"

but is a statutory obligation. Together with the head sentence it assists application of the totality principle and allows victims of crime and the public to understand how seriously the court regarded the individual offence. It also assists with consideration of parity between co-offenders.

Compliance with s 16A(2AA) of Crimes Act 1914 (Cth) mandatory for Commonwealth child sex offences

McNaughton J allowed the appeal in ***Elwdah v R* [2024] NSWCCA 150** upon holding that the absence of any express or implied reference to having considered the "objective of rehabilitation" in a judge's remarks on sentence in respect of a Commonwealth child sex offence indicated a failure to take into account the provisions of s 16A(2AAA) of the *Crimes Act 1914* (Cth). It mandates that when sentencing for such an offence "the court must have regard to the objective of rehabilitating the person, including by considering whether it is appropriate" to impose conditions about rehabilitation or treatment options, or, if imposing imprisonment, to include sufficient time for the person to undertake a rehabilitation program.

Standard of proof for finding facts on sentence adverse to an offender should be acknowledged

***Al Shamari v R* [2024] NSWCCA 155** concerned a sentencing exercise in which the judge was required to resolve disputes as to the facts. She did not mention in her sentencing remarks the principle that the standard of proof to be applied to facts found adversely to an offender is beyond reasonable doubt. A complaint that she did not apply the correct standard of proof became a ground of appeal. Kirk JA inferred from a number of features, including the judge's "long experience in criminal law" that the correct standard had been applied. However, he observed that the principle is simple and foundational in Australian law and it was apposite given there were disputes as to the facts upon which the offender was to be sentenced. He said (at [28]): "It would have been appropriate in that context for her Honour to acknowledge in terms the need to apply that standard of proof".

Duty of Crown to act with fairness and integrity on sentence

In a severity appeal relying upon a parity ground concerning lesser sentences imposed upon co-offenders the Crown argued that Mr Keen's role was in line with his co-offenders while in a Crown appeal against the asserted inadequacy of their sentences it had submitted that he was a low level functionary or labourer subordinate to them. This prompted Wilson J to say in ***Keen v R* [2024] NSWCCA 157** at [8]-[10] that while there is no estoppel or issue estoppel in the criminal law, the Crown must act with fairness and integrity. There can be criticism where different approaches to the same subject appear to have been dictated by convenience or a desire to secure a particular result.

SENTENCING - SPECIFIC OFFENCES

Value of a commercial quantity of a drug, GBL specifically, is relevant on sentence

In ***Bott v R* [2023] NSWCCA 255** the offender was sentenced for attempting to possess a commercial quantity of a border-controlled drug, namely 755kg of gamma-butyrolactone (GBL). The prescribed commercial quantity for this drug is 1kg and the maximum penalty is imprisonment for life. He asserted on appeal that the sentence of 11 years 3 months was manifestly excessive. The Court accepted the argument and replaced the sentence with one of 7 years 6 months. In doing so it accepted that the High Court had been critical of an approach by which courts classified different drugs based on the court's perception of the level of harm they caused: *Adams v The Queen* (2008) 234 CLR 143; [2008] HCA 15. However, Dhanji J concluded that the court should follow *Director of Public Prosecutions (Cth) v Maxwell* (2013) [2013] VSCA 5; 228 A Crim R 218 in which an offender's anticipated financial return and, where known, the wholesale value of the drug, were treated as features of ongoing relevance.

Manslaughter – no range of sentence for any category of manslaughter

The offender in ***Baker v R* [2023] NSWCCA 262** argued that her sentence for manslaughter by criminal negligence was outside the available range for manslaughter of this type. The facts were somewhat unusual in that a significant cause of the death of her grievously ill former partner was her neglectful care of him whereby he experienced extreme weight loss, had developed pressure sores, and had been left in soiled bed linen. Beech-Jones CJ at CL held that there is no "range" of sentence for this or any other type of manslaughter. The offence had been found to be of "high seriousness" and against the maximum penalty of imprisonment for 25 years the sentence of 5 years was not manifestly excessive.

Sexual assault – objective seriousness where state of mind is recklessness

In ***Alenezi v R* [2023] NSWCCA 283** took a randomly encountered, highly intoxicated, woman away from a well-lit populated street to a dark laneway where he put her on the ground, removed her clothes and a tampon, and proceeded to have penile/oral and penile/vaginal intercourse. After half an hour he took her wallet and left her naked in the laneway, returning soon after and throwing the wallet at her. It was argued on appeal that it was not open for the sentencing judge to find the objective seriousness of the primary offence against s 61I of the *Crimes Act 1900* was above the mid-range. (The penile/oral intercourse offence was taken into account on a Form 1).

Basten AJA held (at [20]) that the Crown's response to this contention should be accepted, namely that the applicant's state of mind was only one factor in assessing objective seriousness and there is no reason in principle why recklessness could not support a finding of objective seriousness above the midrange.

Terrorism-related offences – taking into account unlikelihood of grant of parole

The applicant in ***Hatahet v R* [2023] NSWCCA 305** sought leave to appeal in respect of a sentence imposed for engaging in hostile activity in a foreign country against the government of that country, contrary to s 6(1)(b) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). He had become eligible for release on parole but parole was refused by the Commonwealth Attorney General because there were no "exceptional circumstances" as required by s 19ALB of the *Crimes Act 1914* (Cth).

Basten AJA held (at [82]-[85]) that the unlikelihood of parole being granted to the applicant because of s 19ALB (together with serving most of the sentence in the HRMCC) caused the incarceration of the applicant to be more onerous and warranted a reduction of the sentence imposed by the sentencing judge.

However, it was contended in ***R v Hatahet* [2024] HCA 23; (2024) 98 ALJR 863** that the CCA erred in concluding that the application of s 19ALB was a relevant sentencing consideration. The appeal was allowed. The plurality said that consideration by a sentencing court of s 19ALB would turn the legislative intention of the provision "on its head". Further, it would be too speculative for a sentencing judge to make a prediction about the Attorney-General's determination of parole. The Court further emphasised the distinct role of the judiciary and the executive, holding that consideration of an offender's prospects of release of parole did not fall within the judicial function and would be inconsistent with the core object of sentencing, this being to adequately punish the offender.

Child sex offences – relevance of having been sexually abused as a child

A psychologist's report which included the offender's account of having been sexually and physically abused by his brother when the offender was aged between 8 and 13 was tendered on sentencing for the offender having sexually abused two nephews when he was aged 17-18 and they were aged 6-7 between 1976 and 1986. He complained on appeal that the sentencing judge failed to assess how childhood sexual abuse reduced his moral culpability. The offender did not give evidence in the sentence hearing.

In ***WW v R* [2023] NSWCCA 311** Wilson J said (at [87]) that being subjected to childhood abuse may, but not will, be a feature relevant to the determination of sentence. She concluded (at [91]) there was a lack of satisfactory evidence that the events actually occurred; or that they had any adverse impact upon the offender; or that they had any causal role in his commission of the offenders.

Drug supply – financial gain limited to financing drug use or repaying a drug debt

In ***Robertson v R* [2024] NSWCCA 22** it was held that financial gain from drug dealing that is beyond obtaining the ability to fund an addiction or repay drug debts may elevate the objective seriousness of a drug supply offence. However, doing so for only those purposes without more is neither aggravating nor mitigating.

Section 115 of the Crimes Act 1900 - a historical anachronism

Section 115 of the *Crimes Act 1900* provides that anyone who has committed an indictable offence who then commits an offence against s 114 (e.g. being armed, or having face blackened, or entering a building with intent to commit an indictable offence or possessing housebreaking implements) is liable to imprisonment for 10 years. The appellant in ***Bazzi v R* [2024] NSWCCA 35**, was charged with a large number of property offences including one of entering a building with intent to commit the indictable offence of larceny. He was also charged under s 115. A judge sentenced him to an aggregate sentence of 3 years and 1 month. The indicative sentence for the s 115 offence was 9 months.

Simpson AJA (Weinstein J agreeing) referred (at [55]) to the fact that objective gravity of the s 115 offence needed to be assessed and that depended on its *actus reus*, but there was no *actus reus*. She proposed (at [57]) that if such an offence were to be dealt with separately it would be inappropriate to impose any penalty. It would be equally inappropriate to indicate any sentence in dealing with it as part of an aggregate sentence. Button J found the sentencing judge did not err but observed (at [98]) that "a more fundamental solution" may be that upon obtaining a conviction for a s 114 offence it would be very difficult to envisage it would be appropriate in 2024 for the Crown to also seek a conviction under s 115.

Persistent sexual abuse of a child – whether specific occasions of offending need to be identified on sentence

To prove the offence in s 66EA of the *Crimes Act 1900* of persistent sexual abuse of a child it is necessary to establish there was an "unlawful sexual relationship with a child". That exists when "an adult engages in 2 or more unlawful sexual acts with or towards a child over any period". Sub-s (4) provides the prosecution is not required to allege the particulars of any such act as it would if it was charged as an offence in itself; it is required to allege the particulars of the period of time over which the relationship existed. Sub-s (5) provides the jury is not required to be satisfied of the particulars of any specific act and jury members do not need to agree on which acts constitute the unlawful sexual relationship.

In ***MK v R* [2024] NSWCCA 127** it was contended that the sentencing judge erred by relying upon the victims' estimated frequency of the offending which led to him being sentenced for a course of conduct. The judge should have identified specific occasions and treated them as representative of a course of conduct. It was also submitted that the judge was required to consider the specific constituent sexual acts in assessing the seriousness of the offending. In rejecting these contentions, Sweeney J held that they were contrary to the terms of the provision, its intent and purpose, and the mischief it was intended to address. Sub-ss (4) and (5) are relevant to sentencing as well as proof of the offence, particularly given the judge's findings of fact must be consistent with the jury's verdict.

Persistent sexual abuse of a child – Crown should particularise the unlawful sexual acts relied upon

A sentence for persistent sexual abuse of a child contrary to s 66EA of the *Crimes Act 1900* was impugned because the judge took into account an offence which, unlike others, had not

been particularised in the indictment. The appeal was allowed on another basis in ***Nolan v R* [2024] NSWCCA 140**. However, on this point, Sweeney J (with the concurrence of the other judges) observed (at [37]) that whilst particularisation of specific offences is not required pursuant to s 66EA(4), it was preferable that to the extent it is possible and in the interests of fairness and transparency, the Crown should particularise in the indictment any specific acts. (Campbell J developed this point in further detail (at [3]-[10].)

The same issue arose in ***RA v R* [2024] NSWCCA 149** where it was held that the sentencing judge had proceeded correctly in sentencing for the unlawful sexual relationship and by not confining consideration to particularised offences.

SUMMING UP

Dispelling misconceptions about sexual assaults by giving directions not required by statute

Directions as to consent which are intended to disabuse a jury of certain misconceptions in ss 292-292E of the *Criminal Procedure Act 1986* took effect on 1 June 2022 and extended to proceedings for an offence alleged to have been committed before that date "but not if the hearing of the proceedings began before the commencement of the amendment". Such directions were given in a trial that commenced with empanelment of a jury on 5 July 2022. It was contended on appeal that there was no authority for the directions to have been given.

In ***Lee v R* [2023] NSWCCA 203**, Kirk JA (at [76]-[79]) accepted that the proceedings began when the accused was first arraigned in the trial court, rather that when the trial commenced. This has been the accepted construction of a standard transitional provision. However, his Honour went on (at [88]-[89]) to say that it would be surprising if directions directed to dispelling misconceptions were considered the cause of an injustice simply because they were given without any legal requirement to do so. Consent was not the central issue before the jury but it had not been conceded.

Lies — consciousness of guilt — Edwards — Zoneff

It was contended in ***MM v R* [2023] NSWCCA 236** that a trial judge should have given a direction in accordance with *Zoneff v The Queen* (2000) 200 CLR 234; [2000] HCA 28. It concerned evidence that when the appellant's daughter told her mother that the appellant had been touching her, the mother turned to him and asked, "How could you" to which he replied calmly, "I don't know what you're talking about". The mother gave evidence that "it was bizarre" and it was "Like I was asking him what he wanted on his toast". The Crown Prosecutor argued that the jury "might think that his reaction might have been different. You might think that was the reaction of someone who had in fact committed that horrendous crime". The Crown subsequently disavowed reliance upon consciousness of guilt. Defence counsel did not seek an anti-consciousness of guilt direction and none was given. It was agreed that the trial judge would remind the jury that the accused had denied the allegation and tell them that "people do not always act predictably in certain situations".

Adamson JA held that no miscarriage of justice arose from the manner in which the trial judge dealt with the issue. The fact no request was made for a *Zoneff* direction indicated an acceptance by defence counsel that he considered the risk of the jury engaging in consciousness of guilt reasoning to be so low as to not warrant it.

Direction to acquit both accused if not satisfied of joint criminal enterprise was erroneous

Basten AJA upheld a complaint in ***Smith v R* [2023] NSWCCA 254** that at face value might appear surprising. Two accused were tried for causing grievous bodily harm with intent. The case against the co-accused was strong. He admitted having stabbed the victim but claimed he did so in self-defence. Ms Smith denied having also stabbed the victim and none of the witnesses present except for the victim said that she did. The trial judge was persuaded by the Crown to direct the jury that unless they were satisfied beyond reasonable doubt of the existence of a joint criminal enterprise they were obliged to acquit both accused. The appellant complained that this was unfair to her because the jury may have been reluctant to acquit the co-accused so they may have convicted her in order to convict him. Basten AJA found this to be plausible and so she had lost a real chance of acquittal.

Directing a jury on the real issues in dispute and not those which are not

***Agnew v R* [2024] NSWCCA 5** was concerned with a trial for sexual intercourse without consent in which the defence case was that no sexual activity occurred. The trial judge told the jury that the parties' approach was simply that if the jury was satisfied beyond reasonable doubt about the honesty and accuracy of the complainant's account the Crown will have proved its case and if not, then the accused must be acquitted. On appeal, however, it was contended the judge erred in deflecting the jury's consideration of the element of the offences referrable to the accused's knowledge that the complainant was not consenting.

In dismissing this ground of appeal, citing *Hargraves v The Queen* (2011) 195 CLR 257; [2011] HCA 44 at [42], Price J held (at [45]) that a judge's responsibility is to decide "what are the real issues in the case", to "tell the jury what those issues are", and to "instruct the jury on so much of the law as the jury needs to know to decide those issues". That is what the trial judge in this case did.

Directions did not mandate a sequence with which issues could be considered by jury

The applicant in ***Chalabian v R* [2024] NSWCCA 47** was found guilty by a jury of dealing with money in excess of $1M that was proceeds of crime, believing at the time of dealing to be such proceeds contrary to s 400.3(1) of the *Criminal Code* (Cth). There were statutory alternative offences in s 400.3(2) and (3) in the event an offender's state of mind was not belief, but was reckless, or negligent. It was contended on appeal that the trial judge's directions to the jury about the order in which the alternative verdicts were to be considered interfered with the jurors' freedom to organise their processes of reasoning and deliberation.

Fagan J considered the case was like that in *Stanton v The Queen* [2003] HCA 29; (2003) 77 ALJR 1151 in that there was a single issue, the accused's state of mind. There was nothing in what the trial judge said which suggested jurors should not consider the mental states of recklessness or negligence until after they had reached a conclusion as to whether the applicant was guilty of believing that the money was proceeds of crime. The practical reality was that deliberation about whether the applicant had the mental state of belief could not have been undertaken without concurrent consideration of recklessness or negligence.

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