ANNUAL CRIMINAL APPEAL REVIEW

2020

The Honourable Justice R A Hulme

10 September 2020

CONTENTS

INTRODUCTION

This paper would normally have been prepared for the Annual Conference of the Supreme Court of New South Wales. The 2020 conference has been cancelled for reasons associated with the COVID-19 pandemic but the paper has been prepared nonetheless. As usual, its purpose is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the past 12 months.

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

I am most grateful for the assistance in the compilation of this paper provided by Ms Kirsten Gan BIGS LLB (Hons I) and Mr Henry Robinson BA LLB (Hons).

APPEALS

Judges' reports under s 11 of the Criminal Appeal Act 1912 – whether report can be in the form of an email from judge to CCA Registrar

When sentencing for 27 counts of dishonestly obtaining a financial advantage by deception, the sentencing judge accepted a submission that the factor that the offences were committed for financial gain aggravated the offence: s 21A(2)(o) *Crimes (Sentencing Procedure) Act 1999* (NSW). In ***Whyte v R*** **[2019] NSWCCA 218**, it was contended that to do so was an error pursuant to s 21A(2) which precludes courts from having regard to aggravating factors that constitute an element of the offence.

The sentencing judge sent the CCA Registrar an email saying that he agreed that he ought not to have taken that factor into account. There was an issue as to whether the Court could treat the email as a report under s 11 of the *Criminal Appeal Act 1912*. Simpson AJA with Ierace J agreeing (Wilson J dissenting on this point) held that the judge's email could be treated as a s 11 report, to the extent and for the purpose of confirming that the sentencing judge had **not** taken financial gain into account as an aggravating factor, as might have been permissible, because he considered it to be beyond the norm for such offences.

Appellate review of decision not to discharge jury

Mr Hamide stabbed a man in the hip. He then solicited a friend to murder the same man. Prejudicial evidence was spontaneously adduced throughout the trial – that Mr Hamide was evil, a backstabber, involved in an ambiguous drug dealing enterprise and arrested by the Middle Eastern Organised Crime Squad. The trial judge refused four applications to discharge, but directed the jury not to have regard to anything beyond the specific charges in front of them.

On appeal, Bell P held that although the decision to discharge is discretionary, the appeal under s 5(1) *Criminal Appeal Act* lies not against the discretion but against the conviction: ***Hamide v R* [2019] NSWCCA 219**. Therefore, the test is not *House v The King*. His Honour considered each piece of irregular evidence in turn, concluding that any imbalance was cured by the directions given.

NOTE: An application for special leave to the High Court was refused, this case not being an appropriate vehicle: [2020] HCATrans 85.

Re-sentence following successful appeal to an identical aggregate sentence.

A primary school teacher was found guilty of multiple sexual offences against four students. For some reason, he was sentenced individually for the 15 counts and, with some partial accumulation, the overall effective sentence was 11 years' imprisonment. The teacher contended on appeal that the individual sentences were manifestly excessive. The contention was upheld: ***Thomas v R* [2019] NSWCCA 265**. Payne JA accepted the submission that the objective circumstances for the individual counts did not justify sentences that were near the halfway point of the maximum penalty; most of the individual sentences were manifestly excessive.

New individual sentences were indicated in the re-sentencing process and an aggregate sentence was imposed. The full-term and non-parole period of the aggregate sentence was the same as the previous total effective sentence. It was said (at [61]) that this was because it was concluded that the previous total sentence was not manifestly excessive.

Proviso in s 6(1) proviso – error in misdirection on element of offence

A woman was punched in the face, and then sexually assaulted, in 1994. That evening, she made statements to a doctor and a police officer detailing the alleged offences. As the woman had died in 2004, those statements were admitted as hearsay evidence in the trial against the applicant, which took place in August 2017 following his identification as a suspect and later DNA profile match to a semen sample taken by the doctor in 1994. The jury were directed on mental element of the offence in force at the time of the trial – s 61HA *Crimes Act 1900* (NSW) – being that one of the ways the Crown can establish the *mens rea* is by proving the accused had no reasonable grounds for believing the complainant consented. However, the applicable law was the law at the time of the offence, and relevantly, the then s 61R did not contain the 'no reasonable belief' component. The Crown conceded there was a misdirection. The issue then was whether the proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW) applied; in other words, that the appeal on this ground be allowed unless the Court of Criminal Appeal concluded that "no substantial miscarriage of justice has actually occurred".

The proviso was applied: ***Priday v R* [2019] NSWCCA 272**. Macfarlan JA referred to *Kalbasi v Western Australia* (2018) 264 CLR 62; [2018] HCA 7. There, it was held that the proviso may apply even if the error arises from misdirection on an element of the offence. In the present case, there were two counts. Count 1 was the assault occasioning actual bodily

harm (the punch immediately prior to the assault). Count 2 was the aggravated sexual assault. On the appellant's case there was no punch – rather, the sexual intercourse was consensual, following on from kissing and the complainant undoing the appellant's trousers. Because the jury found the appellant guilty of the preceding assault, Macfarlan JA held that the jury could not have found the appellant guilty on the basis that he had an honest but unreasonable belief that the complainant consented to the intercourse. The conviction on Count 1 indicated that the jury accepted the complainant's account and did not consider there was a reasonable possibility that the appellant's version was correct. The conviction on Count 2 was on the basis of the complainant's account, being that the appellant positively knew there was no consent. There was no miscarriage of justice.

Denial of access to significant evidence a reason to refrain from intervention on a Crown appeal

In ***HT v The Queen*** **[2019] HCA 40,** it was held that the Court of Criminal Appeal should have refrained from intervening and increasing an inadequate sentence where the respondent was denied procedural fairness because she was denied access to material relating to her assistance to authorities because of a police claim of public interest immunity.

Sentence not manifestly excessive merely because different to statistics and comparable cases

The appellant in ***Hooker v R*** **[2019] NSWCCA 283** had been sentenced on two drug supply matters in the District Court. The second offence was committed while on bail for the first. Other offences were taken into account on a Form 1. The appellant provided no evidence at the sentence hearing beyond the sentence assessment report. The appellant submitted on appeal that the sentence was manifestly excessive because of its disparity with Judicial Information Research System statistics. The appellant also argued that the quantity of drug limited the objective seriousness of the offending. Hoeben CJ at CL held, dismissing the appeal, that drug quantity is a material but not a determinative factor. In addition, his Honour reiterated that statistics provide a range of sentences without demonstrating their unique factors, applicability or correctness. Statistics therefore do no fetter the discretion of the sentencing judge to any significant degree.

Criminal Appeal Rules (NSW) and Criminal Appeal Act 1912 (NSW) – power of Court of Criminal Appeal to reconsider, vary and set aside its own orders

In ***El Ali v R (No 2)*** **[2019] NSWCCA 289**, the appellant sought the review and variation of orders made by the Court of Criminal Appeal ('CCA') several days after those orders were entered. The appellant alleged that the Court had not provided express reasons for dismissing two grounds of appeal. The first issue was jurisdictional. The Court (Basten JA, Simpson AJA; N Adams J) held that the CCA has the power to vary its own orders flowing from both r 50C *Criminal Appeal Rules* (NSW) and s 12(1) *Criminal Appeal Act 1912* (NSW).

The latter empowers the CCA to borrow the powers of the Supreme Court in civil appeals and applications.

Rule 50C allows an application to vary or set aside orders to be brought (with the CCA's leave) within 14 days of entry. Although the failure of the two grounds was a necessary consequence of the original reasons, the Court here granted leave and addressed the grounds specifically for the sake of transparency. The Court noted, however, that it need not respond to all submissions on appeal – particularly where those submissions are repetitive or obviously wrong.

Administrative errors that do not impact discretion do not trigger a resentencing requirement under Kentwell v the Queen

The offender in ***Diri v R*** **[2019] NSWCCA 319** was sentenced in the District Court for several drug supply offences. At sentencing on 12 April 2019, the judge ordered a 9 month backdate to 15 July 2018. In fact, a 9 month backdate should have commenced on 12 July 2018. The offender appealed on this ground, as well as a ground that the sentencing judge erred in assessing objective seriousness.

Davies J upheld the first ground but did not embark on re-sentencing. His Honour held that the backdating error was purely administrative and had no effect on the sentencing judge's discretion, so therefore did not require resentencing per *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37. The sentence was amended to be backdated to 12 July 2018. The objective seriousness ground was dismissed, as the assessment was well within the judge's discretion.

Factors influencing discretion to order new trial – s 8 Criminal Appeal Act 1912

In ***A2 v R; Magennis v R; Vaziri v R*** **[2020] NSWCCA 7***,* the Court considered whether to exercise its power to order a new trial under s 8 *Criminal Appeal Act 1912* (NSW). Convictions for female genital mutilation had been quashed in the CCA, but a Crown appeal to the High Court was upheld in *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35; (2019) 93 ALJR 1106. The matter was remitted to the CCA for determination of one ground, which was then abandoned.

The Court (Hoeben CJ at CL, Ward JA and Adams J) granted a retrial. The factors in favour included that there was a reasonable prospect of conviction, the abandonment of the unreasonable verdicts ground, and that it would not be unfair to retrial the appellants. The error in interpretation was not the fault of the Crown. Most importantly, the public interest in the administration of justice required the resolution of the charge. The Court considered a new trial the most effective option to remedy any potential miscarriage of justice.

Crown seeks to re-open and adduce fresh evidence in applicant's severity appeal

The offender in ***Barrett v R*** **[2020] NSWCCA 11** pleaded guilty to kidnapping, acts of indecency and murder. He detained, bound and gagged the victim – his wife's niece – in

their shared home, photographed her, stabbed her 31 times and disposed of her body by throwing it off a cliff into a blowhole. After judgment was reserved, the Crown sought leave to bring fresh evidence that the victim was violently sexually assaulted while she was detained.

Garling J dismissed the motion for three reasons. Firstly, there was no challenge to the findings of fact below. Secondly, the new evidence was disputed, and the CCA is not suited to resolving factual disputes. Thirdly, the Crown could simply bring new charges, so there was no injustice in denying the application. His Honour dissented on the dismissal of the appeal. Bathurst CJ (Wright J agreeing) held that the 46 year aggregate sentence (34 years, 6 months non-parole) was severe but not disproportionate.

Unreasonable verdict – appellate court should not view recorded evidence unless in an exceptional case for a real forensic purpose

Pell was convicted of child sexual offences in a second jury trial, the first having been unable to return a verdict. The prosecution were obliged to call witnesses who gave evidence of practices inconsistent with the complainant's account. While leave to cross-examine was granted, much of this evidence went unchallenged – the prosecution sought to show that the practices left open a reasonable *possibility* of the offending taking place. The High Court held unanimously that, in fact, the prosecution were required to exclude the reasonable possibility of the offending *not* taking place – an issue further confused by defence counsel's assertion of "impossibility": ***Pell v The Queen*** **[2020] HCA 12**.

Pell appealed, unsuccessfully, to the Victorian Court of Appeal, which watched the video recordings of evidence and conducted a view of the cathedral. The High Court criticised this, holding that the mere availability of recordings is not enough to justify watching them on appeal – there must be some real forensic purpose, likely only to arise in an exceptional case on application by the parties.

The advantage of the jury is not the mechanical or technical advantage of access to the evidence (the sort of advantage replicated by recordings), but a "constitutional" advantage: the jury's role as a unanimous representative of the community leaves it best placed to determine credit and reliability. An appellate court's analysis, therefore, should proceed on the basis that the jury assessed the complainant's evidence as credible and reliable, and ask – notwithstanding that assessment – whether a rational jury should have entertained a reasonable doubt.

Here, the unchallenged evidence of direct inconsistencies and inconsistent practices should have enlivened a reasonable doubt. The conviction was quashed and a verdict of acquittal entered.

Application of s 25AA Crimes (Sentencing Procedure) Act to CCA re-sentencing where it came into force between sentence and appeal

The offender in ***Corliss v R*** **[2020] NSWCCA 65** appealed his sentence for historical child sexual offences. Between his sentence and his appeal, s 25AA *Crimes (Sentencing Procedure) Act 1999* came into force.

Johnson and Lonergan JJ, in separate reasons, dismissed the appeal. Johnson J held, Lonergan J agreeing, that if the Court had proceeded to re-sentence, he would have applied s 25AA *Crimes (Sentencing Procedure) Act 1999*. The language of the provision, confirmed by extrinsic materials, evinced a clear intent to displace any benefit an offender might glean from the historical nature of their offending. Its application to a court on re-sentencing, his Honour held, stemmed from the inclusion of the CCA in the definition of "a court" in s 3 *Crimes (Sentencing Procedure) Act 1999* and from the present tense of "is warranted in law" in s 6(3) *Criminal Appeals Act 1912*. (Brereton JA dissented.)

A sentence does not become manifestly excessive because of COVID-19

Mses Borg and Gray were sentenced for supplying a commercial quantity of meth. Ms Borg appealed, contending manifest excess while Ms Gray's appeal concerned manifest excess and parity. In Ms Borg's submission, COVID-19 was relevant not only on re-sentence but also in determining manifest excess. No evidence or authority was relied on – Ms Borg submitted, "the pandemic does not accord with principle". In ***Borg v R; Gray v R* [2020] NSWCCA 67**, Adamson J rejected this submission, noting that the Court hasn't the jurisdiction to overturn a sentence that was not excessive at the time it was imposed. McCallum JA agreed, finding that this form of post-sentence review was properly the domain of the Executive.

Indicative sentences nominated notwithstanding conclusion no lesser aggregate sentence warranted

The offender in ***Maxwell v R* [2020] NSWCCA 94** was sentenced for 17 counts of child sexual offences against his daughter. The Crown conceded the sentencing judge erred by referencing standard non-parole periods in formulating the indicative sentences, given that those SNPPs were not operative at the time of the offending. Johnson J noted that the CCA should outline indicative offences when resentencing, particularly where those indicatives were impugned. Ultimately, his Honour came to an aggregate sentence that was higher than that below, so the appeal was dismissed.

Application of Bugmy where not raised at sentence despite evidence

The applicant in ***Kliendienst v R* [2020] NSWCCA 98** appealed his sentence for glassing a man who slept with his partner four years earlier. There was substantial uncontested evidence that the applicant was exposed to violence and alcohol abuse as a child, but there was no explicit reference to *Bugmy*. N Adams J granted the appeal on the ground that, inter alia, there should have been express recognition that the violent offending was caused in part by the applicant's disadvantaged upbringing, despite the failure of counsel below to submit on it.

Sentence appeal – submissions on excessive indicative offence do not demonstrate excessive aggregate sentence

The offender in ***TB v R*** **[2020] NSWCCA 108** committed six offences across two home invasions, including murder as part of an extended joint criminal enterprise. On appeal, the offender argued that a 38 year aggregate sentence was excessive because his liability for the murder was remote and he otherwise had a strong subjective case. Hoeben CJ at CL held, dismissing the appeal, that any excess in the indicative sentence for murder was of limited use in determining excess in the aggregate, because there was no way to tell how much accumulation and concurrency there was as between the murder sentence and those for the other very serious offences.

Inadvertent sentencing error does not require full resentencing

The trial judge in ***Zeiser v R*** **[2020] NSWCCA 154** intended to impose the same sentence for armed robberies on the applicant and his co-offender (adjusted for the co-offender's discounts for pleas of guilty). The sentence imposed did not match this intention because the judge neglected to apply a plea discount for one of the offences. The Court held that this was merely an error of inadvertence that could be corrected without the full *Kentwell* re-sentencing exercise.

BAIL

Bail or stay sought pending special leave application

Mr Karout sought special leave to appeal to the High Court following the CCA's dismissal of his sentence appeal. In addition, he sought bail, or in the alternative a stay of his sentence, pending the application. In ***Karout v Director of Public Prosecutions (NSW)*** **[2020] NSWCCA 15**, Johnson J refused both applications. His Honour held that the Court had no jurisdiction under s 67(1)(d) of the *Bail Act 2013* (NSW), because that provision applied only to pending *appeals*, not special leave applications. His Honour refused the stay due to the special leave application's poor prospects of success.

The following month, the High Court refused an extension of time as the proposed grounds of appeal had insufficient prospects of success to warrant a grant of special leave: [2020] HCASL 56.

COMPLICITY

Accessory at the fact – higher threshold of proof of offence for secondary offender than for principal offender in sexual assault case

The applicant was one of a group of men alleged to have participated in, or were present at, the aggravated sexual assault of a woman that was recorded on a GoPro. The trial was

beset with confusion regarding the basis on which the applicant was being prosecuted – whether as a participant in a joint criminal enterprise or as a principal in the second degree. Despite the lack of clarity in the judge's summing up and written directions – including the requisite mental element required to be proved – the applicant was found guilty by a jury and convicted. The basis of the applicant's appeal against his conviction in ***Decision Restricted*** **[2019] NSWCCA 226** was that, given the Crown's concession that the case went to the jury on the basis that the applicant was an aider and abettor (not as a participant in a joint criminal enterprise), the judge erred by not directing that the mental element the Crown needed to prove was that the applicant actually knew the complainant was not consenting – as opposed to recklessness.

The appeal was allowed and the conviction quashed. After discussing the cases of *Osland* (murder), *Giorgianni* (strict liability dangerous driving occasioning death) and *Phan* (murder), Payne JA said that the mental element for aiding and abetting is "the applicant could not be convicted unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Neither negligence nor recklessness was sufficient." Therefore, the requisite mental element was that the Crown needed to prove the applicant knew the complainant was not consenting. However, there was error in that the jury were told on a number of occasions that recklessness was sufficient.

OBSERVATION: The practical consequence of the holding in this case is that the principal offender could be found guilty on the basis that he was reckless as to whether the alleged victim consented, or that he had no reasonable grounds for believing that she consented. By virtue of the statutory provision, he thereby knew that she did not consent. However, a higher standard of proof for the Crown was said to apply to an aider and abettor in that he/she had to have actual knowledge of the complainant's lack of consent.

None of the cases referred to by his Honour dealt with the rather unique provisions applying to sexual assault on the question of knowledge of consent. *Osland v The Queen* and *R v Phan* were both concerned with the offence of murder. *Giorgianni v The Queen* was concerned with the strict liability offence of dangerous driving occasioning death. It appears to have been the view of the court that the statutory provision relating to an expanded meaning of knowledge about consent was not applicable to an aider and abettor.

No marital immunity from conspiracy in the Criminal Code

Ms Namoa appealed her conviction for conspiring to do acts in preparation for a terrorist attack: ***Namoa v R*** **[2020] NSWCCA 62**. Her co-conspirator, Mr Bayda, gave evidence at his sentencing hearing that he never intended to carry out a suicide-attack. He stated that his talk of an "extremist operation" was a deceptive bid to win back the affections of Ms Namoa, lest she marry another man. The conspirators, aged 18, married on 30 December 2015. On New Year's Eve, Mr Bayda unsuccessfully attempted to set fire to a bush. The appeal proceeded on two grounds – firstly, that Mr Bayda's sentencing evidence was "fresh" evidence that would have acquitted Ms Namoa before a jury, and secondly that she was immune to conspiracy under the Criminal Code by virtue of her marriage.

Payne JA dismissed the appeal. His Honour held that while the evidence was fresh, there was no significant possibility the jury would have acquitted Ms Namoa had they known about it. The fact that she was mistaken as to the scale of the attack did not alter the fact that she conspired to carry one out. On the second ground, his Honour held that the spousal defence to conspiracy was founded in the "one will" legal fiction (whereby a married couple are considered the one legal entity). His Honour held that that fiction had been abandoned before the inception of the Criminal Code.

COSTS

No jurisdiction to order costs in suppression applications within criminal jurisdiction

Messrs Martinez and Tortell were awaiting re-trial for murder, following a successful conviction appeal. Mr Tortell sought a non-publication order under the *Court Suppression and Non-publication Orders Act 2010* (NSW). This was opposed by Fairfax. The application was refused and Fairfax sought costs: ***R v Martinez; R v Tortell (No. 7)*** **[2020] NSWSC 361**. Johnson J held that the Court was exercising criminal jurisdiction when it dismissed the application, and that therefore there was no jurisdiction to order costs.

DEFENCES

Self-defence under s 418 – intoxication not relevant to an assessment of the reasonableness of the defendant's conduct

Two groups of men in separate but nearby homes were drinking heavily On New Year's Eve, 2017. One group (the adults) became concerned that the other group (the young men) had stolen some children's bicycles. The adults went to the home of the young men and violently assaulted some of them. The young men responded with violence. The adults were in retreat, and were pursued by the young men who committed further acts of violence against the adults and made grave threats against them. A magistrate acquitted the young men of some offences, but found them guilty of affray after rejecting the defence of self-defence. The young men appealed to the Common Law Division of the Supreme Court pursuant to s 52 of the *Crimes (Appeal and Review) Act 2001* (NSW) on a question of law: ***Doran v Director of Public Prosecutions; Brunton v Director of Public Prosecutions*** **[2019] NSWSC 1191**. It was contended that the Magistrate erred in relation to self-defence when holding that intoxication could not be taken into account in assessing "the reasonableness of the plaintiff's conduct" (the suffix to s 418(2) of the *Crimes Act*). Rather, it was argued that the correct approach to the law was that intoxication was relevant to assessing the reasonableness of the conduct.

Simpson AJA dismissed the appeal. Her Honour held, consistently with well-known authority in *R v Katarzynski* [2002] NSWSC 613, that intoxication can be taken into account in the assessment of whether the defendant believed that his or her conduct was necessary for one of the purposes in s 418 (the first question), but that in assessing whether the defendant's conduct was reasonable in the circumstances as perceived by the defendant (the second question), intoxication is only relevant to identification of the perceived circumstances. In other words, the assessment of the reasonableness of the conduct is an objective test and the defendant's intoxication cannot be taken into account. Simpson AJA rejected the notion that "some licence should be afforded to them to behave with impunity in a way in which they would not be permitted (without consequence) to behave if unintoxicated" – the consequence of the construction of s 418(2) contended for by the appellants.

Consistently with this construction of s 418(2), Simpson AJA found that the Magistrate was correct to not take into account intoxication in his assessment of the reasonableness of the violence and threats directed at the adults by the young men – these acts were not a reasonable response to an intruding party in retreat, because, as correctly found by the Magistrate, this was when "defence turned to attack".

EVIDENCE

Expert evidence – whether physics formula sufficient to raise doubt in prosecution of camera detected speeding offence

Mr Noble-Hiblen was driving down O'Connell Street, Parramatta, at 2.50pm on a weekday. A speed camera recorded his speed as 118km/h. After pleading not guilty in the Local Court, Mr Noble-Hiblen gave evidence based on the physics formula that "Speed = Distance over Time". The "Time" between the two points at which the car crossed was 0.68 seconds (according to the time-stamps on the images). The "Distance" was measured by both satellite image and Mr Noble-Hiblen's personal measurement of the width of the intersection. Applying the calculation, his "Speed" could not have exceeded 61km/h. The Magistrate accepted this evidence – including Mr Noble-Hiblin's assertion in cross-examination that "You can't bend the laws of physics" – and acquitted him of the charge. The Roads and Maritime Service appealed: ***Roads & Maritime Services v Noble-Hiblen*** **[2019] NSWSC 1230**.

The *Road Transport Act 2013* deals with evidence of camera-detected speeding offences. Sections 137 and 138 deal with the admissibility of images as prima facie evidence, and sections 140 and 141 concern the form in which evidence to rebut the prima facie image evidence. Per s 141(2), Campbell J held that Mr Noble-Hiblin's assertion contradicting or challenging the accuracy, reliability or correct operation of the device concerned or the accuracy or the reliability of information (including a photograph) derived was insufficient. To engage s 141(2), what was required was expert evidence admitted in accordance with s 79 of the *Evidence Act 1995* (NSW). Campbell J did not consider the calculations presented

to be expert evidence – either on the basis that they were adduced from a person with relevant specialised knowledge, or based on specialised knowledge attained from training, study and experience. The matter was remitted to the Local Court for redetermination.

OBSERVATION: The proposition that the respondent drove in O'Connell St, Parramatta at 2.50pm on a weekday afternoon at 118 km/h itself involves two possibilities: he was either travelling at a grossly dangerous speed or something had gone awry with the speed camera. The magistrate accepted his contention as to the latter. It is unfortunate that the respondent filed a submitting appearance on the appeal as this left the judge without the benefit of a contradictor.

It is uncontroversial that expert evidence was required before a doubt could be raised as to the accuracy and reliability of the speed camera: s 141(2) of the *Road Transport Act*. Why could the respondent not qualify as an expert? The determination of the appeal appears to have turned more on the absence of evidence before the magistrate to establish the qualification than on whether the respondent could have so qualified. Evidence as to how he had sourced his knowledge of a law of physics (study at high school, perhaps) may have led to his evidence being treated as expert evidence.

Hearsay – maker unavailable exception – admissibility of contemporaneous representations of sexual assault

A 13-year-old girl was punched then sexually assaulted in 1994. After making her way home, she reported the assault and was taken to hospital. The examining doctor took a history from the girl, and compiled a report a month later. The girl was then taken to the police station, where she made and signed a more detailed police statement. The girl died in 2004. Many years later, the appellant's DNA was matched to a semen sample taken from the girl, and he was charged with the offence of assault occasioning actual bodily harm and aggravated sexual assault. At his trial in 2017, he objected to evidence of the complainant's prior representations to the doctor and police officer on the basis of hearsay. The trial judge overruled the objection, and admitted the evidence pursuant to s 65(2)(b) of the *Evidence Act 1995*. One of the grounds of appeal in ***Priday v R*** **[2019] NSWCCA 272**, was that the trial judge erred by admitting the hearsay representations made by the complainant – either on the basis that all of the circumstances in which the representations were made were not considered (s 65(2)(b)), or because the trial judge took a "compendious approach" inconsistent with authority in *Sio v The Queen* (2016) 259 CLR 47; [2016] HCA 32.

The appeal was dismissed. In respect of the issue of whether the trial judge failed to take into account certain circumstances in his assessment of s 65(2)(b), Macfarlan JA considered each circumstance – which had not been the subject of submissions to the trial judge – in turn. The first circumstance concerned six inconsistencies between the two accounts, which his Honour considered were explicable having regard to the complainant's distressed state. The second concerned the lies told by the complainant to her caregivers as to where she was going on the day of the assault – these could not be characterised as evidence of the circumstances of the representations but rather as relevant to the

complainant's credibility. His Honour dismissed a number of other asserted circumstances as neutral, and held that – as the representations were made very soon after the event, to persons of authority, while in a distressed state, exhibiting injuries consistent with the account, in a formal setting and (in the case of the police statement) formally acknowledging the correctness of her account – the circumstances were as such that it rendered the representations unlikely to be fabrications.

As to whether the trial judge impermissibly took a "compendious approach" to his consideration of s 65(2)(b), Macfarlan JA examined the approaches taken to other sub-sections in s 65(2) in *R v Ambrosoli* (2002) 55 NSWLR 603; [2002] NSWCCA 386 and *Sio v The Queen* (2016) 259 CLR 47; [2016] HCA 32. In particular, he had regard to the High Court's conclusion in *Sio* that "instead of a compendious approach, each material fact to be proved by a hearsay statement must be identified and the statute applied to it is of general application". His Honour noted that the trial judge was cognisant that the material hearsay representations were relevant to Count 1 (as the applicant pleaded not guilty to punching the complainant) and Count 2 (as the applicant's case was that the intercourse was consensual). His Honour considered that the trial judge's reasoning and observations were directed to those two matters and were not affected by impermissible reasoning in a compendious fashion.

Special Caution – s 89A Evidence Act 1995 – offender must be cross-examined on silence before adverse inferences drawn

In 2016, Hogg was arrested and cautioned in relation to a sexual assault alleged to have occurred in 1988. In the presence of his solicitor, he was given a "special caution" pursuant to s 89A *Evidence Act 1995* (NSW). Having consulted with his solicitor, Hogg exercised his right to silence. At trial, he relied on a version of events he had not told police. He was not cross-examined on his reliance on legal advice to justify his silence.

In ***Hogg v R*** **[2019] NSWCCA 323**, White JA upheld the appeal, quashed the conviction and acquitted Hogg. His Honour held that, where reliance on legal advice is raised to explain silence in the face of a special caution, the question then becomes the reasonableness (or, in his Honour's preferred view, genuineness) of that reliance. This is a matter for the Crown to disprove, and the Crown did not cross-examine Hogg to this effect (that the legal advice was, say, a shield for the later invention of an alibi). Acquittal was entered because Hogg had already served most of his sentence, though Wilson J would have preferred a new trial.

Crown cross-examination incurably and unfairly prejudicial

Further in ***Hogg v R*** **[2019] NSWCCA 323**, the Crown cross-examined Hogg's character witnesses, suggesting that vulnerable children were more likely to be targets of sexual abuse due to their isolation. The effect was to cast suspicion on Hogg on the basis that he worked with vulnerable children. White JA held that this strategy gave rise to a miscarriage of justice by way of unfair prejudice that could not have been mitigated by a direction, even if one had been sought.

Standard of proof in tendency evidence – multiple counts, multiple complainants and tendency witness

In ***Jackson v R*** **[2020] NSWCCA 5**, the offender was tried on six counts of child sexual assault. He was found guilty of two counts (one against each complainant) and not guilty of the remaining counts. The Crown led evidence of uncharged acts from a tendency witness. In addition, the Crown relied on the acts against each complainant establishing a tendency that could be used in relation to the other. The trial judge gave directions to the jury that they had to be satisfied beyond reasonable doubt of: each tendency act; that it established the tendency (namely, a sexual interest in young males known to him through familial or personal relations); and that Jackson acted upon that tendency.

Jackson appealed, somewhat confusingly, on the grounds that the trial judge overestimated the standard of proof required. His concern was, inter alia, that by requiring the tendency acts to be proven beyond reasonable doubt, they were elevated in the minds of the jury and therefore would be perceived as having a probative value that outweighed the risk of unfair prejudice. As Price J noted at [114], it was unsurprising the defence did not object to the direction during the summing up.

His Honour noted that *The Queen v Bauer* [2018] HCA 40; (2018) 92 ALJR 846 dispensed with the criminal standard for tendency evidence in single complainant matters, but declined to resolve the question of whether that standard applied in multiple complainant matters. His Honour found that the reversal of the "usual argumentation" made this case an inappropriate vehicle to answer that question ([68]).

NOTE: An application for special leave to appeal to the High Court in this matter was refused: [2020] HCASL 142.

Improperly/illegally obtained evidence – whether desirability of admitting outweighs undesirability – remoteness from illegal conduct

Kadir v The Queen; Grech v The Queen **[2020] HCA 1** concerned the live-baiting of greyhounds. An activist organisation employed an investigator to illegally record surveillance footage of the alleged conduct. These recordings were supplied to the RSPCA, who obtained and executed a search warrant. Finally, the investigator posed as a prospective trainer and elicited admissions from Kadir. The appellants submitted that these three bodies of evidence were tainted and inadmissible due to the illegality of the surveillance recordings.

The High Court (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) held that the surveillance footage should be excluded, as it was obtained in repeated and deliberate contraventions of law. The search warrant and admission evidence was also held to have been gathered improperly, but the Court found that the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in the way it was: s 138 *Evidence Act 1995* (NSW). Critical factors included the highly probative nature of the evidence, the seriousness of the charges, the importance of the evidence in making out those charges and the remoteness of the evidence from the impropriety – the RSPCA did not know, when

executing the search warrant, that the recordings were obtained illegally. Neither did the admissions depend on anything captured in the unlawful recordings.

Drawing inferences from photographs to prove facts

The offender in ***Amante v R*** **[2020] NSWCCA 34** set fire to his ex-partner's apartment (part of a Department of Housing complex). An agreed statement of facts and photographs of the damage, including holes in the roof, were put before the sentencing judge. No expert was called. The sentencing judge purported to take judicial notice from the photographs that the fire – having gotten into the roof void – seriously threatened the structural integrity of the building.

On appeal, N Adams J held that the sentencing judge had not taken judicial notice but merely drawn an inference. Her Honour further held, dismissing the appeal, that the inference was open on all the evidence, including the photo. Beech-Jones J held, agreeing, that the *Evidence Act 1995* (NSW) had overridden most principles relating to the admissibility and weight of photographic evidence. The Court's role, therefore, was simply to determine whether the inference was open or mistaken.

Section 125(2) Evidence Act 1995 – test for loss of client legal privilege due to misconduct

Izod and his solicitor, Zreika, were charged with perverting the course of justice. Izod gave false symptoms to a doctor to obtain a medical certificate, which Zreika (aware of the falsity) used to obtain an adjournment. Zreika's culpability for the offence lay in his advice to Izod in relation to the false certificate, such advice being founded upon intercepted telephone communications. The magistrate upheld a privilege claim over the intercepted communications, finding that the misconduct was not established.

This was overturned on appeal: ***DPP (NSW) v Izod; DPP (NSW) v Zreika*** **[2020] NSWSC 381**. Simpson AJ held that the magistrate had applied a "test of finality". What was required was far less conclusive – an evaluation of evidence to determine whether there was a basis for a conclusion that there were reasonable grounds for finding that the communications were made in furtherance of the misconduct.

Admissibility where witness advised of s 18 Evidence Act after completion of evidence

The offender in ***Jurd v R*** **[2020] NSWCCA 91** was accused of a child sexual offence. His de facto partner gave a police statement and then oral evidence. She was not advised about a potential s 18 objection until after she had given evidence. This was likely for forensic reasons – her oral evidence was more exculpatory than her police statement, which would have been admitted if she was not compellable. She stated on voir dire that she would not have given evidence had she known she could object. On appeal, Price J held that the section could not be complied with retrospectively. Nevertheless, the rest of the evidence was strong enough that there was no miscarriage of justice – the appeal was dismissed.

Victim's interpretation of intent of blackmailer not admissible as lay opinion

Ivan Petch, former mayor of Ryde, was charged with blackmail offences for attempting to coerce the council's general manager into settling a costs dispute against him. On appeal, Petch argued, inter alia, that the trial judge erred in admitting lay opinion evidence (over objection) of what the manager understood Petch to be implying: ***Petch v R* [2020] NSWCCA 133**. Hamill J distinguished such opinion evidence from evidence of victims' reactions. He found that the opinion was not based on what the victim saw, heard or perceived, and was not necessary to understand the events. The conviction was quashed and no re-trial ordered in light of Petch's age, likely delay (he had served most of his sentence), and opprobrium suffered.

Admissibility of tendency evidence – similarities between tendency act and alleged act – probative value where identity in issue

The offender in ***Vagg v R* [2020] NSWCCA 134** was convicted of child sex offences, having assaulted the child of a client he was cleaning windows at a domestic home. Tendency evidence was led from another young girl about the offender twice luring her to a secluded bathroom and exposing (or attempting to expose) himself. On appeal, the offender argued that the tendency evidence was inadmissible by contending, inter alia, that the tendency act and the indicted act were too dissimilar. Simpson AJA, dismissing the appeal, found the evidence was capable of showing that the offender had a sexual interest in young girls and would act on that interest in secluded locations. Moreover, the evidence had significant probative value in circumstances where it might dispel doubts as to the offender's identity.

Admissions of a co-accused must be in furtherance of common purpose reflected in charged offence to be admissible

The applicant in ***Higgins v R* [2020] NSWCCA 149** was convicted, in his third trial, of three historical child sex offences committed against a student at the school where he taught. A co-accused had died between trials. One of the issues on appeal was whether this co-accused made admissions on behalf of the applicant when pressuring the complainant to lie. Payne JA held that the admission by the co-accused was inadmissible in the applicant's trial because it was not made in pursuit of a common purpose constituting a charged offence (and was otherwise irrelevant).

Evidence of previous false allegations inadmissible under s 293 Criminal Procedure Act

In ***Jackmain (a pseudonym) v R* [2020] NSWCCA 150**, evidence that the complainant – the applicant's former partner – had previously concocted 12 complaints was ruled inadmissible by the trial judge, who declined to stay the proceedings under s 192A *Evidence Act 1995*. A 5-Judge bench was called upon to consider the validity of s 293 of the *Criminal Procedure Act*, despite failed attempts to impugn it in the past.

Bathurst CJ dismissed the appeal, finding that evidence led to show the complainant had made false allegations of previous sexual activity would necessarily also be evidence that she had not, in fact, taken part in that activity. Therefore, it would be inadmissible pursuant to s 293 of the *Criminal Procedure Act*. The assail upon the validity of the provision also failed.

OFFENCES

Firearms offences – differences between offences of possessing an unauthorised prohibited firearm and possessing a loaded firearm in a public place – assessment of moral culpability

At midnight outside a Parramatta motel, the drug-affected applicant was discovered by police in possession of a loaded pistol, 100g of ice, $8,200 in cash, and a patch infused with fentanyl. He pleaded guilty to all offences, including – in respect of the pistol - an offence of possessing a loaded firearm in a public place, contrary to s 93G(1)(a)(i) of the *Crimes Act 1900* (count 1) and possessing an unauthorised prohibited firearm contrary to s 7(1) of the *Firearms Act 1996* (count 3). After indicating individual sentences of 4 years, 10 months for each of the firearms offences, and 5 years, 3 months for the drug supply offence, the sentencing judge imposed an aggregate sentence of 9 years, 6 months. Ground 1 of the appeal in ***Taha v R*** **[2019] NSWCCA 240** contended that the sentencing judge made errors when assessing the applicant's culpability with respect to the firearms offences. For example, that he shouldn't have made a blanket assessment of criminality, that the judge shouldn't have taken into account the applicant's evidence that he used the pistol for protection, and that there was an element of double jeopardy because the two firearms offences warranted either complete or substantial concurrency.

In respect of ground 1, Button J held that there was no error in the assessment of the objective seriousness of both firearms offences for a number of reasons. With respect to the blanket assessment argument, it was held that first, counsel for the applicant and Crown had made submissions on gravity that did not differentiate between the offences. Second, there was evidence that the sentencing judge distinguished in his assessment, finding that count 1 (possessing a firearm in a public place) was aggravated by the applicant's intoxication and paranoia, and count 3 (unlawful possession of a readily concealed and semi-automatic lethal weapon) was aggravated by the lengthy period of possession. With respect to count 3 (the motive for possession), his Honour held the reasons for possessing a firearm cannot be taken into account in an objective assessment of seriousness but only as a mitigating subjective feature relevant to motive. And finally, his Honour considered that the relationship between the offences – they concerned the same pistol – did not mean that count 3 couldn't be the subject of additional punishment. (The appeal was allowed on another ground; this ground was rejected.)

Firearms offences – whether and when imitation firearm should be "identified as a children's toy" – ascertainment by reference to matters including use and intention at the time (not past or future uses)

Employees at a car hire company refused to allow a man to hire a car and asked him to leave the premises. He reached into his suitcase, pulled out an item and pointed it at the complainants. They "freaked out" and ran inside to call the police. When the police arrived, they discovered that he possessed two lightweight plastic pistols with an orange trigger and plug in the muzzle. Two of the charges on the indictment at his trial concerned possession of an imitation self-loading pistol without authorization, contrary to s 7(1) of the Firearms Act 1996. Section 4D(4) provides that an "imitation firearm does not include any such object that is produced and identified as a children's toy". An issue in the conviction appeal in ***Darestani v R*** **[2019] NSWCCA 248** concerned the matters to be taken into account when considering whether an object alleged to be an imitation firearm should in fact be "identified as a children's toy".

Price J rejected the construction proffered by the applicant, in which the circumstances in which the object is used is irrelevant to the exception in s 4D(4). Rather, the verb "identified" relates to ascertaining what a thing is, and that ascertainment raises "matters intrinsic to the object, the use of the object and the intention of the person using it, if the object is being used at the time it is asserted to be in the person's possession". Furthermore, the applicant's construction is not consistent with the s 3 purposes of the *Firearms Act*, including to "to improve and ensure public safety". Price J went on to indicate that this identification "is confined to the time of possession and the past and future use of the object is an irrelevant consideration".

The applicant accepted verdicts of guilty on two counts of intimidation in relation to the staff members. But he contended that the verdicts of guilty for the two counts of possession were unreasonable. The Crown based its case for those counts on the time the applicant was found to be in possession of the items by police, as opposed to the time they were produced to the staff members which was therefore irrelevant. The officers had immediately regarded the items as toys. The Crown had not excluded the possibility that, at that time, each was produced and identified as a toy. Accordingly, the convictions for the possession counts were quashed.

Female genital mutilation – meaning of "mutilates in Crimes Act, s *45(1)(a)*

R v A2 **[2019] HCA 35; 93 ALJR 1106** was a Crown appeal from a CCA decision which overturned a trial judge's pre-trial ruling on charges of female genital mutilation contrary to s 45(1)(a) of the *Crimes Act 1900*. This arose from a ceremony performed on two young girls involving the cutting or nicking of each girl's clitoris. That ruling related to the meaning of the word "mutilates" as used in s 45(1)(a) – "excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person" – as meaning "injure to any extent", including a nick or cut, but not necessarily serious injury. The other issue was the trial judge's direction that clitoris included the clitoral hood (prepuce), not the labia minora. The CCA held that the trial judge's rulings

were wrong on both counts. Rather, the ordinary meaning of "mutilates" connotes more than superficial injury or damage and which renders the subject body part imperfect or irreparably damaged. Likewise, the trial judge should not have directed the jury that clitoris includes the clitoral hood.

The appeal was allowed by a majority of the High Court (Kiefel CJ and Keane J; Nettle and Gordon JJ; Edelman J agreeing; Bell and Gageler JJ dissenting). Kiefel CJ and Keane J applied the well-settled approach to construction that gives effect to the purpose of, and mischief to which, the criminal offence provision is directed. On that basis, by reference to the purpose of s 45 (to prohibit the practice of FGM on female children and achieve its cessation), the heading of the provision and extrinsic materials, including the 1994 Family Law Council report "Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Counsel" which condemns practices injurious to a female child, the direction given by the trial judge was legally correct. Likewise, though medical dictionaries differentiate between the prepuce and the clitoris, the context and purpose of s 45 did not require a "narrow or technical meaning" be applied to the identification of anatomical structures where they are closely interrelated. The trial judge approach was preferred over that of the CCA because it promoted the purpose of s 45(1).

Bell and Gageler JJ dissented. Their argument rested on the premise that the purpose of s 45 needs to be read in accordance with its settled meaning at enactment in 1995. Having conducted an extensive review of the extrinsic materials, their Honours did not consider that at the time, "female genital mutilation" did not encompass "ritualised practices" like cutting or nicking. This is supported by the fact that "otherwise mutilates" was used instead of "otherwise injures" thereby not extending conduct that results in not more than transient injury. It was therefore appropriate to give "otherwise mutilates" its ordinary meaning.

Influencing witnesses and jurors – inconsistency of verdicts – meaning of "withhold true evidence"

Vasilevski had been acquitted on several counts of sexual assault, but convicted on a charge of influencing the complainant into withholding true evidence. Vasilevski had procured from the complainant a statutory declaration in which she withdrew the sexual assault allegations. He then appealed, claiming the verdicts were inconsistent – if the sexual assault charges had been proven false, how could he have compelled the complainant to withhold 'true evidence' by withdrawing the falsity?

In ***Vasilevski v R*** **[2019] NSWCCA 277**, the Court (Bell P, Simpson AJA and Fullerton J) held that the verdicts were reconcilable and dismissed the appeal. In upholding the influencing charge, the jury must have decided that the complainant was telling the truth – intercourse did occur and she did not consent. They could still acquit Vasilevski if he lacked knowledge of that consent. The Court then considered, in obiter, the meaning of "true evidence": it may mean either evidence that is objectively true or evidence that the witness believes to be true (as in the case of mistaken identities). The Court concluded with a warning not to conflate giving "false evidence" with withholding "true evidence".

Joint criminal enterprise for specially aggravated break, enter and commit serious indictable offence – what intention is required?

Messrs Ford and Francis attacked Mr Meurant in his home at the urging of Ms Makin. Makin was Francis' partner and was once the victim's stepdaughter. On appeal, Ford established doubt as to whether he or Francis (who cooperated with the Crown) was the principal assailant: ***Ford v R*** **[2020] NSWCCA 99**. His conviction was not overturned, however, because Brereton JA found that there was a joint criminal enterprise to attack Mr Meurant using a bottle and a lamp, which contemplated (the special aggravating circumstance of) wounding.

Intent to threaten is essential element of blackmail

In ***Petch v R*** **[2020] NSWCCA 133**, Hamill J considered a direction on the mental element of blackmail. Petch argued that the trial judge misdirected the jury by not requiring proof of an intention to menace – that being: an intention to threaten with detrimental action that would cause an individual of normal courage in the complainant's position to act unwillingly. His Honour held that this intent to threaten, implicitly or explicitly, was essential to establishing the "menaces" element, and the applicant lost a chance of acquittal because of this misdirection. His Honour upheld this ground of appeal and entered a verdict of acquittal.

POLICE POWERS

Arrest to question but not charge remains unlawful

Constable Smith was investigating the alleged breach of an AVO. The appellant, Mr Robinson, had sent an email to an employee of the protected person. Mr Robinson attended the police station, where he was arrested, interviewed and then released without charge. He brought an action against NSW claiming wrongful arrest and false imprisonment. In evidence, Constable Smith conceded that he had had no intention to charge Mr Robinson with an offence because he needed more evidence. The trial judge dismissed, the Court of Appeal overturned, and NSW appealed to the High Court: ***New South Wales v Robinson*** **[2019] HCA 46; 94 ALJR 10**.

The majority (Bell, Gageler, Gordon and Edelman JJ) dismissed the appeal and upheld Mr Robinson's claim. They held that nothing in LEPRA or its amendments displaced the rule in *Bales v Parmeter* (1935) 35 SR (NSW) 182 at 188-190 that an arrest merely to ask questions is unlawful. Part 9 of LEPRA, relating to detention for investigation, only allows for detention following a lawful arrest – it does not, of itself, create a new power to arrest. Section 99(3), requiring an arrested person to be brought before an authorised officer, confirms that a police officer must have an intention to charge at the time of arrest.

Kiefel CJ, Keane and Nettle JJ dissented, reasoning inter alia that the statutory ability to discontinue an arrest (s 105, cross-referenced in note to s 99(3)) envisaged an officer

arresting someone on suspicion of committing an offence, detaining them for the investigation period and then, as a result of that investigation, ceasing the arrest.

PRACTICE AND PROCEDURE

Cross-examining towards a Birks comment – need for prosecutors to exercise caution

Two complainants in respect of sexual assault allegations had responded to online advertisements for a flat mate posted by the applicant. Prior to viewing the apartment, both of them were encouraged to consume alcohol at a bar, before returning to the applicant's bedroom under the pretext of viewing the apartment. During the course of cross-examination at his trial he was questioned about some evidence he had given in chief and the fact that those matters had not been raised in cross-examination of the complainants. These matters were briefly mentioned by the Crown in closing but were not mentioned at all in the judge's summing up. One of the grounds of appeal in ***Hofer v R* [2019] NSWCCA 244** was that those questions and comments in the Crown's cross-examination of the applicant were impermissible and improper and caused a miscarriage of justice.

A majority of the Court of Criminal Appeal (Fagan J, Fullerton J agreeing with additional reasons; Macfarlan J dissenting) dismissed this ground following close analysis of the impugned aspects of the cross-examination, finding that they were sometimes incomplete, or of no consequence, or did not create prejudice. Likewise, the impugned passages in cross-examination alongside the restrained closing address did not – in contrast to the cross-examination and closing address case of *Picker v R* [2002] NSWCCA 78 – evince the unmistakable gist that the applicant had recently invented his evidence. While experienced criminal advocates know that "if purported details of a sexual assault are not put in cross-examination of the complainant and if they first emerge in the accused's evidence, they are likely to be a departure from the instructions upon which the cross-examination took place", this may not have been perceived by the jury in that way. *Birks* reasoning, the shorthand given by Fagan J, is not intuitive and the implication of recent invention and attack on the applicant's credit would not have suggested itself from the impugned passages. The ground was rejected. Furthermore, if his Honour was in error on this point, the proviso applied because the questioning did not go to the root of the trial, and even if it was impermissible and prejudicial, it would not have been of significance to the jury given the strength of the Crown case on the issue that the applicant knew the complainants' were not consenting.

Both Fullerton J and Fagan J sought to provide practical guidance on how prosecutors might approach a cross-examination of an accused when evidence has been given in the absence of a matter having been raised in cross-examination of the complainant: see Fullerton J at [106]-[118] and Fagan J at [202]-[205].

Warnings in judge-alone trials – unreliability of children s 165A(2) Evidence Act 1995 (NSW) – enough to expressly or implicitly take subject matter of warning into account in reasons

The offender in **GBB v R [2019] NSWCCA 296** was convicted in a judge-alone trial of sexually assaulting his 4-year-old half-sister. There was strong evidence of contemporaneous complaints to multiple people, as well as an "adamant" and "forthright" interview with police. The issue on appeal concerned a recantation made by the complainant at the end of cross-examination. The judge warned herself, in line with s 165A(2) Evidence Act 1995 (NSW) and s 133(3) Criminal Procedure Act 1986 (NSW), of the potential unreliability of this recantation. The offender contested that this warning applied to the whole of the evidence – not an isolated part – and was not meant to be used to undermine evidence favourable to the offender.

Basten JA accepted these propositions, but held that there was no miscarriage of justice and dismissed the appeal. It is the subject matter of the warning rather than the wording which must be taken into account. The trial judge was naturally required to assess reliability and weigh up the evidence in light of any unreliability. Provided that this was evident in the reasons, whether or not the judge actually warned herself was beside the point.

District Court – Power to stay proceedings as "abuse of process" – public confidence in the administration of justice – jurisdictional error

Director of Public Prosecutions (NSW) v Hamzy **[2019] NSWCA 314** concerned the judicial review of a District Court decision to stay a summary prosecution which was before it on appeal from the Local Court as an abuse of process, lest they undermine public confidence in the administration of justice "within the Correctional system". Hamzy had been convicted in the Local Court of assaulting a prison guard. He contended he had already been punished for that offence within the Correctional system by the revocation of most of his privileges. In the Court of Appeal, Gleeson JA held that the power to stay for abuse of process exists to ensure the integrity of a court's own processes. It was enlivened when there was a threat to confidence in the courts, not confidence in the Correctional system. Accordingly, the latter did not empower the District Court judge to stay proceedings and gave rise to a jurisdictional error. Nor did the administrative punishment rise to the level of substantial unfairness that might have grounded a stay for abuse of process by way of unjustifiable oppression, because the circumstances of that unfairness were again outside the control of the Court.

Separate trial application – agreed facts of one co-accused not prejudicial enough to cause real injustice and justify severing indictment – curable by jury directions

Three men were jointly tried for multiple child sex offences. There were agreed facts relating to one co-accused revealing that he had previously committed a child sexual offence, had admitted to a sexual interest in female children, and was on the child protection register. At trial, it emerged that the appellant had been aware of his co-accused's past at the time of their association. The appellant argued in ***DR v R*** **[2019]**

NSWCCA 320 that as the agreed facts were inadmissible but prejudicial to him, he should have been tried separately.

Brereton JA dismissed the appeal. His Honour held that there was no real injustice. To the extent that there was any prejudice, this was mitigated by the trial judge's directions. The only prejudice was guilt by association, which was both an illogical and improper way to reason. Moreover, the case against the appellant was still otherwise extensive and strong. It contained graphic descriptions of acts, which made the agreed facts less shocking and prejudicial by comparison. His Honour concluded that, since no objection or direction was sought, it was clear that the appellant's knowledge of his co-accused's past was of no real import at trial.

Courts should supervise Form 1 use in accordance with statute

The offender in ***Ghalbouni v R*** **[2020] NSWCCA 21** pleaded guilty to drug offences. Seven offences were taken into account on a Form 1, including the deemed supply of MDMA. However, this offence did not actually arise on the agreed facts as the MDMA was for personal use. Hidden AJ allowed the appeal and re-sentenced the offender, stressing the importance of courts and practitioners heeding the procedure for Form 1 offences outlined in s 33 *Crimes (Sentencing Procedure) Act 1999* (NSW).

Use of "answer cards" by child complainants under s 26 Evidence Act 1995 (NSW)

ABR was convicted before a jury of multiple indecent assaults against his ex-partner's daughter. The complainant appeared distraught and struggled to give evidence in cross-examination, so – at the Crown's suggestion and over objection – she was permitted to answer by pointing to cards reading "yes", "no" or "I don't know". The complainant used the cards twice. Ground 12 – of the 23 grounds of appeal – alleged that this gave rise to a miscarriage of justice. In ***ABR v R*** **[2020] NSWCCA 33**[1], Meagher JA dismissed the appeal, holding that s 26 of the *Evidence Act 1995* (NSW) gave the trial judge the power to allow answer cards (that were, in any event, barely used).

Local Court trial stayed due to prosecutor's lack of compliance with duty of disclosure

Mr Bradley was arrested in relation to biting a complainant's finger. He was interviewed, wherein he claimed self-defence. He sought to obtain documents from police relevant to his trial, including his custody management record and the criminal history of the complainant (mainly violence and dishonesty offences). The magistrate refused to enforce the subpoena, denouncing the applicant's "classic fishing expedition" as an attempt to "frustrate the prosecution of this matter by putting the police to additional work" such that the "criminal justice system in New South Wales" would be brought "potentially to a grinding halt".

[1] The full case title includes that "ABR" is a pseudonym, but it would appear unnecessary to point that out.

The decision was overturned on appeal: ***Bradley v Senior Constable Chilby*** **[2020] NSWSC 145**. Adamson J held that the magistrate misconstrued the duty of disclosure – the documents sought were relevant to important issues, in addition to being easy to provide. That a hearing "could" be conducted without these documents did not relieve the prosecutor of the duty. The magistrate's concern for police resources was misguided. Accordingly, the matter was remitted and the trial was stayed pending compliance with the duty of disclosure.

Where no legitimate forensic purpose behind subpoena for criminal histories of prosecution witnesses

In ***Mann v Commissioner of Police*** **[2020] NSWSC 369**, the offender appealed from a Local Court decision setting aside a subpoena for the production of criminal records of prosecution witnesses. The magistrate found that the offender had not shown that it was on the cards that the records would materially assist.

The appeal was rejected by Adamson J. Her Honour noted that no attempt had been made to tailor the subpoena to the issues. She distinguished *Bradley v Senior Constable Chilby* [2020] NSWSC 145 as a duty of disclosure case where the spectre of self-defence put the criminal record in issue. Her Honour also distinguished *R v Jenkin (No 2)* [2018] NSWSC 697 – there, it was accepted that there was legitimate forensic purpose and the Commissioner had already produced some documents. The issue was whether privacy could shield criminal histories from a subpoena, and Hamill J held that it could not. Adamson J found that this did not mandate the production of records in an average criminal case.

Strip search footage of young Aboriginal woman – whether magistrate had power to order matter heard by female magistrate and exclude men from viewing evidence and courtroom

TR sought orders in the Children's Court that a matter be heard by a female magistrate, men be excluded from viewing the evidence and the venue changed accordingly. TR argued that the cultural shame arising from the viewing by men of sensitive parts of her body would scuttle her will and ability to defend the charges, and thereby threaten her right to a fair trial. The magistrate refused, noting that the footage might not need to be shown and, if it did, the sensitive parts could be pixelated.

TR appealed: ***TR v Constable Cox & Ors*** **[2020] NSWSC 389**. Wilson J held, dismissing the appeal, that most of the magistrate's rulings were not "interlocutory orders" and so were not appellable. In addition, the magistrate had no power to transfer the matter to a female magistrate, exclude men from the courtroom or suppress evidence only in relation to men – therefore, there was no error of law in refusing to do so. Wilson J endorsed a practical solution, noting that while the court must recognise an individual's interests in cultural traditions, privacy and modesty, this recognition will be qualified by the public interest in resolving proceedings and the proper administration of justice.

Likelihood of fair trial was the critical question in a jury discharge application following withdrawal of counsel

Defence counsel withdrew from a matter, without leave and seven days into the trial, citing coronavirus fears. Counsel was 69 years old and immunocompromised, while his client and instructing solicitor were both displaying flu-like symptoms. The client, finding himself unrepresented, sought an urgent s 5F appeal against the trial judge's refusal to discharge the jury and vacate the trial.

In ***Kahil v R*** **[2020] NSWCCA 56** Adamson J held that the trial judge's discretion miscarried as a result of not addressing the issue of unfairness. The key question was not whether the withdrawal was reasonable but whether, now that he was unrepresented through no fault of his own, the applicant would receive a fair trial. Harrison J noted that no alternatives – continuing with the solicitor, retaining new counsel or trial counsel appearing by AVL – could mitigate the unfairness.

Kahil cited ***Croke v R*** **[2020] NSWCCA 8**, which agitated a similar issue. Croke's counsel withdrew shortly before his trial – the trial judge refused to vacate on the basis that a witness had been, with difficulty, brought from the US; Croke had an experienced solicitor; and Croke himself was an experienced criminal law practitioner. Croke's erstwhile counsel had agreed to a unique funding arrangement, which made securing new counsel difficult. The Court (Adamson, Beech-Jones and Ierace JJ) embraced the *Dietrich* test of asking whether the accused, unrepresented through no fault of their own, is likely to receive a fair trial. The Court vacated the hearing.

Section 306J Criminal Procedure Act – prospective test examining fairness of new trial

The appellant in ***WX v R*** **[2020] NSWCCA 142** was convicted, in his third trial, of child sex offences committed when he was 15 and the victim was 7 years old. The defence counsel and case changed between the first and second trial, and the appellant sought to compel the complainant's appearance under s 306J *Criminal Procedure Act 1986*, on the basis that the original recorded cross-examination was limited and insufficient. The trial judge refused, holding that a mere change in forensic strategy did not make the original cross-examination inadequate. Payne JA allowed the appeal, finding that this put an impermissible gloss on the test and bound new counsel to old forensic decisions, particularly where there remained relevant and unexplored inconsistencies in the complainant's evidence. Section 306J is concerned purely with a prospective assessment of the fairness of the subsequent trial. A retrospective assessment of tactical decisions in the previous trial may be relevant but is not determinative.

Section 306P Criminal Procedure Act does not require an explicit positive finding by court where all parties consent

Mr Dogan was charged with various violence and robbery offences committed against his neighbour, who was cognitively and physically impaired. The complainant's evidence was given by recording and AVL pursuant to s 306S *Criminal Procedure Act 306S*. Three defence counsel raised no objection. On appeal, Dogan contended the trial miscarried

because the trial judge was not positively satisfied, under s 306P, that "the facts of the case may be better ascertained" by this method of giving evidence: ***Dogan v R*** **[2020] NSWCCA 151**. R A Hulme, Fagan and Cavanagh JJ rejected this argument, holding that as the provision is for the protection of the vulnerable person, it does not need a positive and express finding by the court. Leave was refused.

Crown's duty to call witnesses that flesh out the narrative - not obliged to call defence expert where nothing added to narrative

The applicants in ***WG v R; KG v R*** **[2020] NSWCCA 155** were parents of the complainant, who was aged between 5 and 19 at the time of the offending. WG was convicted of 73 counts of violent sexual assaults and KG was convicted of 13 counts of sexual offending. The second ground of appeal alleged a miscarriage of justice flowing from the Crown's refusal to call a defence expert. Both the Crown and defence expert examined the complainant at the same time - they agreed on observations but differed on their conclusions. The Defence, for forensic reasons, did not call the expert themselves.

Bathurst CJ held, hesitantly, that the Crown had no obligation to call a defence expert where she contributed nothing to the narrative. A difference in opinion but not in observation did not enliven any obligation to call. Even if the Crown should have called the expert, there was no miscarriage of justice because the Defence could've called her but chose not to for forensic reasons. His Honour noted that an appeal report from the expert, which reviewed the trial transcript, was of limited utility because the focus was on her evidence at trial. Fullerton J agreed.

Fagan J agreed, adding that the expert had been engaged by defence, was ready and willing to give evidence for the defence and was not called. His Honour noted that juries are directed on evaluating competing expert evidence without regard to who has engaged them. Also, because the expert was qualified by the applicants, the Crown could not have called her without impeding on privilege. The appeal was dismissed, Fagan J dissenting on the unreasonableness of the verdict where there was no contemporaneous complaint.

Notes of counselling of sexual assault victim are "protected confidences" - cannot subpoena without regard to ss 295 - 299D of the Criminal Procedure Act

Mr Bonanno, charged with sexual offences, was granted a subpoena over documents belonging to the complainant's psychologist. The protected confider appealed on the ground that the trial judge failed to consider the requirements in ss 295 to 299D *Criminal Procedure Act* predicating production of protected confidences: ***R v Bonanno; ex parte Protected Confider*** **[2020] NSWCCA 156**. Adamson J set aside the subpoena, noting that the trial judge failed to have regard to the statute.

Warning against making proposition unsupported by evidence and cross-examination is distinct from rule in Browne v Dunn

Partway through Mr Petryk's trial, his lawyers had to withdraw. New counsel changed course, suggesting in his closing address that a Crown witness (who had received immunity

from prosecution) had fudged her evidence to minimise the role of her partner, the co-accused. Counsel was warned by the trial judge not to stray into suggestions that were not put to the witness. On appeal, Mr Petryk impugned this warning, arguing that *Browne v Dunn* was not strictly applicable to criminal trials: ***Petryk v R* [2020] NSWCCA 157**. The Court dismissed the appeal, holding that the trial judge was reminding counsel of how the case had progressed before he was briefed, and preventing him from making a submission without evidence or support from cross-examination. It was not an application of the rule in *Browne v Dunn*, and its propriety was accepted by counsel at trial in any event.

Prosecution must present case fully and fairly – mixed evidence should not be withheld for strategic reasons

The applicant in **Nguyen v The Queen [2020] HCA 23** threw two beer bottles at the complainant. In his police interview, he admitted to throwing the bottles but said that he did so in self-defence. The prosecutor decided not to lead the interview for forensic reasons – namely, the accused would be forced to give evidence in order to raise self-defence. The majority in the High Court (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ) held that this was impermissible, there being a fundamental prosecutorial duty to present the Crown case fully and fairly. Evidence that is both inculpatory and exculpatory must be led by the Crown, even where doing so would be forensically disadvantageous.

SENTENCING – GENERAL ISSUES

Procedural fairness –disclosure of preliminary views on appropriateness of custodial sentence

A winemaker knew that some people were cultivating commercial quantities of cannabis at a nearby property. He did not inform the police. He pleaded guilty to a charge of concealing a serious indictable offence and was sentenced to imprisonment for 8 months, with a non-parole period of 6 months. It was argued in ***Casella v R* [2019] NSWCCA 201** that the sentencing judge did not "fairly raise" that he was considering a custodial sentence at the hearing, and that this was a denial of procedural fairness. This argument was dismissed, although the appeal was allowed on the basis of manifest excess.

Bathurst CJ said that to start with, there is a difference between disappointed expectations and denial of procedural fairness. The latter arises if the judicial officer deals with a matter in a different fashion without notice, or tells the parties that it is unnecessary to deal with an issue, and then proceeds to make an adverse finding on that very issue. Subject to these circumstances, Bathurst CJ considered, "in the context of the present case, that did not mean that the sentencing judge had a duty to advise counsel for the applicant as to how he should conduct his case, or … express any preliminary views that he or she may have formed on the appropriate sentence". Given that submissions by counsel below adverted to the possibility of a full-time sentence, and that a custodial sentence was being treated as an issue in the sentencing proceedings, his Honour concluded that there was no procedural unfairness.

Procedural fairness – if judge accepts submission at hearing, it is unfair to reverse that finding without allowing an offender opportunity for further submissions

Mr Kha faced sentence for supplying drugs. As the only adult fluent in English, he was the breadwinner and primary caregiver to his wife, four children, and his mother and mother-in-law. Counsel submitted that the judge should find special circumstances. The Crown conceded this and the sentence judge said, "prima facie I think that must be so". Ultimately the sentence reflected the statutory ration and there was no mention of special circumstances in the judgment.

In ***Kha v R*** **[2019] NSWCCA 215**, Ierace J agreed with applicant's submissions on this ground. While it is not clear from the remarks on sentence whether the sentencing judge ended up concluding that special circumstances were not made out, or omitted the issue by mere oversight, but the end result was the same. The sentencing judge's rejection of special circumstances was unexplained. His Honour held that the applicant was denied procedural fairness because he lost the opportunity to make submissions in favour of a finding of special circumstances, having been led to believe it was not necessary in view of the Crown's concession and the judge's express preliminary view. Error having been made out, the applicant was re-sentenced to a shorter term of 9 years, with a 6 year NPP.

Powers of sentencing judges – caution required in giving directions to Corrective Services NSW; no power to make recommendations to Parole Authority

A woman used her position as a valued and trusted employee in a small family business dishonestly to obtain a financial advantage for herself by deception. She made over $2.9 million dollars over a period of 7 years. The deception was discovered, and she was convicted following a trial. The sentencing judge sentenced her to imprisonment for 11 years with a non-parole period of 6 years, 6 months. Following his remarks on sentence, the sentencing judge purported to give directions to the "Corrective Services Commission" to assist the woman with rehabilitation programs, and made recommendations to the Parole Authority with respect to potential parole conditions.

Simpson AJA said in ***Whyte v R*** **[2019] NSWCCA 218** that the judge acted without power in purporting to give directions to authorities administering sentences. Further, it was inappropriate for a judge to intervene in these types of administrative decisions – it may cause confusion and engender disrespect. Her Honour noted that sentencing judges can make recommendations to such authorities, but they should be made with caution as they are not binding and judges lack the requisite information about resourcing and priorities. It is also inappropriate to make recommendations in view of the elaborate structure of the parole systems and the qualifications of those who administer it.

Commonwealth additional offences (s 16BA) – requirement to adhere to fundamental statutory procedures

When the applicant applied for leave to appeal his sentence for Commonwealth child abuse offences (8 primary offences and 3 additional offences under s 16BA), the CDPP as

respondent identified a number of procedural errors attending the original sentence. Specifically, s 16BA *Crimes Act 1914* (Cth) required the sentencing court to expressly ask the offender if he or she admits guilt of the additional offences and whether he or she wishes to have them taken into account by the court in passing sentence. As this had not occurred, Simpson AJA found that there was error: ***Purves v R* [2019] NSWCCA 227**. Although the applicant asked that the CCA re-sentence him in accordance with procedure, her Honour considered that the terms of s 16BA(1) were clear: the procedure needed to be undertaken by the court before which the person is convicted. The appeal was allowed on the grounds raised by the DPP, and the sentence set aside, with the matter being remitted to the District Court for re-sentence according to law.

Defence submissions – requirement that sentencing judges explicitly deal with them

A man got into a taxi and threatened the driver with assault unless the driver drove him at high speed down the Pacific Highway to Bulahdelah. The taxi driver complied out of fear, until he managed to swerve into a service station and barricade himself inside the building. The man then unsuccessfully attempted to set the service station across the road on fire. Police arrived and pepper-sprayed the man, and eventually were able to arrest him. He was sentenced in the District Court after pleading guilty to a series of offences to 5 years, with a non-parole period of 2 years, 6 months reflecting a finding of special circumstances. The appeal to the Court of Criminal Appeal asserted that the sentencing judge had failed to deal with two explicit submissions made on behalf of the applicant: that is, the failure to address whether the applicant's mental condition at the time of offending reduced his culpability, and the applicant's good prospects of rehabilitation and low likelihood of reoffending. In ***Masters v R* [2019] NSWCCA 233**, Hamill J upheld the grounds of appeal and re-sentenced the applicant to a shorter term.

In respect of ground 1, there was an express submission that the applicant's change of medication affected his mental condition, and that by virtue of the causal link with the offending, this reduced his moral culpability. The judge's sentencing remarks made no reference the mental condition reducing the applicant's moral culpability, apart from the brief remark that it mitigated the offending. This was insufficient and the judge needed to expressly deal with the submission. The ground was upheld by Hamill J on this basis.

In respect of ground 2, submissions that the judge should find good prospects of rehabilitation and unlikelihood of reoffending were not resolved in the remarks in sentence in terms of either making a finding or considering how it would impact on the sentence. While the remarks made by the sentencing judge during the course of proceedings were favourable, there was an obligation on the judge to record a clear finding given that there were some differences in opinion between the pre-sentence report and the evidence called by the applicant. Hamill J upheld this ground for that reason.

Procedural unfairness not established because judge did not depart from proposed finding but is established because judge made finding adverse regarding prospects of rehabilitation without notice

A man supplied a pistol to another man in exchange for $20,000, which was used to pay down a $100,000 gambling debt. He pleaded guilty to charges of supplying a pistol to a person not authorised to possess it. In the proceedings on sentence, the judge said that "my impression is that the risk of reoffending is minimal if at all". Later in his judgment he said the man's prospects of rehabilitation were "poor to moderate". One of the grounds of appeal in ***Neil Harris (a pseudonym) v R*** **[2019] NSWCCA 236** was that there was a denial of procedural fairness, because the finding of the risk of reoffending was different at hearing than what transpired in the remarks – in other words: "a sentence was imposed on the basis of a different course, adverse to the applicant, without the applicant being afforded an opportunity to be heard in the matter".

N Adams J found that there was procedural unfairness, although not on the basis of the sentencing judge having resiled from the preliminary finding on risk of reoffending. Rather, it was procedurally unfair for the sentencing judge to make a finding that the applicant's prospects of rehabilitation were "poor to moderate". This was so because the finding was not the subject of submissions by the Crown, and was not based on anything in the psychological report before the sentencing judge. Therefore, if the sentencing judge was contemplating an adverse finding, it was incumbent on him to raise this with representatives for the applicant.

Intensive correction orders – no statutory requirement to give reasons for concluding that a sentence of full-time custody was more appropriate than an ICO

A man was sentenced for a drug supply offence to 2 years' imprisonment following a plea of guilty. It was contended on appeal in ***Karout v R*** **[2019] NSWCCA 253** that by imposing a sentence of full-time custody instead of an intensive correction order, the sentencing judge failed to have regard to protection of the community per s 66 of *Crimes (Sentencing Procedure) Act 1999* (*CSPA*). Fullerton J (with whom Hoeben CJ at CL agreed, Brereton J in dissent) dismissed the ground. Her Honour held that the ground of appeal was premised on a flawed understanding of s 66 of the *CSPA* which provides:

> "(1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender."

Fullerton J said that she did not consider that s 66(1) elevated community protection to a mandatory consideration that dominated "broader sentencing principles, including considerations which may dictate that no lesser sentence than one involving a full-time custodial term is appropriate". Skipping over the controversy as to whether s 66 should be interpreted in a restrictive or facilitative way (see Basten JA in *R v Fangaloka* at [63]-[67] and Beech-Jones J at [107]-[108]), her Honour agreed with the analysis of Basten JA in *Fangaloka* at [60]-[61] in saying once a sentence of 2 years was imposed, there was no obligation to consider whether it should be served by way of ICO. Rather, once a sentence of imprisonment is imposed, the Court must consider whether any alternative to full-time

imprisonment should be imposed and in so doing ascertain whether there is a basis upon which a court should decline to consider imposing an ICO including broader considerations like adequate punishment, general deterrence, denunciation or for recognising the harm done to the victim and the community. Her Honour considered that the provisions relating to ICOs in the *CSPA* do not make plain that a Court has a statutory requirement to give reasons for considering that the appropriate sentencing outcome is full-time custody over an ICO.

In applying these principles to the asserted ground of appeal, Fullerton J held that the sentencing judge's ex tempore reasons, following detailed oral and written submissions from the parties, did not evince a failure to give adequate consideration to whether an ICO should be imposed. Due regard was given to the multiple considerations including the question of community protection, but the objective seriousness of the offence and general deterrence (mandatory considerations under s 66(3) overwhelmed other considerations. There was no error.

Moral culpability assessment – where offender sustained traumatic brain injury a few months prior to offending

Armed with a meat cleaver, the applicant was arrested during the course of a robbery of a home. He was convicted for the offences of aggravated break and enter with intent to commit a serious indictable offence, namely larceny, contrary to s 113(2) of the *Crimes Act 1900*, and sentenced to 6 years' imprisonment with a non-parole period of 4 years, 6 months. A few months prior to the robbery, the applicant had sustained a traumatic brain injury and leg and spine fractures, after crashing a motorbike into a tree at 180km/h. One of the grounds of appeal in ***Isbitzki v R*** **[2019] NSWCCA 247** was that the sentencing judge fell into error by not having proper regard to the applicant's traumatic brain injury.

Fullerton J was not satisfied that the sentencing judge dealt in a principled way with the issue of the applicant's traumatic brain injury and its causal relationship to the offending reducing his moral culpability. She derived from a number of authorities that the sentencing judge needed to assess the impact of the applicant's traumatic brain injury – either on the assessment of the offence's objective seriousness or his moral culpability. The sentencing judge failed to make that assessment and asked himself the entirely wrong question – whether the offender was aware the offending was wrongful.

Procedural fairness – discount for guilty plea at lower amount than Crown concession

The applicant pleaded guilty to manslaughter 4 days before his trial was due to start. He was sentenced to 8 years after a 12% discount for the plea. One of the grounds of appeal against sentence in ***ES v R*** **[2019] NSWCCA 262** asserted a denial of procedural fairness in relation to the sentencing discount. During the sentence hearing the applicant's counsel sought a discount of 25-25% and the Crown accepted it should be higher than 15%. The judge observed, "you are not terribly far apart, but the top of your suggested range is the bottom of his". It was held that the judge had not indicated that she would find a figure in

the range suggested, but made a neutral observation of the extent of the issue between the parties that reflected their submissions. Appeal dismissed.

Fresh evidence of terminal medical condition may be admitted if compelling and previously unknown

In ***Lissock v R*** **[2019] NSWCCA 282**, the offender appealed the severity of his sentence for multiple child sexual assault offences. At the time of sentencing there was evidence that he suffered from cirrhosis of the liver. It was subsequently found that he had liver cancer at an advanced stage that was terminal. Button J allowed the evidence as it was compelling and not available at sentencing. He reduced the head sentence from 18 to 14 years to better reflect the greater toll imprisonment would take on the offender, but refused to make the sentence manifestly inadequate just so a terminally ill offender might enjoy liberty. That, to his Honour's mind, should be left to the State Parole Authority. Davies J dissented on varying the sentence because there was insufficient evidence to show that the illness made prison more onerous.

Special circumstances in varying statutory ratio should not be double-counted if already considered when formulating head sentence

The applicant in ***PW v R*** **[2019] NSWCCA 298** had been convicted of 12 counts of sexual offences against his 16-year-old daughter. The applicant sought a finding of special circumstances (first time in custody, ill-health and rehabilitation) to justify a shorter non-parole period. The sentencing judge refused. Firstly, a first-time custodial sentence was not enough to constitute a special circumstance. Secondly, the applicant's poor health had already been taken into account to determine the head-sentence, so should not also be considered as a special circumstance. Thirdly, there was no need for a longer parole period to facilitate rehabilitation.

Macfarlan JA embraced the approach of the sentencing judge and dismissed the appeal. The applicant's argument that the indicative sentences were manifestly excessive also failed – though some of the indicatives were stern, the aggregate sentence was well within an acceptable ambit.

Intensive correction orders - s 66 of the Crimes (Sentencing Procedure) Act should be expressly considered when cogently raised in sentencing submissions

Blanch v R **[2019] NSWCCA 304** concerned an appeal from a full-time custodial sentence. At sentencing, the applicant's counsel sought an intensive correction order (ICO). Section 66 of the *Crimes (Sentencing Procedure Act) 1999* (NSW) requires a sentencing judge to have regard to several mandatory factors, especially community safety, when considering whether or not to grant an ICO. However, the sentencing judge here opted for full-time custody and did not contemplate an ICO in his reasons.

On appeal, Campbell J held that this constituted a sentencing error. While it was open to the judge to find that full-time custody was the only appropriate sentence, he was

required to, expressly or by necessary implication, deal with the question of an ICO. This was because the material before him enlivened, by virtue of s 66, a requirement to consider the mandatory factors.

Parity requires parties to be co-accused or engaged together in a criminal enterprise – wrong large commercial quantity used in comparison to assess objective seriousness

Mr Malouf appealed his sentence on four grounds, including that his sentence was disparate from that of Mr Azzopardi. Malouf had bought drugs from Azzopardi to on-sell to his own customers. In ***Malouf v R*** **[2019] NSWCCA 307**, R A Hulme J dismissed this ground, holding that Azzopardi lacked enough involvement in Malouf's criminal business to be considered comparable. They were neither co-accused nor engaged in the same enterprise.

The appeal was upheld on different grounds, namely that the sentencing judge misconstrued the objective seriousness of the offending when she made a comparison with the wrong prescribed large commercial quantity. At the time of offending, the large commercial quantity for methylamphetamine was 1kg. At the time of sentence, this had been reduced to 500g – the quantity referred to by her Honour. Malouf was being sentenced for the supply of 366.54g. The sentencing judge fell into error when she compared Malouf's quantity to the new large commercial quantity, rather than the old, to determine the objective seriousness of the offending.

Sentencing judge should be mindful of impact of accumulation on ratio between non-parole period and head sentence

In ***Hardey v R*** **[2019] NSWCCA 310**, the applicant pleaded guilty to an aggravated break, enter and steal offence. The sentencing judge made a finding of special circumstances (primarily a need for assistance on release). To give effect to this, her Honour sentenced the applicant to a three-year head sentence with two-year non-parole period – a ratio of 66%. However, the applicant had recently been sentenced to a term of imprisonment for other offending. The sentencing judge was aware of this, but the effect of the accumulation was that the applicant would serve 80% of his overall sentences in custody. The applicant appealed on the basis that the finding of special circumstances was not given effect.

Bellew J allowed the appeal on this ground. His Honour held that the sentencing judge had expressly intended a 66% ratio and that this had been frustrated by the accumulation. His Honour quoted Bell P in *Huang v R* [2019] NSWCCA 144 in noting that prisoners should not be left to wonder whether their sentence was deliberate or the result of a miscalculation – an issue solvable by reference to the transcript and sentencing remarks.

Prior offences – Veen (No 2) principles still apply if current offence is less serious than previous offences

The applicant in ***Gilshenan v R*** **[2019] NSWCCA 313** had been sentenced for ("unsophisticated" and "not… well planned") child pornography offences. The applicant's

criminal history disclosed similar offences of a more serious nature. The principles in *Veen v R (No 2)* (1988) 164 CLR 465 allow a sentencing judge to take the offender's criminal history into account to determine if an offence is an "uncharacteristic aberration" or part of a pattern of "continuing disobedience of the law". The latter may justify a more severe sentence, while the former might justify leniency.

The applicant submitted that it was not open to the sentencing judge to rely on *Veen (No 2)* in this way, because the recent offences were less serious than the previous offences. Johnson J dismissed this, holding that it was the repetition of the offending of the same type, no matter its severity, which empowered the sentencing judge to impose a harsher sentence.

Breach of trust should not be double-counted as both an aggravating factor and undermining good character

Merhi was a former Australian Border Force employee who was convicted of bribery, fraud and corruption offences. Her breach of trust was taken to be a significant aggravating factor. However, the sentencing judge refused to consider her good character and lack of prior record, on the basis that the good character enabled her to obtain the position of trust. In ***Merhi v R* [2019] NSWCCA 322**, Cavanagh J upheld this ground, finding that where the position is not obtained for the purpose of committing the offence, the refusal to consider good character is a form of double-counting the breach of trust. In addition, the fact that she was a former employee at the time of the offence did not absolve Merhi of the breach of trust, as she was still exploiting the knowledge she had been entrusted with as an employee.

Indicative sentences not actually operative – no need for accumulation

The offender in ***Vaughan v R* [2020] NSWCCA 3** was sentenced for domestic violence offences – namely, GBH with intent to murder and wounding with intent to cause GBH – against his former partner and her co-worker. He was imprisoned for an aggregate term of 21 years (NPP 14 years). The single ground of appeal advanced was that there was a calculation error in the accumulation of indicative sentences. Johnson J refused leave for an extension to appeal. Indicative sentences assist with totality and transparency, but are not actually passed by the court so have no operative effect. The aggregate sentencing regime is intended to simplify sentencing, not complicate it further. The indicatives merely indicate; they do not cascade into the aggregate.

Phrase "in this country, that is sexual intercourse" not impermissible consideration but part of duty to give reasons to offender and laypeople

The applicant in ***Rahman v R* [2020] NSWCCA 13** was sentenced for a penile-vaginal sexual assault offence with a cunnilingus sexual assault offence taken into account on a Form 1. The sentencing judge, in his remarks, said "in this country, that [cunnilingus] is sexual intercourse". On appeal, the applicant inferred from this that the sentencing judge took into account an irrelevant consideration – namely, that the applicant wasn't Australian.

Beech-Jones J held, dismissing the appeal, that the sentencing judge was merely fulfilling the duty to give reasons. The offender had expressed confusion as to what cunnilingus was. Additionally, it was not readily clear to the layperson that cunnilingus amounted to sexual intercourse in Australian law. Therefore, the sentencing judge was explaining the law in this jurisdiction for the benefit of both the offender and the observer.

Distinction between assessment of objective seriousness and instinctive synthesis of objective and subjective matters

The offender in ***Simmons v R*** **[2020] NSWCCA 16** pleaded guilty to 7 offences with a further 6 taken into account on a Form 1. The offending was largely in the nature of knifepoint robberies and breaking and entering. The sentencing judge delivered an ex tempore judgment the day following the sentencing hearing. On appeal, it was alleged he elided subjective matters (criminal history; conditional liberty) with an assessment of objective seriousness.

On closer inspection, Adamson J held that, while the factors might have been referred to in the same sentence, they were treated as distinct concepts. Her Honour dismissed the appeal – while the sentencing judge was discursive, he appreciated the need to separate an assessment of objective seriousness from the process of intuitive synthesis (which takes into account subjective matters).

Not double-counting to consider guilty plea both for utilitarian value and as evidence of remorse – Bugmy principles where offender now pro-social

Mr Hoskins hit and killed a woman with his car, panicked, and drove off. There was no evidence that his driving was negligent or dangerous. He turned himself in the next day, was charged with failure to stop and assist and pleaded guilty at the earliest opportunity. The sentencing judge refused to double-count the guilty plea as evidence of remorse, having already granted the 25% utilitarian discount. His Honour also rejected a causal link between Mr Hoskins' disadvantaged background and the offending, given that Mr Hoskins was at the time of the offence living a pro-social life.

In ***Hoskins v R*** **[2020] NSWCCA 18**, Basten JA allowed the appeal. His Honour held that the guilty plea should have been taken into account as evidence of contrition, given how clearly remorse was raised on the facts (conceded by the Crown). R A Hulme J held that the actual criminal act of Hoskins – fleeing the scene – was clearly a poor decision consistent with his troubled background, such that *Bugmy* principles could not be discarded.

Discount for offer to plead guilty to lesser offence where offer rejected but offender then found guilty of lesser offence

Mr Magro was charged with murder after fatally shooting a man in the neck. This followed a confrontation the previous night. Magro offered to plead guilty to manslaughter,

arguing that the Crown could not rule out excessive self-defence. The offer was refused, the matter proceeded to trial, self-defence was raised and Magro was found guilty of manslaughter. The sentencing judge allowed a discount of 10% for the offer, finding "no great utilitarian value" given the significant factual and culpability disputes.

Gleeson JA ruled that this was in error. In ***Magro v R*** **[2020] NSWCCA 25**, his Honour held that the importance of the offer was its potential utilitarian value, not its actual value. In addition, his Honour held that the offer resolved all the criminal elements – it did not need to resolve every fact. Disputes about culpability could be resolved in the normal course of a sentencing hearing.

Form 1 procedural issues

The applicant in ***LS v R*** **[2020] NSWCCA 27** was sentenced for three aggravated sexual assaults against his daughter. Further counts were taken into account on a Form 1. The Form 1 only listed one principal offence, but the sentencing judge considered the Form 1 offences across all three offences. Harrison J held that this was in error – Form 1 offences can only be contemplated when considering a stipulated principal offence. The appeal was dismissed as no lesser sentence was warranted.

Ex tempore judgment – failure to adequately address objective seriousness, moral culpability and mental health

In ***Tuncbilek v R*** **[2020] NSWCCA 30**, the offender robbed a service station with a butter knife. He did so hoping to be sent to gaol where his drug use and mental health could be addressed. The sentencing judge delivered an ex tempore judgment in which there was no reference to submissions on objective seriousness and scant mention of the offender's mental health. On appeal, Johnson J held that objective seriousness and moral culpability were central issues that demanded determination, particularly given the unusualness of the robbery. Equally, the offender's mental health impacted questions of deterrence, and the lack of any brief explanation of this factor was an error. The offender was re-sentenced.

Parity appeal rejected where incongruous with case below

Mr Raine and his wife were sentenced for defrauding their employer, Tabcorp, by falsifying betting tickets. At sentencing, they were represented by the same senior counsel who argued that Mr Raine was the "ringleader" and his wife a "follower". This argument was accepted by the sentencing judge, and Mr Raine received a higher sentence as a result. On appeal, Mr Raine argued that this disparity gave rise to a legitimate sense of grievance. In ***Raine v R*** **[2020] NSWCCA 32**, Lonergan J rejected that argument as being incompatible with the submissions made below.

Sentencing hearing where facts disputed – can adverse inferences be drawn from silence of offender?

The offender in ***Strbak v The Queen*** **[2020] HCA 10; 94 ALJR 374** pleaded guilty to the manslaughter of her son. At sentence, it was disputed whether she killed her son through

neglect or through the infliction of blunt force trauma. She did not give evidence. The sentencing judge, noting the lack of contradictory sworn evidence, found facts against her.

The Court (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) held that *R v Miller* [2004] 1 Qd R 548 was wrongly decided, and that adverse inferences cannot be drawn from the refusal of an offender to give evidence in sentencing proceedings. *Miller* suggested that the presumption of innocence enlivens the rule, and this presumption is lost at sentence. However, it is actually the accusatorial nature of criminal trials that is critical. Sentencing, like a trial, is an accusatorial process and the facts found are still adverse and significant to the offender. The appeal was upheld and the proceedings were remitted to the Queensland Supreme Court.

Totality and accumulation in aggregate sentencing

Mr Taitoko pleaded guilty and was sentenced to an aggregate sentence of 4 years for 5 offences. The offences reflected an hour of random, drunken violence. He appealed on nine grounds, many of which were spurious and without merit, but was successful on manifest excess: ***Taitoko v R* [2020] NSWCCA 43**.

Leeming JA held that the sentencing judge misunderstood the purpose of aggregate sentencing. It is not to avoid "crushing" sentences but rather to relieve courts of the burden of having to cascade sentences when accumulation is required. Here, the aggregate sentence did not appropriately represent the totality of the offending, given that the criminality of the offences elided across the hour of encounters.

Difficulty in identifying error in objective seriousness where only slight difference between parties

Mr Pearce was sentenced to an 18-month ICO for providing a false alibi in his friend's sexual assault trial. The Crown appealed on manifest inadequacy, which the Court would have upheld but for Mr Pearce's exemplary subjective circumstances: **R v Pearce [2020] NSWCCA 61**. The Crown submitted that the sentencing judge erred in his assessment of objective seriousness – the Court noted the difficulty with this ground when where there was only slight difference between the parties' submissions below. The Crown alleged "in the mid-range", while defence submitted "not yet at the mid-range". The Court could not divine what sort of offending lay in the difference.

Re-sentencing and the coronavirus

The offender in ***Scott v R* [2020] NSWCCA 81** was convicted of numerous child sex offences. His appeal against sentence was upheld on the ground of manifest excess, and Hamill J proceeded to re-sentence. A number of late submissions were filed without leave annexing various internet articles and pages from WebMD concerning the offender's ill-health and the coronavirus. His Honour disregarded much of this material, but held that the offender's ill-health, advanced age, vulnerability to Covid-19 and the increased hardship of custody were factors relevant on re-sentence.

The anomalous advantage of aggregate over concurrent individual sentences regarding availability of ICOs

The applicant in ***Abel v R*** **[2020] NSWCCA 82** appealed his sentence for cocaine supply and proceeds of crime offences. Originally, the proceeds offence was on a Form 1. When the sentencing judge proposed, after his remarks, a sentence of 2 years, 6 months for the principal offence, the applicant sought an adjournment to disentangle the offences and have them dealt with on separate indictments. This would allow the court to impose an aggregate sentence and therefore an ICO (by virtue of s 68(2) *Crimes (Sentencing Procedure) Act 1999* (NSW)).

When the applicant then complained, inter alia, of a lack of assessment of objective seriousness of the proceeds offence, Button J refused leave. A number of criticisms were also made about procedural aspects of the case.

Interaction between discounts and jurisdictional limits

Mr Park was sentenced for a number of sexual assaults. There were two further offences on a certificate pursuant to s 166 *Criminal Procedure Act 1986* (NSW). They were indictable offences to be dealt with summarily and thereby subject to the Local Court's jurisdictional limit of two years imprisonment. The issue in ***Park v R*** **[2020] NSWCCA 90** was how the jurisdictional limit interacted with s 22 *Crimes (Sentencing Procedure) Act 1999* (NSW) which allows for sentences to be reduced on account of pleas of guilty. The focus was upon the words: "may accordingly impose a lesser penalty than it would otherwise have imposed". The question was whether s 22 or the jurisdictional limit fell to be considered first – whether the sentence that would otherwise have been imposed was two years (at most) because of the limit, or whether the sentence that would otherwise have been imposed was the sentence appropriate in all the circumstances.

Bathurst CJ and R A Hulme J held that s 22 referred to the sentence appropriate in all the circumstances. The jurisdictional limit is not the maximum penalty – that is, it is not reserved for a worst-case offence. An appropriate sentence might, for example, be 2 years, 3 months, in which case it would be reduced by the limit. The plea of guilty is one of numerous factors that is synthesised when determining the appropriate sentence. Otherwise, courts would be constrained to passing disproportionate sentences by virtue of incoherence in the legislation. Fullerton J dissented, favouring the alternative construction.

"Sentencing remarks" is not anachronistic

In ***Maxwell v R*** **[2020] NSWCCA 94**, Johnson J responded to criticism of the term "remarks on sentence" as being inaccurate and depreciatory. His Honour held that the remarks on sentence play an important role in explaining the sentencing process to offenders, victims, the community and appellate courts. His Honour pointed to usage of the term in recent

English decisions and in parliamentary and legislative materials. The term is also used in recent decisions of the High Court.

Failure to give effect to finding of special circumstances

The applicant in ***AM v R*** **[2020] NSWCCA 101** was 19 when he committed sexual offences against his 10-year-old half-sister. The sentencing judge made a finding of subjective circumstances and purported to calculate this by reducing the non-parole period by 9 weeks to 6 years (with a balance of 2 years, 3 months). On appeal, Hidden AJ held that while fixing a non-parole period was a matter for the discretion of the judge, such a small reduction required explanation to not be in error.

Discount for spontaneous cooperation where no evidence of value in Commonwealth matters

Mr Weber pleaded guilty at an early opportunity to an offence of importing a marketable quantity of methylamphetamine. In his police interview, he gave up the names of two other offenders. His appeal, alleging a failure to account for his plea, was successful: ***Weber v R*** **[2020] NSWCCA 103**. At re-sentence, the issue arose as to what discount could be given for his assistance where there was no evidence of its value. Bellew J gave a 5% discount, noting that s 16(2)(h) of the *Crimes Act 1914* (Cth) made no specific reference to the usefulness of the assistance (cf s 23 *Crimes (Sentencing Procedure) Act 1999* (NSW)).

Breach of conditional liberty a subjective aggravating factor that does need to relate to the offending

Mr Field stabbed a man. He was on two good behaviour bonds at the time. He argued on appeal (inter alia) that it was wrong to regard breach of the bonds as aggravating because they did not contribute to the seriousness of the offending in a material sense: ***Field v R*** **[2020] NSWCCA 105**. *In particular, he was not abusing his freedom or abandoning his rehabilitation because he believed the stabbing was necessary in self-defence. Hoeben CJ at CL rejected this argument, holding that while breach does not elevate the objective seriousness of an offence, it will always aggravate because of its effect on factors like deterrence and community protection.*

Assessing objective seriousness where multiple indicative sentences

The applicant in ***FL v R*** **[2020] NSWCCA 114** pleaded guilty to multiple child sex offences committed against his stepdaughter. He argued that the sentencing judge erred in assessing objective seriousness "globally", rather than assessing each offence separately. Wilson J held that the judge did in fact step through the facts and circumstances relevant to the seriousness of each offence before concluding that the offending was well within the mid-range. Nothing further was required.

Is a fixed term sentence a head sentence or a non-parole period?

In ***Waterstone v R*** **[2020] NSWCCA 117**, the offender was convicted of state offences (aggravated acts of indecency) and Commonwealth offences (carriage service sexting) committed against his stepdaughter. The trial judge imposed an effective fixed term sentence, which was overturned on appeal because of a lack of reasons for how that effective term was reached. N Adams J, in obiter, provided a detailed historical analysis of the controversial question of whether a fixed term of imprisonment is set at the level of the overall sentence or represents a reduction of a sentence to the level of the non-parole period, the latter being despite any legislative authority to do so. (Proponents of the latter appear to favour the flawed argument suggested in *Tuvunivono v R* [2013] NSWCCA 176 at [10]: see (2020) 27(6) Crim LN [4293].)

"In company" not always aggravating despite inclusion in s 21A Crimes (Sentencing Procedure) Act

Mr Pehar and two associates robbed an industrial complex under cover of night, committing 10 offences. On appeal, he contended that the sentencing judge was wrong to find that the offences were aggravated by the fact he was in company: ***Pehar v R*** **[2020] NSWCCA 118**. Fullerton J found that circumstances aggravate to different degrees, despite their inclusion in s 21A. Being in company is more aggravating where, as is usual, victims are intimidated by superior numbers of offenders. Here, there were no bystanders and no confrontations. The trial judge should have considered whether, on the evidence, the offences were actually aggravated by the presence of two other men.

Intention to "prank" makes no difference to objective seriousness of firing a handgun

Mr Ah-Keni challenged the finding of objective seriousness in his sentence for discharging a pistol in a taxi (while on bail): ***Ah-Keni v R*** **[2020] NSWCCA 122**. He argued that, as he had taken the loaded pistol into the taxi as a "prank", and its discharge only resulted from the ensuing struggle, a finding of objective seriousness above the mid-range was excessive. Hoeben CJ at CL dismissed the appeal, holding that the finding was well within the ambit of the judge's discretion. The fact that it was intended to be a "prank" did not make any difference to the risk and the potential consequences.

Accounting for course of conduct in lead-up to offence distinct from sentencing for uncharged offence

The offender in ***LN v R*** **[2020] NSWCCA 131** was convicted alongside her partner for the murder of their three year old son. In the two months prior to his death, the son was repeatedly physically and psychologically abused. On appeal, the offender submitted that the trial judge erred by taking these uncharged assaults into account in assessing the objective seriousness of the murder charge.

Basten JA held, dismissing this ground, that sentencing for an uncharged offence was distinct from taking into account conduct that could constitute an offence when

sentencing for another, more serious offence. His Honour noted that the administration of justice would only be frustrated by requiring the Crown to charge every assault potentially arising on the course of conduct. The events were relied upon to prove the seriousness of the murder, not to prove the elements of uncharged offences. Moreover, the earlier violence was relevant because it contributed to the child's death - the child was weakened and vulnerable as a result of weeks of abuse.

Hamill J dissented on this ground, finding that the offender was indeed punished for uncharged offences. The appeal was otherwise allowed as the judge made insufficient reference to evidence of the offender's mental illness.

Sentencing judge not bound by submissions of parties on objective seriousness, unless agreement expressly indicated

Mr Brown was sentenced for two assault offences, including puncturing a man's lungs with scissors. At sentencing, the Crown agreed with defence counsel that the objective seriousness of the offending fell below mid-range. In his remarks, the judge disagreed with these submissions. Brown appealed, alleging a lack of procedural fairness because he was not given notice or an opportunity to dissuade the judge from that course: ***Brown v R* [2020] NSWCCA 132**.

Harrison J dismissed the appeal, finding that the judge was not bound by the submission or concession of the Crown on objective seriousness without some express or implied indication that he intended to adopt it. Here, it was clear that the assessment remained a matter for the judge, and so Brown was not denied an opportunity to be heard on it.

Parity a relevant factor even where co-offenders dealt with summarily

The applicant in ***Greaves v R* [2020] NSWCCA 140** appealed his sentence for a number of assaults and thefts. His two co-offenders were dealt with in the Local Court, while he was sentenced in the District Court. On appeal, the applicant argued a lack of parity between him and his co-offenders – the trial judge had disregarded parity because the co-offenders were dealt with summarily.

Cavanagh J held that this was in error. The sentencing exercise is the same in both the Local and District Courts, and takes as its point of maximum reference the maximum sentence, not the jurisdictional limit. The limit should only have entered the equation if the final sentence exceeded it. Parity should therefore not be disregarded because of the limit.

Section 16BA Crimes Act 1914 (Cth) - sufficient if instructed counsel agrees that offender admits offence - artificial to require offender to admit personally

Mr Kabir, a tax agent, pleaded guilty and was sentenced for proceeds of crime and fraud offences. A further dishonesty offence was taken into account under s 16BA of the *Crimes Act 1914* (Cth). On appeal, Mr Kabir alleged (inter alia) that the failure to formally ask him

if he admitted to the 16BA offence amounted to a procedural error: ***Kabir v R*** **[2020] NSWCCA 139**. Harrison J rejected this argument. Mr Kabir signed the charge sheet and he was present in court when his counsel, presumably acting on instructions, agreed to the charge being taken into account. This satisfied the s 16BA requirements - to find otherwise would be to allow form to triumph over substance.

Three-step process in considering an ICO sufficiently followed

The applicant in ***Kember v R*** **[2020] NSWCCA 152** pleaded guilty to his part in supplying a pistol and possessing a silencer, with eight other firearms offences taken into account. He sought, unsuccessfully, an ICO. On appeal, he argued that the sentencing judge failed to follow the three-step process in refusing an ICO and gave insufficient reasons as to why an ICO was unsuitable while overvaluing community safety.

Bellew J dismissed this ground, finding that the judge gave extensive reasons for why the seriousness of the offending militated against an ICO. His Honour also dismissed submissions on parity – while the co-accused were sentenced by different judges, specific regard was had to parity and material differences between the offenders justified a higher sentence.

Guilty plea discounts in Commonwealth offences are purely for utilitarian value – lack of remorse does not affect numerical discount

The offenders in ***Betka v R; Ghazaoui v R; Hawchar v R*** **[2020] NSWCCA 191** pleaded guilty at an early stage to money laundering offences. The trial judge gave them a discount of 20% for these pleas, reasoning that they were made in the face of a strong prosecution case and so were born more of fatalism than a desire to facilitate the administration of justice. On appeal, Fullerton J held this was in error. Her Honour found that the discount for a guilty plea is purely for its utilitarian value, and therefore its timing. The reason for the plea may be relevant to remorse, but that is a separate and subjective factor.

Discontinued charges as irrelevant considerations in sentencing

The offender in ***Farrell v R*** **[2020] NSWCCA 195** pleaded guilty to charges that he posted the details of "informer" witnesses on Instagram (with the hashtag "supergrass"). N Adams J held that the trial judge erred by placing weight on the similarity of these charges to other charges that were discontinued against the offender in 2017, and therefore were not established in fact. Moreover, the trial judge placed minimal weight on a character reference written by the offender's partner, who had been a co-accused before charges against her were discontinued. N Adams J found that, where the charges had been discontinued (and therefore her involvement not proven), and the referee not called or cross-examined, the trial judge had had regard to an irrelevant consideration without appropriate warning. The appeal was upheld.

SENTENCING - SPECIFIC OFFENCES

Drug possession offence – imposition of custodial sentence not determined by statistical comparison

The applicant in ***Ahmad v R*** **[2019] NSWCCA 198** attempted to import cocaine via post from the United States. He was sentenced for drug importation offences and a related offence of drug possession. Overall, he was sentenced to 7 years, 5 years non-parole and appealed against the portion of the sentence in which a 6 month custodial sentence was imposed for the possession offence. The basis of the challenge was that there were Judicial Commission statistics showing that custodial sentences were not imposed for possession offences in 97% of cases. The ground was rejected.

Wilson J affirmed that the available range of sentence is not determined by statistical comparison but "by the facts of the offence, and the circumstances of the offender, and in compliance with sentencing law and principle", particularly as someone must be at the higher end of a given range in sentence. Further, comparison with statistics says nothing about the circumstances, and her Honour noted that this case was necessarily different from summary cases in the Local Court. Wilson J concluded that the assessment that a six month sentence reflected the criminality of the possession offence was open to the sentencing judge. Further, her Honour considered that the quantity of the drug, the applicant's criminal history, lifestyle choice to use drugs, and need for specific deterrence met the s 5 *Crimes (Sentencing Procedure) Act* threshold, which was not disturbed by anything of significance in the applicant's subjective case.

Aggravated break and enter – whether double-counting aggravating factor to take account of fact that additional common assault occurred in a home

A man broke into a home where he assaulted a woman and then assaulted her brother when he came to her aid. He destroyed items of property, and then assaulted a neighbour who came to investigate. He pleaded guilty to offences of aggravated break and enter and commit serious indictable offence, namely an assault occasioning actual bodily harm (s 112(2) of the *Crimes Act 1900*) (to which offences of intentionally damaging property and assaulting a neighbour were taken into account) and to an offence of assault (s 61 of the *Crimes Act*). The length of the sentence imposed was 6 years, 1 month and 9 months respectively, with an accumulation of 3 months. The appeal to the Court of Criminal Appeal was on the ground of manifest excess: ***Pham v R*** **[2019] NSWCCA 211**.

Leave to appeal was granted and the applicant was re-sentenced. One of the issues was the contended double-counting of aggravating factors in respect of the common assault committed against the brother. Fagan J held that "The Court cannot treat this offence as aggravated by the circumstance that it occurred in the course of a home invasion as that would result in double punishment, the break and enter being already dealt with as part of the criminality of the first offence." This was because, in the circumstances of the offending, the applicant pushed the brother then immediately left the building – therefore

"The circumstance that this took place within [the brother's] home is punished as an aspect of the aggravated break and enter".

OBSERVATION: It was uncontroversial that P could not be doubly punished for the breaking and entering of the premises in the assessment of the sentence for the common assault offence against the male occupant. It remained the case, however, that s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* had application to that offence. It was held in *Jonson v R* [2016] NSWCCA 286; (2016) 263 A Crim R 268 at [41] that the correct construction of s 21A(2)(eb) promotes the purpose of the section, "namely, that a home is a place which should be safe and secure for persons who reside, or are otherwise present, at such a place".

Taking that aggravating factor into account in relation to the common assault in the present case would not be to punish the offender twice for having broken and entered the premises. It is respectfully suggested that caution is required in construing this aspect of the present judgment as meaning that an aggravating factor that applies to one offence cannot be taken into account in assessing the seriousness of another offence committed at the same place and time: e.g. two offences committed at the same time by an offender who is on conditional liberty (s 21A(2)(j)). The response may be more in the application of the totality principle, having regard to what was said in *Pearce v The Queen* (1998) 194 CLR 610, in considering the degree of concurrence of individual sentences.

Illegal exportation, importation, and possession of wildlife – ICO manifestly inadequate

The applicant was an ex-rugby league player who had turned to international wildlife smuggling as a way of making money following a ban for breaching anti-doping policies. He was charged with a number of offences under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act*)* that carried a maximum penalty of 10 years or 5 years imprisonment, as well as a proceeds of crime offence under the *Criminal Code* (Cth) (maximum penalty 2 years). A judge imposed an aggregate sentence of 3 years' imprisonment to be served by an intensive correction order. An inadequacy appeal brought by the Commonwealth Director was upheld and a 4 year full-time sentence was imposed in ***R v Kennedy*** **[2019] NSWCCA 242** (Payne JA and Fullerton J, with Adamson J agreeing with additional reasons).

The Court held that the 3 year ICO was outside the discretion available to the sentencing judge in view of: the maximum penalties for the relevant offences; the potentially catastrophic effect that the importation offences could have on the Australian ecosystem; the fact that some of the reptiles were listed on the CITES appendices III and II; that the offences were discrete episodes of repeat offending involving different but substantial risks to the Australian ecosystem; and in circumstances where such offending is notoriously difficult to detect. The Court went on to hold that it was not a case where the residual discretion should not be exercised because of a number of factors, including the seriousness of the conduct and range of breaches of the EPBC Act, which meant that the sentence would be of significant utility for future sentencing courts.

Proceeds of crime offence – substantial sentence of imprisonment not manifestly excessive

The applicant applied for leave to appeal against his sentence for proceeds of crime offences that related to the activities of a Vietnamese money laundering syndicate, as part of a more complex drug trafficking operation: ***Musgrove v R* [2019] NSWCCA 245**. The applicant received a head sentence of 4 years, 6 months with a non-parole period of 2 years, 9 months, reflecting a ratio of 61.1%. Bell P refused leave to appeal. The aggregate sentence was not manifestly excessive and within the range open to the sentencing judge in her discretion considering the degree of concurrency between the indicative sentences for the offences, the serious nature of the offences charged, and where the subjective circumstances were taken into account to a full and appropriate degree.

Aggravated sexual intercourse with a child aged 10-14 (s 66C(2)) – victim's willingness does not mitigate – intellectual disability not self-evidently less serious than other aggravating circumstances

The applicant in ***Bell v R* [2019] NSWCCA 251** contended that the sentencing judge erred in his assessment of objective seriousness and that the sentence was manifestly excessive. The objective seriousness error was said to be twofold. First, the victim (a 12 year-old girl), while not capable of consenting, was a willing participant in the intercourse. R A Hulme J, quoting from *R v Nelson* [2016] NSWCCA 130, held that while coercion or force might aggravate offending, a lack of coercion or force (from an unresisting victim) would not mitigate its seriousness.

Secondly, the applicant submitted that the aggravating circumstance in question (a mild intellectual disability) was not as serious in comparison to the other aggravating factors in s 66C(5) *Crimes Act 1900* (NSW), such as threats, the infliction of harm or the deprivation of liberty. His Honour rejected this comparison because it was not put to the sentencing judge, nor was it necessary or inevitable that one circumstance would always be less serious than another. The manifest excess submission was upheld and the applicant resentenced to give greater weight to the applicant's subjective case.

Aggravated robbery with wounding (s 96) – no error in taking into account "gratuitous act of cruelty"

An elderly man out walking in the early morning to collect a newspaper was assaulted by the applicant who was intoxicated. The applicant pushed the man who fell back against a fence and then punched him in the face several times. The applicant then robbed the man of $300 cash. The elderly man required an operation for facial injuries as well as physiotherapy and walking assistance. Following pre-trial hearings, the applicant pleaded guilty to the charge of aggravated robbery with wounding, pursuant to s 96 of the *Crimes Act 1900*. He contended on appeal that the sentencing judge erred by finding that the conduct included "a gratuitous act of cruelty": ***Melvaine v R* [2019] NSWCCA 274**. He submitted, by reference to *McCullough v R* [2009] NSWCCA 94; 194 A Crim R 439, that a gratuitous cruelty finding can only be made if "the infliction of pain was an end in itself.

Cavanagh J noted that the sentencing judge's reference to "gratuitous cruelty" was not for the purpose of making out a finding of an aggravating factor. Rather, it was made in the context of a series of statements intended to describe the violence inflicted and to elaborate on the finding that the objective seriousness of the offending was "of an extremely high order". Furthermore, the additional punches inflicted on the elderly man were rightly described as "needless violence" and submissions that they served a purpose as part of continuing with the robbery were rejected.

Drug supply – criminality of drug runner in sophisticated organisation

In ***Kay v R*** **[2019] NSWCCA 275**, the applicant sought leave to appeal in respect of a sentence for ongoing drug supply. The original head sentence was 4 years with a non-parole period of 1 year, 8 months. The sentencing judge found that the offending fell just under the mid-range of objective seriousness. Harrison J, allowing the appeal, held that the significant sophistication of the drug operation could not be attributed to the applicant, who was a mere "minnow". She contributed no expertise or capital and was paid partly in kind. The viability of the organisation did not turn on her involvement, which diminished her criminality. His Honour ruled that the sentencing judge erred in the objective assessment and reduced the sentence to 17 months with a non-parole period of 12 months.

Assaults – extent of injury not determinative of objective seriousness

The applicant in ***Waterfall v R*** **[2019] NSWCCA 281** was a prison officer who was convicted of recklessly inflicting grievous bodily harm (GBH) to a prison inmate. The sentencing judge found that although the injury was at the lower end of seriousness (for GBH), the offending was aggravated by the abuse of authority. The applicant submitted that the seriousness of the injury should have been the determinative factor.

Cavanagh J rejected this submission and dismissed the appeal, holding that the extent and nature of an injury was always important but not always critical. There was no need, in his Honour's judgment, to fetter the sentencing discretion by ranking objective factors.

Drug manufacturing and supply – purity an objective factor in sentencing despite "admixture" provisions in s 4 Drug Misuse and Trafficking Act 1985 (NSW)

The appeal in ***El Kheir v R*** **[2019] NSWCCA 288** arose from an asserted disparity between the applicant's sentence and that of his co-offender. Both men were sentenced, inter alia, for the manufacture of a 12.84kg liquid containing 2.6kg of pure methylamphetamine ("meth"). The indictment of the co-accused referred to the 12.84kg mixture, while the indictment of the applicant referred to the 2.6kg pure quantity. The thrust of the applicant's argument was that s 4 *Drug Misuse and Trafficking Act 1985* (NSW) – the admixture interpretation provision – required all mixtures or preparations of a drug to be treated as that drug, including at sentence. This would mean that the difference in indictment wording would result in different sentences.

Leeming JA dismissed the appeal. His Honour held that purity remained relevant as an objective factor. For example, a 5kg liquid distilling to 1g meth and another 5kg liquid distilling to 4kg meth might (by virtue of s 4) both result in prosecution for a large commercial quantity, but obviously the difference in purity accords with a difference in objective criminality. The fact that the co-accused was sentenced for the larger quantity of a more dilute mixture did not result in disparity.

Terrorist organisation membership – value judgment of terrorist organisation a matter for legislature – methods, not merits, relevant to assessing objective seriousness

The Kurdistan Worker's Party ('PKK') was listed as a terrorist organisation in 2005 under Div 102 *Criminal Code* (Cth). Australia granted Mr Lelikan refugee status in 1997 because of the persecution he faced due to his and his family's support for the PKK. From 2004 to 2015, he travelled with PKK guerrillas as a writer and interviewer, searching for his brother's grave. On his return to Australia, he pleaded guilty to being a member of the PKK and was sentenced to a community correction order.

In ***R v Lelikan*** **[2019] NSWCCA 316**, the Commonwealth DPP submitted that the sentencing judge gave impermissible weight to the nature and ideology of the terrorist organisation when assessing the objective seriousness of the offence and moral culpability of the offender. The sentencing judge determined that the PKK's ideology (national self-determination), subscription to international humanitarian law, de facto alliance with Australia during the Syrian conflict, and the selectiveness of their attacks, placed the offending on the middle to lower end of objective seriousness. The Director submitted that these value judgments lay within the realm of the legislature and not the judiciary.

Bathurst CJ agreed with most of the Director's submissions. His Honour held that the merits of terrorist organisations are a matter for the legislature that lists them as such. The organisation's activities are relevant – not the underlying ideology. In addition, Lelikan's knowledge of the PKK affected his moral culpability in joining, but this was mitigated by his torture at the hands of Turkish authorities in his youth. Nevertheless, due to the Crown's concessions before the sentencing judge, that she could consider the nature and quality of the organisation, and due to Lelikan's good behaviour while at liberty, the discretion to decline intervention and re-sentencing was exercised.

Proceeds of crime worth $1 million – 5 year imprisonment not unjust – moderately serious

The applicant in ***Olivier v R*** **[2020] NSWCCA 26** was the de-facto partner of an airport baggage handler who used his position to import cocaine. Around $5.4 million was found in their house, though the applicant only knew about $1 million. She pleaded guilty and was sentenced to 5 years imprisonment (3 non-parole). She appealed on the grounds that, inter alia, the sentence was manifestly unjust and the assessment of objective seriousness mistaken.

Harrison J held, dismissing the appeal, that both the finding of moderate objective seriousness and the 5 year sentence were open to the sentencing judge, who considered

all the submissions raised by the applicant. The quantity of money was not insignificant and the applicant knew that it derived from crime (though not specifically that it was derived from cocaine importation). His Honour reiterated that manifest excess is not made out unless no judge exercising the discretion could reasonably have come to the result.

Drug supply – seriousness of GBL given modest profitability

Mr Petkos appealed his sentence for supplying a large commercial quantity of gamma-butyrolactone (GBL): ***Petkos v R*** **[2020] NSWCCA 55**. He alleged that not enough regard was had, when assessing seriousness, to the limited financial gain he would have reaped from the supply. Hamill J held that the sentencing judge took account of the modesty of the profits and concluded that the sentence was within the bounds of the judge's discretion.

Possess prohibited firearm – objective seriousness

Mr Andary rented out a basement for use as a clandestine meth lab. He and his family lived in premises across the road. A rifle was found in his bedroom. It lacked a retaining pin, which made it dangerous to the user if fired, and also lacked a magazine, meaning it was not self-loading. On appeal, Mr Andary established that the sentencing judge erred in finding that the drug operation and the firearms were located in the same premises – there was no evidence that the two were linked: ***Andary v R*** **[2020] NSWCCA 75**. Hamill J also held that the fact the rifle was disassembled placed the offence between the low and the mid-range of objective seriousness.

Objective seriousness of possess child abuse material - parents exploiting children

The offenders in ***R v LS; R v MH*** **[2020] NSWCCA 148** were sentenced for child abuse material offences relating to sexually explicit messages and an image they sent to each other. The material featured their newborn son and MH's infant daughter from a previous relationship. LS, the father/step-father, received an aggregate of 4 years with an 18 month non-parole period. MH received 3 years, with a non-parole period of 21 months. The Crown appealed on manifest inadequacy.

Wilson J, upholding the appeal, found that the sentencing judge underestimated the objective seriousness of the offending. In particular, her Honour noted that the children were real; vulnerable due to their age; in the care of the offenders; and the material was produced for their own gratification. These factors significantly elevated the seriousness of the offending. Meanwhile, a lack of conscious memory - due to the youth of the victims - did not diminish the gravity of the offending. Furthermore, the trial judge erred in taking into account that no more serious offending eventuated. More serious offending would have grounded its own charge - its absence did not detract from the seriousness of the actual offending.

Objective seriousness of drug supply where drug is fake

Mr Khoury supplied an undercover officer with 27.9 grams of cocaine. He went on to supply more than 2kg of a powder that was revealed not to be cocaine. He was arrested during this second supply. He pleaded guilty and was sentenced to 4 years and 3 months (non-parole period of 2 years, 9 months).

On appeal, Khoury argued that the sentence was excessive considering that no drug was actually supplied: ***Khoury v R* [2020] NSWCCA 190**. Johnson J dismissed the appeal, finding that while drug "rip-offs" are less serious than drug supplies in that no actual drug filters through to the community, there are a number of countervailing factors. The transaction was fraudulent; general deterrence was important (particularly given that most offenders escape punishment because victims don't report); and drug rip-offs beget further violent offending.

SUMMING UP

Jury direction – where offender relies on tendency of victim, not required to prove on balance of probabilities

Michael and Wade Basanovic, father and son respectively, were tried together for the murder of Mr Mitrovic. Michael was convicted of murder by joint criminal enterprise. Wade, who fired the shots that killed Mitrovic, was convicted of manslaughter by excessive self-defence. In raising self-defence, counsel adduced evidence that Mitrovic had been a violent, dangerous and intimidating man, such that his threats to the Basanovics induced in Wade a real fear. The trial judge directed the jury on tendency, stating that the offenders had to prove the violent episodes on the balance of probabilities. The offenders appealed on grounds that, inter alia, this was wrong in law.

In ***R v Basanovic, Michael; R v Basanovic, Wade* [2018] NSWCCA 246**, Simpson AJA dismissed this ground. Her Honour found that the direction was incorrect – there is no need for an accused to prove tendency on the balance of probabilities, because there is no onus of proof on an accused person. However, the violent tendencies of Mitrovic were unchallenged and well-established, so it followed that the wrongful direction could have no effect on the jury's deliberations.

Simpson AJA also held that self-defence should have been left to the jury by the trial judge because it was raised on the facts, even though it undermined Michael's defence strategy that he did not contemplate killing Mitrovic.

Note: The judgment was restricted until December 2019, because a retrial was ordered against Michael. (The Crown then accepted a plea of guilty to manslaughter.)

Markuleski direction – no requirement for precise form of words

A taxi driver sexually assaulted a passenger. He was found guilty on a count of sexual intercourse without consent, and not guilty on a count of indecent assault. In ***Ganiji v R* [2019] NSWCCA 208**, Basten JA noted that in *Markuleski* itself, Spigelman CJ said of the direction: "The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case". His Honour then extracted the direction given by the trial judge, finding that there was "no basis to quarrel with the terms" and noted that the defence did not complain about it. As to the assertion that the judge had made a "personal observation", he considered that it could not be characterised as such. His Honour concluded by saying, "An attempt to insist on precise and unqualified words for such a direction is not consistent with authority and is wrong in principle."

Trial judge obligation to ensure fair trial not obviated by forensic decisions of defence counsel

The offender in ***Decision Restricted* [2019] NSWCCA 234** was convicted of child sex offences against his neighbour's granddaughter. He told police in an interview (ERISP) that he didn't know what happened, he couldn't remember because he'd been drinking and that he couldn't "believe it". His denials in evidence were far less equivocal. In closing, the Crown suggested that he had lied about his memory in the ERISP. The defence refused the offer of a consciousness of guilt direction, presumably to avoid drawing attention to the issue.

On appeal, Price J held that the thrust of the Crown's argument was that the offender lied about memory failure in the ERISP because he was guilty. While it was clearly a legitimate forensic choice for the defence to object to a consciousness of guilt direction, that was not enough to relieve the trial judge of the obligation to ensure a fair trial, as outlined in *Pemble v The Queen* (1971) 124 CLR 107. The line of reasoning evoked by the Crown enlivened a need for the direction. A re-trial was ordered. Grounds alleging improper prosecutorial conduct and the inadmissibility of the ERISP were rejected.

"Liberato" direction – when to give and form it should take

Mr De Silva was found guilty of rape by a jury in the Queensland District Court. He did not adduce any evidence, relying largely on a version of events he gave in his recorded interview with police. The issue on appeal in ***De Silva v R* [2019] HCA 48; 94 ALJR 100** was whether a *Liberato* direction should have been given. Such a direction is derived from the judgment of Brennan J in *Liberato v The Queen* [1985] HCA 66; 159 CLR 507 at 515 (even if the jury rejects the accused's version of events, they must still be satisfied by the Crown of guilt beyond reasonable doubt).

The majority (Kiefel CJ, Bell, Gageler and Gordon JJ) held that there was no need. The trial judge's summing up was sufficient to dispel any notion that the jury's task was merely to choose who to believe, rather than to decide whether the elements of the offence were proven beyond a reasonable doubt.

The majority formulated the direction at [12]:

> (i) if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit;
> (ii) if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and
> (iii) if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

Nettle J accepted the majority's formulation but dissented on whether it was necessary. His Honour argued that it was likely the jury did not realise they could not accept De Silva's account but still acquit, given (inter alia) an overuse of the word "accept" ([43]).

Unfair and unbalanced summing up – impermissible comment and failure to put defence case

The appellant in **Decision Restricted [2019] NSWCCA 305** was found guilty of two offences following a jury trial. The offences arose from an alleged sexual assault upon a person known to the appellant. The Crown case relied upon various circumstantial matters. The defence case comprised alternative interpretations and inferences that the jury should draw. The trial judge directed the jury a number of times in his summing up that questions of fact were entirely for them and that, although he was entitled to express a view, he did not intend to do so. In referring to various aspects of the Crown case, he referred to the interpretation or inference for which the Crown contended but did not say anything about the defence response. He refused an application to discharge the jury midway through the summing up but then continued in the same fashion.

It was held by Gleeson JA that the failure to put the essential aspects of the defence case to the jury rendered the summing up unbalanced. After referring to McKell v The Queen (2019) 264 CLR 307; [2019] HCA 5, he also held that the line of permissible comment by the judge had been crossed. That followed from the judge having directed the jury that they "may infer" what the Crown contended about certain aspects of the evidence, prefacing directions with the otiose comment, "I have a view about it", and not reminding the jury of the defence case.

Replaying video of complainant's evidence during deliberations – circumstances where a direction required.

The appellant in ***IW v R*** **[2019] NSWCCA 311** was a foster parent facing allegations of child sexual assault. During deliberations, the jury requested that video of the complainant's evidence be replayed. Bellew J held that this resulted in a miscarriage of justice, because it was not accompanied by any direction. The jury should have been directed not to overvalue the evidence simply because they were hearing it for a second time, and to view the video in light of both cross-examination and the other evidence adduced.

Had there been no defence evidence, no direction would have been needed because the replay could not cause any imbalance (as was the case in *R v NZ* [2005] NSWCCA 278; 63 NSWLR 628 resulting in r 4 of the Criminal Appeal Rules being applied).

Summing up not unfair if judge draws attention to evidence not mentioned in closing addresses

The offender in ***Balachandran v R*** **[2020] NSWCCA 12** was convicted of stabbing a man during a party. Much of the Crown case relied on identification evidence adduced from multiple witnesses. In the summing up, the trial judge referred to evidence of prior meetings and brief introductions between the offender and witnesses – evidence that the Crown did not refer to in closing.

White JA held that this was not a miscarriage of justice because the evidence was uncontroversial. Reminding the jury of evidence that was in the trial but not raised in the Crown's address could not amount to an unfair or unbalanced summing up. Any lack of balance was attributable to the strength of the Crown case. In addition, the trial judge gave ample direction to the jury that they should disregard any opinions they perceived him to have. The appeal was dismissed.

Markuleski direction not crucial in every word against word case – ultimate question is whether it is required as a matter of fairness

The appellant in ***R v Keen*** **[2020] NSWCCA 59** was charged with a number of drug supply and manufacture offences. He pleaded guilty to the former and not guilty to the latter. Much of the Crown case relied on evidence from his accomplices. The jury found him not guilty of three counts but guilty of one count. The appellant challenged this conviction on the ground that, inter alia, there should have been a *Markuleski* direction.

McCallum J held, dismissing the appeal, that a *Markuleski* direction is not required simply because a case is word against word – the essential question is one of fairness. Her Honour held that, in any event, the case was not truly word against word. The acquittals could have been founded on the weakness of other Crown evidence (the drugs were not recovered). The conviction could have been founded on other direct and circumstantial evidence. The evidence of the accomplices was accompanied by judicial warnings and directions. Therefore, there was no unfairness.

Tendency direction not required where risk of tendency reasoning is remote, even where tendency application brought and rejected

Hamilton (a pseudonym) v R **[2020] NSWCCA 80** concerned an array of child sexual offences committed against the applicant's five children. A tendency application was refused at the close of the Crown case. *Murray* and separate evidence directions were given, but not an anti-tendency direction. One ground of the applicant's appeal was that this resulted in a miscarriage of justice.

Beech-Jones J held, Adamson J agreeing, that no direction was required. Multi-complainant cases do not always require tendency directions – the question is whether the lack of one caused a miscarriage, which turns on the likelihood the jury engaged in tendency reasoning. Here, the *Murray* and separate evidence directions assuaged that risk – the jury already had to satisfy themselves positively of a relevant child's reliability before convicting on their respective count. In addition, his Honour found that not seeking a tendency direction was a forensic decision – the defence case invited the jury to "join the dots" between the complainants to conclude that they had been poisoned by their mother against the applicant. Therefore, there was no miscarriage.

In addition, Adamson J held that a trial judge cannot delegate the drafting of the summing up – it is a judge's legal responsibility, and delegation would unfairly distract counsel from preparing their closing addresses. Macfarlan JA disagreed with their Honours on the tendency ground, holding that almost every multi-complainant sexual assault case will require an anti-tendency direction.

Murray direction unnecessary where jury already addressed and directed on need to consider weaknesses in complainant's evidence

Mr Neto was convicted of violently sexually assaulting a woman he had been messaging on Instagram. At trial, he argued that the encounter was consensual, the complainant regretted it, and her complaints of rape the following day were an attempt to control the narrative. He appealed on the grounds that the trial judge failed to give a direction with the force of a *Murray* direction and that the verdict was unreasonable: ***Neto v R* [2020] NSWCCA 128.**

Hidden JA, Fagan J agreeing, found that the trial judge sufficiently directed the jury to carefully consider the evidence of the complainant. No further direction was sought. The jury was perfectly capable of considering the weaknesses in the complainant's evidence following the adept address of defence counsel, and so no further direction was needed. Basten JA noted in obiter that a complaint that a close scrutiny direction lacked the force of *Murray* was fraught with peril in light of s 294AA *Criminal Procedure Act*, which prohibits a judge warning the jury of convicting on uncorroborated evidence.

Departure from Bench Book direction not appellable error – no need for anti-tendency direction where tendency evidence admitted, lest jury be confused

The applicant in ***BRC v R* [2020] NSWCCA 176** appealed his conviction for historical child sex offences committed against multiple complainants. The charged acts were relied on as tendency evidence in support of each other. Uncharged acts were relied upon as context evidence to explain delay in complaint.

On appeal, the applicant argued that the tendency direction was deficient in its departure from the direction in the Bench Book – namely, that a paragraph was omitted warning the jury against reasoning that the applicant was of bad character and more likely to commit offending. Simpson AJA held, dismissing the appeal (Johnson and Hamill JJ agreeing in separate judgments) that the paragraph would only have confused the jury and

undermined the admissible tendency evidence. Her Honour noted that departure from the Bench Book is not a ground of appeal.

Bench Book complaint direction – complaint not independent of complainant

SB was convicted of child sexual offences committed against his daughter. The victim complained to her mother following an after-school care program on sex education. The trial judge gave the jury the complaint direction from the bench book, including that they could use the complaint as "some evidence independent of the evidence given to you of that incident by [the complainant]". The use of "independent" was impugned on appeal: ***SB v R* [2020] NSWCCA 207**.

Rothman J held that "independent" was erroneous because the complaint was not independent or corroborative of the complainant. However, his Honour found that this did not result in a miscarriage of justice. The appeal was allowed on another ground.

NOTE: The Bench Book complaint direction has been given for years and not been the subject of adverse comment. The content of the same direction was analysed in *DV v R* [2017] NSWCCA 276, where Hoeben CJ at CL noted that the direction was one that had "been given since the promulgation of the *Evidence Act* without challenge". Regrettably, the view taken about the direction here may involve a misconstruction – the Bench Book suggests that the complaint can be used independently of the evidence given in the trial by the complainant. This is confirmed by the subsequent reference to the jury using the complaint as evidence "in addition to the evidence that has been given about [the subject incident] in this courtroom".