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INTRODUCTION

Muldrock v R (2011) 244 CLR 120 was decided in late 2011. This High Court decision has obviously been of searing importance for sentencing law in NSW.¹ The Court of Criminal Appeal in 2012 has been dealing with three main issues in the wake of Muldrock²:

1. Error or otherwise in pre-Muldrock sentencing;
2. Assessment of objective seriousness;
3. Relevance of matters personal to the offender in assessment of objective seriousness.

SENTENCE APPEAL CASES

1. STANDARD NON-PAROLE PERIOD (SNPP) – THE SITUATION POST-MULDROCK

Muldrock v The Queen

Standard non-parole periods (SNPPs) were inserted into Part 4 Div 1A of the **Crimes (Sentencing Procedure) Act 1999** in 2002. The provisions created SNPPs for a large number of offences. The High Court in **Muldrock v The Queen** (2011) 281 ALR 652 held that the leading case on SNPPs - **Way** (2004) 60 NSWLR – was wrongly decided. The SNPP does not have determinative significance in sentencing: at [32]; **Koloamatangi** [2011] NSWCCA 288; **KG** [2012] NSWCCA 10. **Muldrock** held that when sentencing for a SNPP offence:-

- . A court is not required to commence by asking whether there are reasons for not imposing SNPP nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness: at [25].
- . A Court is not to engage in a two-stage approach commencing with an assessment of whether the offence falls within the middle range of objective seriousness by comparison with a hypothesised offence answering that description and, if so, by inquiring if there are matters justifying a longer or shorter period: at [28]

The approach to sentencing for a SNPP offence is as follows:

- . Fixing of the non-parole period is one part of the larger task of passing a sentence and is not to be treated as if it were the necessary starting point or the only important end-point in framing a sentence: at [17].
- . "[T]he judge identifies **all** factors relevant to sentence, discusses their significance and then makes a value judgment as to the appropriate sentence given all the factors of the case": at [26]; **Markarian v The Queen** (2005) 228 CLR 357 at [51] per McHugh J.

¹ H. Donnelly, The Diminished Role of Standard Non-Parole Periods, **Judicial Officers' Bulletin**, February 2012, Volume 24, Number.1.

² The Honourable Justice RA Hulme, "After Muldrock – Sentencing for Standard Non-Parole Offences in NSW", **Judicial Officers' Bulletin**, November 2012, Volume 24, Number 10.

- Under s 54B(2) and (3) the Court must take into account the full range of factors, mindful of the maximum sentence and the SNPP. The assessment of the middle of the range of objective seriousness for a SNPP offence is to be assessed wholly by reference to the nature of the offending, without reference to matters personal to a particular offender or class of offenders: at [27].
- Under s 54B(4), a judge must identify the facts, matters and circumstances which bear upon sentence. The obligation applies for all Div 1A offences regardless of whether the offender has been convicted after trial or whether the offence might be characterised as falling within low, middle or high range of objective seriousness: at [29].

Appeals against sentences imposed before Muldrock

Note that the Legal Aid Commission, in conjunction with the Public Defenders, is presently conducting an extensive review of the standard non-parole period sentences decided before the decision in **Muldrock**. As at March 2013, a decision of a 5 judge bench of the CCA in **Achurch v R** is reserved. It is anticipated that decision may provide some further guidance. However, there is a prospect that it will be limited to the issue of whether or not s 43 of the **Crimes (Sentencing Procedure) Act 1999** may be used to correct “**Muldrock** errors” in pre-**Muldrock** cases.³

Error at first instance

In **Butler** [2012] NSWCCA 23 the CCA said that to merely show that a judge sentenced in accordance with the “dictates of **Way**” will not be sufficient to demonstrate error. It is whether a reliance on **Way** has “sufficiently infected” a sentence with such error that the Court must intervene: at [26]. This may well be the case where an applicant is found guilty by a jury, as the judge would have considered a two-stage process and the SNPP as mandatory unless factors justified a variation from it. But it is far less likely following a plea of guilty and the sentencing judge has referred to the SNPP as simply a guideline or yardstick: at [26].

The CCA will read the judge’s entire sentencing remarks to examine how the SNPP was used. In **Aldous** [2012] NSWCCA 153 Allsop J (Latham and agreeing) said:

[2] I refer to my reasons in *Williams v R* [2012] NSWCCA 172. I do not wish to repeat anything I there said, beyond, first, stating once again my agreement with McCallum J (with whose reasons Beazley JA and Harrison J agreed) in *Bolt v R* [2012] NSWCCA 50 at [35]-[36] that the fair reading of the whole of the reasons of a sentencing judge should take place with the recognition of the then perceived orthodoxy and correctness of cases such as *R v Way* [2004] NSWCCA 131; 60 NSWLR 168, *R v McEvoy* [2010] NSWCCA 110 and *R v Knight* [2007] NSWCCA 283; 176 A Crim R 338; and, secondly, emphasising that this is a matter of substance and not form or linguistics.”

The CCA intervened where the sentencing judge used the SNPP as a starting point, even though acknowledging that it stood only as a guide in light of the plea: **Bolt** [2012] NSWCCA 50 at [37]. And also where the SNPP was used as a benchmark from which to commence sentencing and resulted in a higher sentence than would otherwise have been imposed: **GN** [2012] NSWCCA 96 at [12].

³ See Richard Wilson, “Sentencing since Muldrock”, **Public Defenders’ Conference**, 16 March 2013, p.29: Public Defenders website <http://www.publicdefenders.lawlink.nsw.gov.au> under “Conference Papers.”

The CCA has made it clear during 2012, that the approach as to whether there is **Muldrock** error does not involve a mechanical approach, but rather one of substance over form.⁴

Assessment as to the objective seriousness of the offence relative to the mid range for offences of that type

Assessment of the objective seriousness of an offence has always been an element of sentencing. A question raised by **Muldrock** is whether a sentencing judge should or should not make an assessment as to the objective seriousness of the offence relative to the mid-range for offences of that type. This remains an open question. Per Davies J in **Butler** [2012] NSWCCA 23:

“[23] Secondly, his Honour said nothing about the objective seriousness of the offence, nor did his Honour engage in the two stage process mandated by Way [2004] NSWCCA 131; (2004) 60 NSWLR 168 but rejected in Muldrock at [28]. Of course, whether a court is now required or permitted to classify, or is prohibited from classifying, the particular offence by reference to low, middle or high range of objective seriousness remains in doubt: Koloamatangi [2011] NSWCCA 288 at [19]. The High Court did not suggest, however, that a conventional assessment of objective offending was to be avoided.”

Per Johnson J in **Zreika** [2012] NSWCCA 44:

“[45] The High Court did not suggest that a conventional assessment of objective offending, according to a scale of seriousness, was to be avoided: Koloamatangi at [18]-[19].

[46] The process of instinctive synthesis to be undertaken by a sentencing court involves the sentencing judge identifying all the factors that are relevant to the sentence and then making a value judgment as to is the appropriate sentence in all the circumstances of the case: Markarian[2005] HCA 25; 228 CLR 357 at 377-378 [51]; Muldrock at 1162 [26]. Assessment of the objective gravity of an offence has traditionally been an essential element of the sentencing process: Dodd (1991) 57 A Crim R 349 at 354; Khoury [2011] NSWCCA 118 at [71]. It is an essential element of the process of instinctive synthesis, a purpose of which is the imposition of a proportionate sentence, which adequately punishes an offender: s.3A(a) Crimes (Sentencing Procedure) Act 1999.

[47] The judgment of the High Court in Muldrock has left somewhat opaque the meaning of the term “objective seriousness”: Koloamatangi at [19]-[21]. Nevertheless, as subsequent decisions of this Court have stated, it remains part of a sentencing Judge's function to consider the objective gravity of the subject crime and the moral culpability of the offender: Ayshow at [39]; Sheen at [169]. Her Honour's remarks on sentence perform this function, albeit using different language. “

In **Badans** [2012] NSWCCA 97 Meagher JA said that the sentencing judge was not required to assess and classify the objective seriousness of the offence relative to the “mid-range of objective seriousness of the offence” and that **Muldrock** had rejected such an approach: at [55].

More recently in **PK** [2012] NSWCCA 263 McCallum J (Macfarlan JA and Price J agreeing) said that decisions since **Muldrock** have emphasised it remains important to assess the objective criminality of the offending, which has always been an essential aspect of the sentencing process. In that context, the view has been expressed that there is no vice in doing so according to a scale of seriousness: **Zreika** [2012] NSWCCA 44 at [45]; **Koloamatangi** [2011] NSWCCA 288 at [18]-[19]. However, the usefulness of

⁴ See The Honourable Justice RA Hulme, op cit Note 2, p. 3

comparing the particular offence before the court with the hypothetical mid-point offence has been doubted: at [26].

There has not been one immutable position on this question in the Court of Criminal Appeal. The better view appears to be that a finding as to the level of objective seriousness in a SNPP case is not compulsory and it is not an error to make such a finding.⁵ It is probably desirable for a “sentencing judge, having reviewed the objective features of the matter in the remarks on sentence ... to make some assessment of the objective seriousness of the offence.”⁶

A further complicating residual question remains of whether objective seriousness is a statutory concept as opposed to objective gravity, a common law concept: see *Kaewklom* (No 3) [2013] NSWSC 59 per Johnson J [101]-[102]; cf *Stewart* [2012] NSWCCA 183 at [35]-[37], per Button J, (McClellan CJ at CL and Price J agreeing), apparently interpreting *Muldrock* as referring to objective seriousness in its original common law form.⁷

Whether circumstances personal to the offender that are causally related to the offence (such as mental health) are relevant to assessment of objective seriousness

The High Court in *Muldrock* said at [27] said that “The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.” (The CCA had said the opposite in *Way* at [86] stating: “Some of the relevant circumstances which can be said ‘objectively’ to affect the ‘seriousness’ of the offence will be personal to the offender at the time of the offence but become relevant because of their causal connection with its commission.”)

In relation to mental condition, the High Court in *Muldrock* stated that an offender’s mental condition is a factor relevant to moral culpability (at [54]-[55]).

In *Yang* [2012] NSWCCA 49 RA Hulme J summarised the contrasting approaches that have emerged in the CCA. It was unnecessary to decide the issue in the circumstances of the case. Per Hulme J:

“[28] Secondly, the High Court of Australia in *Muldrock* [2011] HCA 39; (2011) 85 ALJR 1154 at [27] appears to have rejected the notion propounded in *Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [86] that matters personal to an offender, including a mental illness, can be said to affect the objective seriousness of an offence. I have said, “appears to have rejected”, because it has not been universally accepted.

[29] In *MDZ* [2011] NSWCCA 243, Hall J (Tobias AJA and Johnson J agreeing) stated:
[67] In my opinion, in light of the High Court’s judgment in *Muldrock* (above), it is open to conclude that the mental condition of the applicant at the time of the offence may bear upon the objective seriousness of the offences: *Muldrock* (above) at [27] and [29]. Certainly, in the present case, the sentencing judge, on the evidence, was required to expressly determine the moral culpability of the applicant in assessing the seriousness of the offences and in determining the appropriate sentences to be imposed in relation to them. In this case, the evidence required a finding that the applicant’s moral culpability was reduced by his mental health issues.

⁵ See The Honourable Justice RA Hulme, op cit Note 2.

⁶ See *Stewart* [2012] NSWCCA 183 at [41].

⁷ See Richard Wilson, op cit, Note 3, p.13. See also *McLaren* [2012] NSWCCA 284 re ‘statutory’ objective seriousness.

[30] In *Ayshow* [2011] NSWCCA 240 the point was referred to but not decided. Johnson J (Bathurst CJ and James J agreeing) said (at [39]):

To the extent that a question arises whether the Applicant's mental state at the time of the offence may bear upon objective seriousness (*Muldrock* at 1162–1163 [27], 1163 [29]), it remains a relevant factor on sentence in an assessment of moral culpability. Accordingly, if there is evidence to support a finding that an offender's moral culpability is reduced by a relevant mental condition, the offender is entitled to have it called in aid on sentence.

[31] There are first instance decisions that reflect different approaches. In *Biddle* [2011] NSWSC 1262 at [88], Garling J, with reference to *Muldrock*, specifically excluded from an assessment of the objective seriousness of the offence the offender's mental health (an impaired capacity of the offender to control himself due to brain damage).

[32] The point is not entirely clear, with respect, in the approach taken by Harrison J in *Fahda* [2012] NSWSC 114. His Honour said:

[50] The objective seriousness of the offence is to be determined without reference to the personal attributes of the offender, but "wholly by reference to the nature of the offending": *Muldrock* at [27]. However, such factors remain particularly relevant to any determination of the appropriate sentence to be imposed.

[33] Earlier, however, his Honour said:

[38] I accept that the offender suffered from post-traumatic stress disorder that was caused and evident prior to the commission of the offence and that this was associated with hyper-vigilance, paranoia, auditory hallucinations, depression and inverted sleep patterns. I also find that the offender was substantially impaired by an abnormality of mind arising from an underlying condition in the form of post-traumatic stress disorder or an anxiety disorder and a probable psychotic illness. I have taken all of this into account in mitigation of the objective criminality of the offence.

[34] In *Tran* [2011] NSWSC 1480 at [13], Rothman J took into account in an assessment of objective seriousness, "circumstances personal to the offender that are causally connected to the commission of the offence such as his state of mind". The "state of mind" he was speaking of does not appear to have been any mental condition. The case concerned a murder committed at a meeting between parties involved in an illicit drug transaction. The offender engaged another man (the actual killer) to provide protection because he was in fear of the deceased's notoriety for violence and it would appear that it was this that his Honour had in mind.

[35] In *Cotterill* [2012] NSWSC 89, McCallum J (at [30]) said that the assessment of the objective seriousness of the offence may include consideration of circumstances personal to the offender that are causally connected to the commission of the offence. Her Honour added that she did not understand *Muldrock* to hold otherwise. It was concluded (at [45]) that the seriousness of the offence was mitigated by the offender's impaired control due to several psychiatric disorders.

[36] Finally, I note that in *Koloamatangi* [2011] NSWCCA 288 at [18], Basten JA said that *Muldrock* limits the range of factors to be considered in determining the objective seriousness of the offence.

[37] This issue in relation to *Muldrock* was not the subject of submissions by the parties and I have come to the view that it is unnecessary to decide. It would be a relevant matter if the contention was that the judge overestimated the seriousness of the offence. Aside from the finding that the applicant was involved in drug trafficking to a substantial degree, about which there was no criticism, his Honour did not otherwise express a view as to the relative seriousness of the offence. In these circumstances it is not possible to say that a finding was made that was not open on the evidence."

In **Badans** [2012] NSWCCA 97 Meagher JA (Hoeben and Rothman JJ agreeing) said that circumstances personal to the offender would not be taken into account in assessing objective seriousness: at [53].

Price J in **Williams** [2012] NSWCCA 172 took the view that *provocation* established under s 21A(3)(c) **Crimes (Sentencing Procedure) Act 1999** is a matter that can be taken into account in determining objective seriousness. The objective seriousness of an offence is determined wholly by reference to the "nature of the offending": **Muldrock** (2011) 244 CLR 120. The reference to the "nature of offending" may mean the fundamental qualities of the offence. Provocation established as a mitigating factor under s 21A is a fundamental quality of the offending which may reduce objective seriousness. There cannot be a realistic assessment of the objective seriousness of the offence unless the provocation is taken into account: at [42].

In **Stewart** [2012] NSWCCA 183 Button J (McClellan CJ at CL and Price J agreeing) said:

"[36] In *R v Muldrock; Muldrock v R* [2012] NSWCCA 108 at [8], Allsop P (with whom Hoeben JA and Beech-Jones J agreed, Beech-Jones J delivering a separate judgment), determined the objective seriousness of the offence subject to re-sentence "without reference to matters personal to a particular offender or class of offenders."

[37] In accordance with that recent decision of this Court, I proceed on the basis that features personal to the offender should not be taken into account in assessing the objective seriousness of an offence. That approach accords with sentencing practice before the statutory system of standard non-parole periods began in 2003. Furthermore, so long as sentencing is founded on instinctive synthesis, whereby all relevant objective and subjective features will be accorded appropriate weight, that approach disadvantages neither the Crown nor an offender.

[38] It may be that, with regard to some features, the dividing line between classification of them as objective or subjective cannot be sharply drawn: for a recent discussion by this Court of the classification of provocation, for example, see *Williams v R* [2012] NSWCCA 172. However, in this case, I consider that all of the factors personal to the applicant about which complaint is made by his counsel should be seen as subjective, and not relevant to the objective seriousness of the offence. "

As a practical question, whether or not a matter is assessed as personal to the offender or part of the objective seriousness, it should make no difference to the ultimate sentence.⁸ This must be so in view of the process of instinctive synthesis.

Court to give reasons if non-custodial sentence imposed for SNPP offence

In **Dungay** [2012] NSWCCA 197 the CCA said at [31] that comments made in **Thawer** [2009] NSWCCA 158 must now be approached with care as the position has been altered by the High Court in **Muldrock** (2011) 244 CLR 120. Section 54C **Crimes (Sentencing Procedure) Act 1999** states a court must provide reasons for imposing a non-custodial sentence for a SNPP offence. In **Thawer** Howie J said at [39] that s 54C requires that a court explain why "despite the fact that the offence falls within the provisions dealing with the standard non-parole period, a sentence without a non-parole period is being imposed." In **Dungay**, McCallum J (Macfarlan JA and Grove AJ agreeing) said that given the High Court's rejection of the two-stage approach to sentencing, a judge will not fail to comply with s 54C simply by omitting to explain why a sentence without a non-parole period is

⁸ See The Honourable Justice RA Hulme, op cit Note 2, p. 6. See also Richard Wilson, op cit, Note 3, p. 27.

being imposed "despite the fact" that the offence carries a SNPP. The significance of that statutory fact has been diluted since *Thawer*. Of course, a judge may not overlook the relevance of a SNPP which remains a factor that must be taken into account as a guide: at [33]-[34].

Section 45 Crimes (SP) Act (Court may decline to set NPP period) does not apply to SNPP offences

Section 45 ***Crimes (Sentencing Procedure) Act 1999*** provides (in part):

"When sentencing an offender to imprisonment for an offence, or in the case of an aggregate sentence of imprisonment, for offences (other than an offence or offences set out in the Table to Division 1A of this Part), a court may decline to set a non-parole period for the offence or offences if it appears to the court that it is appropriate to do so....."

In *Collier* [2012] NSWCCA 213 the CCA said that the words "other than an offence set out in the Table to Division 1A of this Part" means that:

- . There is no power to decline to set a non-parole period with respect to offences which carry a SNPP; and
- . A Court cannot impose a fixed term for a SNPP offence and to do so would constitute an error of law: at [24].

2. MITIGATING FACTORS (s 21A(3) Crimes (Sentencing Procedure) Act 1999)

Dysfunctional childhood

In *Millwood* [2012] NSWCCA 2 the Court rejected the Crown's submission that the judge had given too much weight in mitigation to the offender's dysfunctional childhood. The Crown submission "significantly underestimates" the impact of a dysfunctional childhood. Per Simpson J:

"[68] The argument advanced under this ground was that a large proportion of the Remarks on Sentence was devoted to the respondent's personal circumstances.

The submission was made that:

... it is evident that his Honour was greatly affected by the respondent's statement to the court, and his tragic and dysfunctional upbringing.

The submission went on:

... there is little in the circumstances of the respondent that assist him by way of mitigation. He is not young, being 27 years old at the time of sentencing. He has a lengthy criminal history ... the victims were strangers to him. His plea of guilty was not entered at the earliest opportunity.

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

Indeed, it sits uneasily with the immediately preceding acknowledgement that his upbringing had been “tragic and dysfunctional”. That his background is a relevant consideration affording some (although limited) mitigation is entirely consistent with the approach taken by Wood J (as he then was) in *R v Fernando* (1992) 76 A Crim R 58, a decision which has repeatedly been followed in this court. If that were not so, there would be no purpose in sentencing courts receiving, as they invariably do, evidence concerning the personal background of offenders.”

3. PURPOSES OF SENTENCING

Rehabilitation

Rehabilitation is recognised as a significant purpose of sentencing: s 3A(d) **Crimes (Sentencing Procedure) Act 1999**. In *Pogson* [2012] NSWCCA 225 the CCA discussed an earlier view that ‘rehabilitation’ has the singular purpose of endeavouring to ensure that an offender will not reoffend: at [103]. The CCA said, however, that rehabilitation is a concept broader than merely avoiding re-offending: at [122]. Per McClellan CJ at CL and Johnson J at [124]–[125] (Price, RA Hulme and Button JJ agreeing):

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

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

See further discussion of *Pogson* below, under: “4. Sentencing Options - Intensive Correction Orders.”

4. SENTENCING OPTIONS

Intensive Correction Orders

A five-judge bench in *Pogson & Ors* [2012] NSWCCA 225 held that there is no statutory provision which confines the use of an ICO to a person expressly in need of rehabilitation: at [68] disapproving *Boughen* [2012] NSWCCA 17. Per McClellan CJ at CL and Johnson J:

“[99] There is nothing in s.7 of the *Sentencing Procedure Act* which confines the imposition of an ICO to persons who have an identified need for rehabilitation, or of whom it can be positively said there is a risk of reoffending. Although obviously more lenient than a sentence of full-time imprisonment, the conditions imposed by an ICO will be an imposition of varying degrees of significance to an offender depending on his or her personal circumstances. “

Although ICO’s are aimed at reducing the risk of re-offending, the other purposes of sentencing will still also be relevant. Per McClellan CJ at CL:

“[98] Although the Attorney-General identified the fact that the new regime is designed to reduce the risk of reoffending, this does not mean that all of the other purposes of

sentencing referred to in s.3A of the *Sentencing Procedure Act* are irrelevant. An ICO is an order made in respect of a person who has been sentenced to imprisonment. Even if the sentence is to be served by an ICO, it must fulfil the relevant purposes in s.3A(a)-(g) in respect of an individual offender. They include amongst other matters punishment (a); accountability of an offender (e); and denunciation (f).

An ICO is a substantial punishment to be utilised in an appropriate case: at [108]. However, as with all sentencing options which do not involve immediate incarceration, it may also reflect a significant degree of leniency: *Whelan* [2012] NSWCCA 147 at [120]. The stringent conditions attached to an ICO ensure an offender is not living a carefree existence amongst the community, and deprives an offender of liberty in a real sense: at [111].

Bonds – difference between s 9 and s 10 Crimes (Sentencing Procedure) Act

In *Mauger* [2012] NSWCCA 51 it was observed that the fact that a conviction is recorded under s 9 (and not s 10) of the *Crimes (Sentencing Procedure) Act* is a matter of special significance. However, the fact that a conviction is not recorded should not “dilute or downgrade the significance” of a s 10 bond: per Harrison J at [38]. Onerous consequences apply if an offender fails to comply with a s 10(1) bond and just because the court has decided not to record a conviction it does not mean that the sentence is automatically inadequate or lenient: at [38].

Sentencing for an offence that may be dealt with summarily

In *Zreika* [2012] NSWCCA 44 the CCA reiterated that failure by a sentencing judge to mention a matter could have been dealt with in the Local Court cannot of itself constitute error: *Jammeh* [2004] NSWCCA 327 at [28]; *Pickett* [2004] NSWCCA 389 at [32]: at [78]. The possibility of summary disposal as a mitigating factor is to be confined to a rare and exceptional set of circumstances where the offender is being sentenced in the District Court for an offence which may be seen as a clear summary offence which ought otherwise have been prosecuted in the Local Court: at [83]. The bare theoretical possibility of the matter being dealt with in the Local Court does not suffice: at [109]; *McIntyre* (2009) 198 A Crim R 549.

The frequency of appeals which raise this ground emphasises that the issue is well known as a potential factor to be taken into account on sentence. The Court should apply a rigorous approach in requiring offenders to take the point at first instance, before being permitted to raise it on appeal: at [110]. The ground of appeal can only be meaningful if this Court determines that the total sentence for the particular offence should not have exceeded the jurisdictional limit of the Local Court: at [111].

5. CHILDREN

s 18(1) Children (Criminal Proceedings) Act 1987 - Obligation of sentencer to consider whether to sentence according to law

In *BT* [2012] NSWCCA 276 the applicant was sentenced for armed robbery. The applicant was under 18 when he committed the offences and under 21 when charged and sentenced. The applicant submitted the sentencing judge was obliged, but failed, under s 18(1) *Children (Criminal Proceedings) Act 1987*, to consider whether to sentence the applicant under Part 2 Division 4 (by which adult penalties apply) or pursuant to Part 3 Division 4 (by which more lenient Children’s Court penalties apply).

In regard to a sentencer's obligations under s 18 in deciding whether a person is to be dealt with under Part 2 Division 4 or Part 3 Division 4, the CCA said that where there is a choice under s 18(1) and a list of mandatory considerations in s 18(1A), it may be inferred a court is obliged to make a determination as to which way to proceed and to have regard to the factors listed: at [18]-[21].

There was no error in this case because the more plausible explanation was the judge failed to advert to s 18 because he did not think there was an issue to be resolved. The applicant conceded that, had the judge turned his mind to s 18, it was almost inevitable he would have sentenced according to law. The judge was not asked to consider s 18 nor directed to the factors identified for consideration. The judge did identify armed robbery as a "serious criminal offence" carrying a maximum penalty of 20 years imprisonment, involving "a crime of violence" and that "Full time custody for offences of this type is almost inevitable": at [21]-[22]. This statement included an express rejection of the availability of any lesser form of sentence, including those under Part 3 Division 4. The nature of the indictable offence was a mandatory consideration under s 18(1A)(b). It could not be said the sentencing process miscarried: at [23].

Where juvenile serve sentence in a juvenile detention centre past 18th birthday and not in an adult prison

In *JM* [2012] NSWCCA 83 the Court said it is not permissible to impose a shorter non-parole period so as to avoid the operation of s 19 ***Children (Criminal Proceedings) Act 1987***: at [22]. In this case, the judge had no power to order that the sentence be served as a juvenile: [15], [117].

In sentencing a person under 21 years of age, a Court may direct that whole or part of the sentence be served as a juvenile offender: s 19(1). However, the offender cannot serve their sentence as a juvenile offender unless the non-parole period ends within six months from the time the offender turned 21 and the court is satisfied there are special circumstances: s 19(2).

6. SETTING TERMS OF IMPRISONMENT

Aggregate sentencing

Section 53A was inserted into the ***Crimes (Sentencing Procedure) Act 1999*** in 2011 to allow for an aggregate sentencing scheme. The aim was to remove some of the complexity involved when sentencing offenders for multiple offences. Section s 53A allows a court, when sentencing an offender for more than one offence, to impose an aggregate sentence of imprisonment instead of imposing a separate sentence of imprisonment for each.

Section 53A provides:

"(1)A court may, in sentencing an offender for more than one offence, impose an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each.

(2)A court that imposes an aggregate sentence of imprisonment under this section on an offender must indicate to the offender, and make a record of, the following:

(a)the fact that an aggregate sentence is being imposed,

(b)the sentence that would have been imposed for each offence (after taking into account such matters as are relevant under Part 3 of any other provision of this Act) had separate sentences been imposed instead of an aggregate sentence.

(3) Subsection (2) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions.

(4) The term, and any non-parole period, set under this Division in relation to an aggregate sentence of imprisonment is not revoked or varied by a later sentence of imprisonment that the same or some other court subsequently imposes in relation to another offence.

(5) An aggregate sentence of imprisonment is not invalidated by a failure to comply with this section."

In **Nykolyn** [2012] NSWCCA 219, a Crown appeal, the respondent received an aggregate sentence of 7 years imprisonment with a NPP of 18 months for four break and enter offences. The judge found the four offences were of similar seriousness and each would warrant a sentence of 4 years imprisonment: at [56]. The CCA said a court is required to indicate the sentence that would have been imposed for each offence. However, s 53(A)(5) means that the judge's failure to comply with s 53A(2)(b) did not invalidate the aggregate sentence. Per McClellan CJ at CL (RA Hulme J agreeing with additional reasons, Hall J agreeing):

"[31] Section 53A was introduced to ameliorate the difficulties that had emerged with the obligations required of a sentencing judge by reason of the High Court's decision in *Pearce v R* [1998] HCA 57; (1998) 194 CLR 610.

"[32] Section 53A(1) allows a court to impose an aggregate sentence instead of a separate sentence of imprisonment for each count. However, s 53A(2) requires the sentencing judge to indicate to the offender the sentence that would have been imposed for each offence had separate sentences been imposed instead of an aggregate sentence. A sentencing judge is accordingly required to give consideration to the criminality involved in each offence and, where appropriate, have regard to any matters on a Form 1 when defining the sentence that would have been imposed for an individual offence. Subsection 5 will save from invalidity any aggregate sentence that has been imposed in circumstances where the sentencing judge has failed to comply with s 53A(2)(b) or any other requirement of the section.

[33] It follows that in the present case, although his Honour should have considered and recorded the sentence to be imposed for each individual offence, the failure to do so does not invalidate the sentence."

RA Hulme J made additional comments that the judge appeared to be doing little more than paying lip service to s 53A(2)(b). The offences were of a similar but not identical nature, and two offences on a Form 1 were to be taken into account on two of the offences. Per RA Hulme J:

"[58] The importance of proper compliance with the requirement to indicate the separate sentences that would have been imposed arises for at least four reasons. First, it assists a sentencing judge in application of the totality principle, an important factor in the assessment of the aggregate sentence to be imposed. Secondly, it exposes for appellate review how it is that the aggregate sentence was arrived at: see *R v Brown* at [17] per Grove AJ. Thirdly, it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence. Fourthly, it assists this Court to assess an appropriate new aggregate sentence if one or some of the underlying convictions are quashed on appeal."

In **Brown** [2012] NSWCCA 199 the respondent was sentenced for a large number of child sexual assault offences. Allowing the Crown appeal, Grove AJ (Macfarlan JA and McCallum JJ agreeing) said although an indicative sentence recorded in accordance with s 53A(2) is not in itself amenable to appeal under s 5(1)(c) **Criminal Appeal Act**, an erroneous approach in the indication of the sentence that would have been imposed for an individual offence may well reveal error in the aggregate sentence reached: at [17]. In

this case, a "blanket" assessment was applied and individual criminality was not assessed: at [25]-[26].

See also *Rae* [2013] NSWCCA 9 in the Stop Press Annexure in regard to aggregate sentences and accumulation.

Parole orders by court

Section 50 *Crimes (Sentencing Procedure) Act* provides:

"50 Making of parole orders by court

(1) When a court imposes a sentence of imprisonment for a term of 3 years or less, being a sentence that has a non-parole period, the court must make an order directing the release of the offender on parole at the end of the non-parole period.

(2) A parole order may be made under this section even though at the time it is made it appears that the offender may not be eligible for release at the end of the non-parole period because of some other sentence to which the offender is subject.

(3) The failure of a court to comply with the requirements of this section with respect to a sentence does not invalidate the sentence."

In *Cross (No 2)* [2012] NSWCCA 234 the CCA made some observations on s 50. The CCA was dealing with the difficulty of what purpose might be intended by making a parole order which cannot be effected as a result of a sentence for a further offence being imposed at the same time: at [6]. The CCA observed that the purpose of s 50 is obscure: at [4]. The section is likely aimed at individual sentences and not the total sentence: at [4]-[5]. The CCA said that from the point of view of strict compliance with s 50(1), it is likely that a court is obliged to make a parole order notwithstanding that it cannot be complied with. One justification for this would be to allow the sentence in respect of the later offence being set aside or interfered with on appeal in such a way that the parole order imposed for the first offence takes effect: at [8]. In this case, as the NPP period for the first count had expired before the appeal, the making of a parole order in respect of that count was futile: at [9].

Not necessary to proceed mechanically by considering all alternatives to full-time custody in every case

In *Hardie & Phillipson* [2012] NSWCCA 6 the CCA said that a sentencing judge is not required to proceed mechanically by considering all alternatives to full-time custody in every case. In *Zamagias* (2002) NSWCCA 17 at [24]-[28] Howie J did set out the steps required before the ultimate sentence is imposed including that once the term of the sentence has been determined, the court is then to consider whether any alternative to full-time imprisonment is available. However, while Howie J's remarks accurately reflect the various steps and order, it does not follow that a judge must expressly follow this order and refer to all of the steps in circumstances where the ultimate result is, in the judge's view, clear. Howie J made this clear at [30]. The CCA said that the risk of error may increase if a judge does not expressly advert to some or all of the possibilities or steps. But there are many cases where a sentence of full-time imprisonment is so obviously demanded that the procedure can properly be foregone: at [17].

Backdating sentence where parole is revoked due to a subsequent offence

Where parole is revoked because of the commission of a subsequent offence, it is a matter of discretion whether the subsequent sentence is to be backdated only to the time the offender was taken into custody for the subsequent offence. It would in some cases be unfair however not to backdate to some point (not necessarily the date of revocation of

parole) before the expiration of the earlier parole period, as it is always open to an offender to seek and be granted parole even after a revocation: **Callaghan** (2006) 160 A Crim R 145 at [21]-[23].

In **DW** [2012] NSWCCA 6 the Court outlined the matters that inform the exercise of the discretion. Per RS Hulme J:

“[79] There is no doubt that the decision as when, within a period of revoked parole, another sentence should commence is a matter of discretion - see *Callaghan v R* (2006) 160 A Crim R 145. It may be at the beginning; it may be at the end; it may be somewhere in between. A number of matters are liable to inform the exercise of that discretion. Without attempting to be exhaustive, one is the fact that imprisonment for the period of revoked parole is, in its origins, due to the sentence pursuant to which the period when the offender was eligible for parole was granted. Revocation may have occurred because it has been demonstrated that an offender has been unable to adapt to normal community life. A second, although there will commonly be overlapping with the first, may be as in this case, that the revocation arises in consequence of a new offence for which a fresh sentence is being imposed, rather than for some unconnected cause. A third and fourth are likely to be the period served with apparent adherence to the terms of parole and the periods of revocation and for which the revocation is liable to continue.”

Per Basten JA:

“[35] Although it was submitted that the commencement date for the sentences for the new offences should not properly have been backdated, the primary submission was that the extent of the backdating, to the commencement of custody relating to the new offences, was excessive. In circumstances where the offences constitute the reason for the revocation of parole, it is important not to double count the fact that the offences were committed whilst serving an incomplete sentence for an earlier offence, and whilst on parole for that offence. It is also necessary to consider whether there should be a degree of concurrency, to allow for the possibility that the respondent could have been re-paroled during the course of the balance of term on the earlier offence: *Callaghan v R* [2006] NSWCCA 58; 160 A Crim R 145 at [21]-[23] (Simpson J, James and Hall JJ agreeing). A further factor to be taken into account on the appeal is that the prosecutor's submissions on sentence accepted the backdating to the commencement of the new period of custody. That factor is not conclusive against intervention, but is a consideration which may persuade the Court not to intervene in the exercise of its residual discretion. “

7. PARITY: A USEFUL SUMMARY

Arenilla-Cepeda [2012] NSWCCA 267 sets out the application of the parity principle where co-offenders had different roles and were sentenced by different judges. The applicant's sentencing judge had not been informed of his co-offender's sentence. The CCA reiterated the strong desirability that related offenders be sentenced by same judge and the necessity for remarks on sentence to be provided if to be sentenced by different judge. Johnson J (Macfarlan and Davies JJ agreeing) adopted the relevant principles as set out **Rees** [2012] NSWCCA 47 and **Rae** [2011] NSWCCA 211:

“[85] For the purpose of determining this appeal, I gratefully adopt the statement of principles of Garling J in *Rees v R* [2012] NSWCCA 47 at [50]:

"So far as I understand it, the authorities on the application of the parity principle in circumstances such as those with which this court is presented in this case, provide the following principles:

(1) The parity principle is an aspect of equal justice, which requires that there be consistency in punishment. Unequal treatment under the law is likely to lead to an erosion

of public confidence in the integrity of the administration of justice: Lowe at 610-611 per Mason J; Postiglione at 301 per Dawson and Gaudron JJ, at 335 per Kirby J; Green v R; Quinn v R [2011] HCA 49 at 28 and 30 per French CJ, Crennan and Kiefel JJ;

(2) Because the function of imposing a sentence on an individual has a discretionary character, an appellate court will ordinarily be reluctant to intervene. There is no such thing as perfect consistency in sentencing. A search for perfect consistency is to look for the unattainable and will frequently be an exercise of academic abstraction: Postiglione at 336-7 per Kirby J, R v M (CA) (1996) 105 CCC (3d) 327 at [92] per Lamer CJ;

(3) Hence, the discrepancy required to be identified between sentences is one which is not merely an arguable one, but one which is 'marked', or 'clearly unjustifiable', or 'manifest ... such as to engender a justifiable sense of grievance' or else it '[appears] that justice has not been done': Lowe at 610 per Gibbs CJ (Wilson J agreeing), at 613 per Mason J, at 623-624 per Dawson J; Postiglione at 301 per Dawson and Gaudron JJ, at 323 per Gummow J, at 338 per Kirby J; R v Taudevin [1996] 2 VR 402 at 403 per Hampel AJA, at 404 per Callaway JA; DGM v R [2006] NSWCCA 296 at [46] per Latham J (McColl JA agreeing); Green at [31] per French CJ, Crennan and Kiefel JJ, at [105] per Bell J;

(4) The elimination of an 'unjustified' discrepancy is a matter of importance not just to the individual concerned, but to the administration of justice in the community more generally. This court is therefore concerned not with whether an appellant actually feels a sense of grievance, that is, a subjective test, but rather whether, examined objectively, the sense of grievance is a justifiable one, namely that a reasonable mind looking over all of what happened would see that a grievance was justified. In other words, the matter is considered objectively: Lowe at 613 per Mason J; R v Kelly [2005] NSWCCA 280 ; 155 A Crim R 499 at [11] per Johnson J (Simpson J agreeing); Postiglione at 338 per Kirby J; Green at [31] per French CJ, Crennan and Kiefel JJ.

(5) In determining whether there has been a discrepancy of a kind sufficient to give rise to a justifiable sense of grievance, a court:

(i) must consider not just the head sentence, but all components of the sentence including the non-parole period and the total effective period that both offenders will serve: Postiglione at 303 per Dawson and Gaudron JJ, at 338 per Kirby J;

(ii) must also consider all of the facts and circumstances applicable to both individuals involved, including the objective seriousness of the offence, in order to identify whether a differential sentence was justified; Green at [30] per French CJ, Crennan and Kiefel JJ;

(iii) ought not intervene to reduce a sentence below a level, which would mean that the sentence would be wholly inadequate having regard to the offence involved and the criminality of the offender, and consequently the result would be an affront to the proper administration of justice: R v Chen [2002] NSWCCA 174 ; 130 A Crim R 300 at [289] per Heydon JA, Sully and Levine JJ; DGM at [58] per Latham J (McColl JA agreeing); Kelly at [12] per Johnson J (Simpson J agreeing); Green at [33] per French CJ, Crennan and Kiefel JJ."

[86] Before moving to the particular circumstances of this case, it is also necessary to mention features relevant to an assessment of a parity ground of appeal, where different Judges have sentenced co-offenders. In Rae v R [2011] NSWCCA 211, with the concurrence of McClellan CJ at CL and Hidden J, I said at [52]-[56]:

"52 There are significant advantages where related offenders are sentenced by the same Judge at the same time, with remarks on sentence containing factual findings and conclusions concerning the relative criminality of the offenders and differing subjective features of each of them: R v Swan [2006] NSWCCA 47 at [71]; Gurney v R; Willetts v R [2011] NSWCCA 48 at [81]-[82]; Dwayhi at [39]-[43].

53 Different Judges may take different views as to the relevant culpability of related offenders: Postiglione v The Queen [1997] HCA 26; 189 CLR 295 at 320; R v Mercieca [2004] VSCA 170 at [6]; Dwayhi at [35], [37].

54 Where co-offenders are dealt with separately, there may be differences in the substratum of facts upon which the different sentencing Judges act and the impressions formed by them with respect to the relative roles, levels of responsibility and prospects of rehabilitation of the individuals involved, with this flowing in part from the different

emphases which can be expected to be placed on aspects of the offending behaviour and the circumstances of the offenders: *R v Rodden* [2005] VSCA 24 at [28]; *Dwayhi* at [38].

55 Strong maintenance of the practice of related offenders being sentenced by the same Judge at the same time will serve the public interest in consistent and transparent sentencing of related offenders which underlies the parity principle itself: *Dwayhi* at [46].

56 A recurring theme in the authorities is that, where co-offenders are sentenced after hearings before different Judges, there may be different evidence and submissions, leading to different conclusions being expressed by the sentencing Judges concerning criminal conduct of persons involved in the same criminal enterprise."

[87] In my view, the present case constitutes yet another clear example of the consequences which may flow from separate sentencing hearings before different Judges, involving different bodies of evidence and different findings arising from the evidence in each case. The position is exacerbated in this case because the second Judge did not have the remarks on sentence of the first Judge, or even information concerning the sentencing outcome."

Allowing the appeal, the CCA found that an objective foundation for a sense of grievance on the part of the applicant with respect to the very wide difference in the starting points adopted by the two sentencing Judges. A marked and unjustifiable disparity may be mitigated by reduction of the sentence appealed against to a level which, although lower, is still within the range of appropriate sentences: at [97] citing *Green v The Queen*.

8. OFFENCES

Money laundering

Milne [2012] NSWCCA 24 referred to the breadth of the Commonwealth money laundering offences contained in Division 400 of Part 10.2 of Chapter 10 of the ***Criminal Code Act 1995 (Cth)***: at [130]-[135].

When provisions such as the money laundering offences are introduced, it is clear that care must be exercised by a prosecutor in their use. As the authorities make clear, the money laundering provisions are broad with a capacity to extend to a wide range of circumstances. By their nature, they are likely to be intertwined with other criminal conduct. By the enactment of these provisions, the Commonwealth has determined that criminal offences of this type are necessary to deal with the wide range of conduct which has manifested itself in contemporary society, with consequences adverse to the public interest including the revenue. At a Commonwealth level, the money laundering offences in s 400 constitute a 21st century response to antisocial and criminal conduct commonly with international elements: ***R (Cth) v Milne(No 1)*** [2010] NSWSC 932 (Johnson J) at [161]-[164]; *Ansari* (2007) 70 NSWLR 89 at [118]-[122].

As to sentencing range, while sentencing decisions for money laundering offences can provide assistance by way of statements of general sentencing principle, they did not at the present time, enable "the identification of a range of sentence": at [291].

Tax fraud – Disparity between sentences for tax fraud and social security offences

In *Boughen & Cameron* [2012] NSWCCA 17 the Court allowed the Crown appeal against the respondents' sentences for conspiring to defraud the Commonwealth. The respondents, who operated a very successful television production company, became aware they were involved in an illegal tax scheme introduced by their accountant but

nevertheless continued to participate in it for 7 years. The Court reviewed various sentences imposed in tax fraud and social security cases and reflected on the fact that the former are treated more leniently than the latter. In contrast to "white collar criminals" social security fraud was usually committed by persons who access the social security system and who were less privileged, less prosperous, less educated, and in possession of fewer resources: at [76]. To fail to sentence middle class offenders commensurately with social security offenders risks bringing the administration of justice into disrepute as perpetrating class bias: at [96].

The respondents were each originally sentenced to an intensive correction order for 2 years. The CCA quashed their sentences and on each imposed imprisonment for 3 years, to be released on recognisance after 18 months. The Court said that for their conduct over 7 years involving around \$500,000 tax each, the starting point should have been 6 years imprisonment, resulting in 3 years imprisonment after discounts of 50% for guilty pleas and other matters: at [104]-[105].

Aggravated kidnapping – s 86(2) Crimes Act

In ***Speechley*** [2012] NSWCCA 130 the respondent was sentenced for aggravated kidnapping (s 86(2) ***Crimes Act***) to 1 year and 11 months imprisonment, wholly suspended. Allowing the Crown appeal, the CCA said the length of the sentence was in range but a suspended or non-custodial sentence is not generally appropriate for a s 86(2) offence: at [108]. ***Collett*** (NSWCCA, unreported, 7/6/79) sets out objective factors relevant to sentencing for kidnapping but that case relates to the old repealed offence under s 90A.

The respondent argued the offence was less serious due to the absence of actual bodily harm. But if there had been actual bodily harm, then the specially aggravated kidnapping under s 86(3) would have applied. In assessing the objective gravity of a s 86(2) offence, it would be erroneous to have regard to the absence of a feature which, if it were present, would constitute a different and more serious offence under s.86(3): ***Burton*** [2008] NSWCCA 108 at [90].

Reliance upon ***Collett*** is problematic in an assessment of objective gravity of a s 86 offence. The move away from s.90A, and the enactment of the offences now contained in s.86, reinforces the need to concentrate upon s.86 (and cases which have applied it): ***Jeffries*** [2008] NSWCCA 114. That does not mean factors mentioned in ***Collett*** are to be placed entirely to one side. A number of the factors in that case are relevant to kidnapping offences generally. However, the statutory structure of s.86 is different to that in the old s.90A: at [105].

9. ASSISTANCE TO AUTHORITIES

Discount available where offender reported historical child sexual assault offences of which offender was the victim

A court may impose a lesser penalty than it otherwise would, where the offender has assisted law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, "the offence concerned or any other offence": s 23(1) ***Crimes (Sentencing Procedure) Act 1999***.

RJT [2012] NSWCCA 280 (Basten JA, Adams J agreeing; RA Hulme JA dissenting) held that the discount for assistance to authorities extended to an offender who reported

historical child sexual assault offences of which he himself was the victim. The assistance was provided after the the offender's own offences (of child sexual assault) but before being charged. The applicant disclosed to police details of child abuse by his grandfather which resulted in the grandfather's conviction. As the applicant was a victim in respect of those offences, and not a co-offender, the sentencing judge held that "the rationale of the section" did not extend to his circumstances: at [2]. The Crown accepted that the sentencing judge was in error in concluding that the power did not extend to this case, but submitted that no error was revealed in declining to reduce the sentence: at [3]. The Court allowed the appeal.

Basten JA discussed the public policy rationale for reducing sentences on account of assistance and whether the discount applies when the offender assists as a victim of crime: at [5]-[9]. His Honour then said:

[9] There are other situations which involve disincentives to revealing criminality. Reporting of sexual abuse is notoriously rare: even victims require encouragement, for a range of reasons which need not be explored here. There is a public interest in increasing the level of reporting of sexual abuse. No doubt an incentive that applies only to those charged with other crimes will have a limited effect, but that is true of assistance to law enforcement authorities in cases which are squarely within the accepted scope of s 23. Neither the limited scope of the incentive, nor the fact that the reporter was indeed the victim, destroy the public interest in encouraging the provision of assistance in such circumstances.

[10] There was little consideration given in argument to the value of a discount in a case such as the present, which is thought not to fall within the primary field of operation of s 23. This factor warrants a more limited discount than might otherwise be applied. There is also the need not to reduce the sentence to one unreasonably disproportionate to the offending: s 23(3). In the circumstances, a discount of 10% is appropriate. That should apply to each of the offences, but in a way which would maintain the degree of accumulation and the proportion between the minimum custodial period and the aggregate sentence period.

[11] Questions as to the availability of a discount, and as to its level if available, in circumstances where the assistance was provided before both the discovery and commission of the offences for which the beneficiary of the discount is being sentenced, should await a case in which they squarely arise. In the present case there should be a grant of leave to appeal, the sentences below should be quashed and the applicant should be resentenced so as to achieve a period of nine years imprisonment with a minimum custodial term of five years and 10 months."

RA Hulme J, dissenting, said he was not prepared to accept the applicant's general proposition that reporting a crime will always amount to assistance to authorities under s 23. Such a proposition is inconsistent with the rationale that underlies the section. There may be a case in which a victim who reports the crime committed against him or herself could be entitled to consideration of a reduction in sentence, but it would be a most unusual case with the most exceptional circumstances. It would have to be a case in which there was a public policy to be served that is consistent with the policy underlying the common law principle and adopted by the legislature. Acceptance of the applicant's general proposition would lead to absurd results: at [74]-[75].

Cumulative on other discounts

In *Ehrlich* [2012] NSWCCA 38 the CCA, dismissing the Crown appeal, held it was not an error to give a discount of 25% for the respondent's guilty plea and then a further 10% discount for his assistance to authorities.

Section 23 **Crimes (Sentencing Procedure) Act 1999** gives a court power to reduce penalties for assistance to law enforcement authorities. The penalty imposed must not be “unreasonably disproportionate to the nature and circumstances of the offence:” s 23(3).

On 14.3.2011 a new s 23(4) commenced. Section 23(4) states that a court that imposes a lesser penalty for either assistance or an undertaking to assist must:-

- (a) indicate and make a record of the fact that the lesser penalty is being imposed, and
- (b) state the penalty that it would otherwise have imposed, and
- (c) where the lesser penalty is being imposed for both reasons—state the amount by which the penalty has been reduced for each reason.

Basten JA (Adams J agreeing; Johnson J agreeing the 10% discount was available but otherwise dissenting) made the following points.

(a) whether there is some restraint to be imposed on the amount of a discount for assistance to authorities:

The Crown submitted, on the basis of **Kumar & Feagaiga** [2008] NSWCCA 328 at [34], that a discount of only 15% is available for assistance to authorities and thus 10% (being two-thirds of the generally available discount) could not be justified: The submission is misconceived. To speak of a level of discount as “generally available” is to invite questions as to the kind of assistance which is “generally provided”. It is also to make assumptions about the matters to which the Court must have regard, as set out in s 23(2) **Sentencing Procedure Act**. Further, taking reasoning in a particular case out of context and applying it as a general principle is fraught with dangers in relation to the broad discretionary exercise of sentencing. It runs the risk of selective reliance on particular “authorities”, to the exclusion of others. Other decisions have allowed discounts for assistance to the authorities of up to 50%: **NP** [2003] NSWCCA 195; **El Hani** [2004] NSWCCA 162: at [5]-[7].

(b) whether the arithmetical assessment of individual discounts is necessary or appropriate:

In **Gallagher** (1991) 23 NSWLR 220 at 230 Gleeson CJ had said that “what is involved is not a rigid or mathematical exercise, to be governed by tariffs derived from other and different cases”. What might have been said in **Gallagher** as to the ability of a sentencing judge not to specify specific elements of a discount now requires qualification by reference to the new s 23(4). Compliance with s 23(4) will generally, if not invariably, permit the discount to be identified by calculating the proportion of the sentence imposed of that which would otherwise have been imposed, each of which are to be stated.

(c) whether, where two separate discounts are applied, they should operate consecutively or cumulatively:

Where there is more than one discount, it is accepted that it may be appropriate to specify individual discounts and apply them consecutively: **NP** [2003] NSWCCA 195; **El Hani** [2004] NSWCCA 162.

In this case, the judge took a cumulative approach. There was no error in this course. The judge assessed the respective discounts for the guilty plea and for assistance to authorities and combined them to identify the appropriate sentence. It is not incorrect to add the discounts, so as to achieve a single global figure applied to the sentence which would otherwise have been imposed. It is commonplace to adopt such an approach,

Section 23 does not require either process to the exclusion of the other. It says nothing as to the manner in which the discounting is to be achieved. The manner in which it is achieved is irrelevant:

the selected reduction can be expressed in a number of different ways, none of which is prohibited: at [11]-[12].

Onerous prison conditions

The Court has said it should now be accepted that an offender who has provided assistance will not necessarily be disadvantaged in the prison system and, if the offender wishes to assert otherwise, s/he should lead evidence of that fact: see **Sukkar** [2006] NSWCCA 92 per Howie J; **Mostyn** (2004) 145 A Crim R 304 at [179].

In **DW** [2012] NSWCCA 66, RS Hulme J (Hall J agreeing; Basten JA agreeing in separate judgment) said these remarks “should not be adopted uncritically.” Per RS Hulme J:

“[145] Howie J's remarks in *R v Sukkar* have been referred to in many cases since - see eg *Brown v R* [2010] NSWCCA 73; *R v Choi* [2010] NSWCCA 318 and *R v Kumar & Feagaiga* [2008] NSWCCA 328 where I cited them. However, my experience indicates that they should not be adopted uncritically. Too often have I been faced with evidence of prisoners on protection spending about 23 hours a day in their cells or allowed to see or communicate with but one or a few other prisoners. Certainly, I accept that not all prisoners on protection suffer significantly harsher conditions of imprisonment for all or most of their time in custody. However some, including the Respondent, certainly do.”

The evidence revealed conditions of custody substantially worse than those experienced by the general prison population and the respondent's sentence should be reduced from what it would otherwise have been to take account of the fact: at [142], [146].

Discount for assistance to apply to all counts

In **Isaac** [2012] NSWCCA 195 the information provided to police was of no assistance in relation to two out of the applicant's three offences. However, the CCA (Garling J; Hoeben JA and Latham J agreeing) said that this did not mean that a discount should not be assessed and applied to the sentences imposed in respect of those particular counts. The sentencing Judge, and now the appeal court, was being asked to take into account the assistance which the applicant had provided in respect of an offence for which there was no matching count on the indictment It was necessary to assess all of the assistance given, and apply any discount to all counts equally: at [43]. Per Garling J:

“[44] The complexity of applying an assessed discount to multiple offences was discussed by Howie J, with whom McClellan CJ at CL and Harrison J agreed, in *Felton v R* [2010] NSWCCA 79 at [45]:

"45 It is important to note that, when sentencing for multiple offences, the discount has to apply to the overall sentence imposed and not just the individual sentences. This of course may be difficult when there are different discounts applicable to different sentences. A rigid application of *Pearce* means that the sentence for each offence, including any applicable discount, is determined and then attention paid to the issue of totality. But in considering totality, the sentencer must not lose sight of the discount that has to apply to the total sentence and not just the individual sentences. Where all sentences are made concurrent, of course the problem does not arise. But where individual sentences are accumulated, either in whole or part, the discount can be eroded."

[45] In this case, in order that the discount for assistance is not eroded, and because there are different sentences being imposed on the three individual counts in the indictment, the appropriate approach is to identify and apply the assessed discount for assistance to each of the sentences, after each is initially assessed. Totality then needs to be considered.”

10. PROHIBITIONS IN SENTENCING

De Simoni may be breached even when maximum penalties are the same

In **Cassidy** [2012] NSWCCA 68 the appellant was sentenced for s 198 **Crimes Act** 'intentionally destroying property with intent to endanger life'. The sentencing judge took into account that the offender intended that "the fire would spread in such a way that the people inside the house would not get out alive" and that the offender had wanted people to die. Allowing the appeal, the Court said ss 28-30 carried a standard non-parole period, whereas s 198 did not, which demonstrated the legislature's view that the attempted murder provisions are more serious offences. Further, ss 28-30 carry an intention to kill. These factors made ss 27-30 "more serious" offences within the meaning of **De Simoni** (1981) 147 CLR 383 at [7], [26].

Double counting where proceeds of crime offence based on drug supply offences

In **Redfern** [2012] NSWCCA 178 the applicant was sentenced for two drug supply offences. A 'Dealing with the proceeds of crime' offence was taken into account on a Form 1. The applicant said that the money was derived from the drug supply offences which was accepted by the Crown. However, the sentencing judge said: "*I am asked to take into account the matter contained on the Form 1. It is, of itself, a serious matter and I have increased the penalty to be imposed for the sentence of ongoing supply to reflect that matter.*"

Allowing the appeal, Adams J (McClellan CJ at CL and Hoeben J agreeing) said this was an error. To punish the offender additionally for possessing the money which was the proceeds of the drugs supply offences was double counting. Per Adams J:

"[17] It is self evident, as it seems to me, that the totality of the applicant's criminality in the charged offences is not increased by the fact that he had in his possession the money paid to him for the supply of the drugs. It would be as sensible to have charged and punished him additionally with possession of the drugs for the purpose of supplying the undercover police officer because he had the drugs in his possession. Both the possession of the drug itself and the proceeds of sale are part and parcel of the primary offence. It needs hardly to be said that it is immaterial that he had the cash in his possession at the point of sale as distinct from in the safe in his home. To punish him additionally for either one of those aspects of his conduct is to double count: see *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure Act) 1999 No 1 of 2002* [2002] NSWCCA 518; (2002) 56 NSWLR 146 at [42] ff; *Thorn v R* [2009] NSWCCA 294; (2008) 198 A Crim R 135 at [27]; *Nahlous v R* [2010] NSWCCA 58; (2010) 77 NSWLR 463 at [13]–[15]; *Schembri v R* [2010] NSWCCA 149 at [11]–[16]; *Maglis v R* [2010] NSWCCA 247 at [9]; cf *Hinchcliffe v R* [2010] NSWCCA 306."

Double punishment

In **Portolesi** [2012] NSWCCA 157 the applicant was sentenced for cultivation of a commercial quantity of cannabis plants, and various other offences including 'diverting electricity without authority' and 'possession of a radio communications transmitter'. The operation involved a complex hydroponic system involving electrical transformers, fans, air-conditioning ducting, irrigation piping, security cameras, alarms, and a mobile phone jamming device to prevent a listening device from working.

In finding the cultivation offence was "significantly above the middle of the range", the sentencing judge took into account "the highly sophisticated" operation involving the diversion of electricity and the mobile phone jamming device. The applicant submitted he was doubly punished because he had been separately charged and sentenced in respect

of these two matters. The CCA (Beech-Jones J: Basten JA and Harrison J agreeing) found the applicant was doubly punished for possessing a telecommunications device and diverting electricity – however, this was only relevant to the comparatively short sentences that were received for those offences. They were still relevant matters to take into account on the cultivation offence. Dismissing the appeal, per Beech-Jones J:

“[47] In this case although his Honour sought to avoid the suggestion that the appellant was being twice punished for possessing a telecommunications device and diverting electricity, in my view that conclusion cannot be avoided. His Honour's conclusion as to the degree of sophistication involved in the cultivation offence were part of the reasoning that lead to the finding as to the overall level of seriousness of the offence. His Honour took into account the fact that the applicant “held” (ie possessed) a telecommunications device and diverted electricity to avoid detection. Those matters were encompassed by separate charges in respect of which he received separate sentences. The level of sentences imposed for those offences, being 12 months and 3 months imprisonment, suggests that they fully reflected the criminality involved in that conduct.

[48] This conclusion does not, however, necessarily lead to the result that there was error on his Honour's part in the sentence arrived at for the cultivation offence. [Discussion of *R v Elphick* [2010] NSWCCA 112 follows].

.....

[50] Consistent with these observations, it was open and in fact appropriate for his Honour to consider the common “elements” or aspects to the various charges in the course of sentencing for the cultivation offence first before addressing the offences on the s 166 certificate including the charges of diverting electricity and possessing a telecommunications device.

[53] In my view if there is any error it only arises in respect of the sentences for diverting electricity and possession of a telecommunications device and not for the cultivation offence. To have ignored those matters in describing the sophistication of the applicant's system of cultivation would have been artificial. It would have run the risk that the overall sentence would not reflect the totality of the applicant's conduct in cultivating prohibited plants. I do not understand the applicant to be seeking leave to appeal in respect of the sentences imposed for the divert electricity and supply charges. Unlike the sentences considered by the High Court in *Pearce* those sentences have now been served in their entirety.”

11. COMMONWEALTH MATTERS

Guilty Plea

In *Lee* [2012] NSWCCA 123 the CCA repeated that when sentencing for a Commonwealth offence, a court is not required to specify a quantifiable amount for an offender's guilty plea. The approach taken is different to that taken for State offences. The principles in *Cameron* (2002) 209 CLR 339 apply to Commonwealth offences, not *Thomas & Houlton* (2000) 115 A Crim R 104. The guilty plea is taken into account as recognition of a willingness to facilitate the course of justice, not the utilitarian value of the plea of guilty: at [58].

Section 19AB Crimes Act (Cth) where judge may decline to fix a NPP or recognisance release order

In *Hancock* [2012] NSWCCA 200 H pleaded guilty to a number of state and Commonwealth offences. H received fixed terms of imprisonment for the two

Commonwealth offences. The appellant submitted there was failure to comply with s 19AB(3) **Crimes Act 1914 (Cth)**:

(3) Where, but for this subsection, a court would be required by this section to fix a non parole period, or make a recognizance release order, in respect of a person, the court may decline to do either if, having regard to the nature and circumstances of the offence or offences concerned and to the antecedents of the person, the court is satisfied that neither is appropriate.

The CCA said that the discretion under s 19AB(3) is a wide one. A judge is to consider all of the relevant circumstances, such as the nature and circumstances of other offences, antecedents, or other sentences still being completed.

12. OTHER SENTENCING CASES

Distinction between criminal responsibility and moral culpability

In **KR** [2012] NSWCCA 32 the Court considered the distinction between criminal responsibility and moral culpability. The applicant and his co-offender were charged with murder and robbery. The Crown alleged a joint criminal enterprise, namely that the offenders acted jointly upon an agreement to cause the death of the victim. The applicant appealed against sentence on the basis of lack of parity with his co-offender. Dismissing the appeal, the Court said the offenders were equally responsible for the death of the deceased and that this reflected their joint participation in the murder. However, the applicant was more culpable than his co-offender due to the infliction of greater violence and the parity principle was thus not engaged: at [23]-[25].

Latham J (Whealy JA and Harrison J agreeing) discussed the difference between criminal responsibility and moral culpability.

[18] More recently, in *R v Sukkar* [2011] NSWCCA 140, Davies J summarised the position thus at [36] :-

To the extent that the grounds do not raise the parity principle they seem only to deal with the proper approach to sentencing for a joint criminal enterprise particularly where the co-offenders have different roles in the enterprise. Although the starting point is that the offenders were parties to the same joint criminal enterprise, and that should not be lost sight of, (*Johnson v R*; *Moody v R* at [4]), and that one should not identify the differences in the roles with any precision (*R v Hoschke* [2001] NSWCCA 317 at [18], *R v JW* [2010] NSWCCA 49 at [161], *Johnson v R*; *Moody v R* at [11]), it is always relevant to refer to **the particular conduct** of each such participant with a view to identifying **the level of culpability** for which each must be sentenced (*R v JW* at [161], and see *Johnson v R*; *Moody v R* at [4] and [94], *Regina v Darwiche & Ors* [2006] NSWSC 1167 at [74], *Regina v Rick Barry Swan* [2006] NSWCCA 47 at [72] and [74]). (bold not in original)

[19] **What emerges from these statements of sentencing principle is that the participants in a joint criminal enterprise are equally responsible or liable for all the acts in the course of carrying out the enterprise, by whomsoever they are committed, yet a particular participant's level of culpability stands to be assessed by reference to his/her particular conduct. [Emphasis added in this Paper].**

[20] Such an approach is consonant with the distinction in law between an offender's responsibility for criminal conduct and his/her culpability. They are relevant at different stages of the criminal process.

[21] Criminal responsibility, and therefore liability to punishment, attaches to a person who voluntarily and intentionally performs those acts constituting an offence. "The concurrence of will and physical act and the concurrence of intent and physical act suffices to attract criminal liability." :*R v O'Connor* [1980] HCA 17 at [20] ; 146 CLR 64 at 72, per Barwick CJ.

[22] Culpability, on the other hand, is concerned with the assessment of an offender's moral responsibility for the offence. As such, it assumes liability for the offence and focuses upon aspects of the offender's conduct and his/her subjective circumstances in order to determine the appropriate degree of punishment: *R v Merritt* [2004] NSWCCA 19 ; *R v Henry & Ors.* [1999] NSWCCA 111 at [254]; 46 NSWLR 346 ; 106 A Crim R 149.

[23] Turning then to Howie J's remarks on sentence, the reference to the offenders' equal responsibility for the death of the deceased did no more than reflect their joint participation in an agreement to inflict serious physical injury that resulted in the victim's death. The findings of fact made by his Honour that attribute to the applicant the stomping injuries to the head of the deceased are not disputed by the applicant. His Honour then implicitly acknowledges that some other injuries to the face and head of the deceased were probably jointly inflicted with LR.

.....

[25] In short, a proper reading of the remarks on sentence make it abundantly clear that this applicant was indeed more culpable than LR. That greater culpability arose from his infliction of more significant violence upon the deceased than LR, a conclusion that followed from the forensic evidence and from the absence of any evidence before the judge capable of differentiating the applicant's role in the commission of the offence from that suggested by the agreed statement of facts.

[26] In my view, there is no substance to this ground. The applicant's sentence does not engage the parity principle because the judge made legitimate findings of fact that gave rise to different degrees of culpability. In these circumstances, the notion of equal justice was not violated: *Postiglione v R* [1997] HCA 26 ; 189 CLR 295.

Evidence of Dangerousness

In ***Potts*** [2012] NSWCCA 229 the appellant was sentenced for murder after a jury rejected the defence of substantial impairment. On appeal it was argued the sentencing judge failed to give appropriate weight to the appellant's mental illness and that the sentence was manifestly excess. In rejecting the appeal the Court of Criminal Appeal rejected the proposition that automatic consequences follow on sentence where an offender suffers from a mental disorder. Submissions that a mental illness made the offender an inappropriate vehicle for general deterrence, and made a custodial sentence more onerous had to be balanced with countervailing considerations such as future dangerousness and protection of the community (applying ***Veen v The Queen (No 2)*** (1988) 164 CLR 465).

Assessing the objective seriousness of car rebirthing offences

In ***Tannous; Fahda; Dib*** [2012] NSWCCA 243 the Court of criminal Appeal considered the relevant factors in assessing the seriousness of car rebirthing offences. These factors include extent of an offender's involvement, profit obtained from the offences, the length of time over which the offence were committed.

Selling of drugs to undercover police officer as a mitigating factor

In **DW** [2012] NSWCCA 66 at [117] Basten JA considered relevant cases and concluded that unless criminality had been exacerbated or instigated by the authorities the fact that drugs had been supplied to undercover police officers and not to the general public did not mitigate the subjective criminality of the offender. At the same time the fact that the supply to authorities meant there was no harm to the public was a matter that should be taken into account on sentence.

Discount for offer to plead guilty

In **Blackwell** [2012] NSWCCA 227 the appellant's offer to plead guilty to the statutory alternative charge was rejected by the Crown. Although the plea was not formally entered it was drawn to the attention of the judge prior to the commencement of the trial by judge alone.

CONVICTION APPEALS AND OTHER CASES

1. EXPERT WITNESSES

Obligations of Expert Witness

In **Wood** [2012] NSWCCA 21 the Court was critical of the Crown's expert witness, a physicist, who was called to give evidence to exclude the possibility that the victim had committed suicide. The expert witness took on the role of investigator and became an active participant in attempting to prove that the applicant had committed murder, rather than remaining impartial to the outcome and offering his independent expertise: at [758].

The Court outlined the obligations of an expert witness:

"[719] The obligations of an expert witness were discussed by Cresswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68 at 81-82. They may be summarised as follows:

Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. See also *Whitehouse v Jordan* (1981) 1 WLR 246 at 256 (Lord Wilberforce).

An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.

An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider the material facts which could detract from his concluded opinion.

An expert witness should make it clear when a particular question or issue falls outside his expertise.

If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert who has prepared a report cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert reports, or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports. "

Whether an expert witness's failure to comply with their obligations makes their evidence inadmissible was a "live issue" and did not need to be resolved in these proceedings: at [722]-[730]. However, evidence is clearly inadmissible where an expert gives evidence not based on their specialised knowledge: at [726], *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588.

Allowing the conviction appeal and entering an acquittal, the CCA ruled there was insufficient evidence to support the conviction: at [378]-[387].

Expert Witness Code of Conduct applies in criminal proceedings

The ***Expert Witness Code of Conduct*** applies in criminal proceedings: see ***Supreme Court Rules*** 1970 pt 75 r 3J; ***Uniform Civil Procedure Rules*** sch 7: ***Wood*** [2012] NSWCCA 21 at [275]; ***Gilham*** [2012] NSWCCA 131 at [405].

Although an expert's evidence may not be inadmissible just because the expert has breached the Code of Conduct, where the breach is sufficiently grave then a court may be justified in excluding the evidence under ss 135 or 137 ***Evidence Act 1995***: ***Wood*** [2012] NSWCCA 21 [728]-[729].

The Code is set out in Schedule 7 to the ***Uniform Civil Procedure Rules***:-

"Schedule 7 Expert witness code of conduct

1 Application of code

This code of conduct applies to any expert witness engaged or appointed:

- (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or*
- (b) to give opinion evidence in proceedings or proposed proceedings.*

2 General duty to the court

- (1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.*
- (2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).*
- (3) An expert witness is not an advocate for a party.*

3 Duty to comply with court's directions

An expert witness must abide by any direction of the court.

4 Duty to work co-operatively with other expert witnesses

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:

- (a) must exercise his or her independent, professional judgment in relation to that issue, and*
- (b) must endeavour to reach agreement with the other expert witness on that issue, and*
- (c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.*

5 Experts' reports

- (1) An expert's report must (in the body of the report or in an annexure to it) include the following:*
 - (a) the expert's qualifications as an expert on the issue the subject of the report,*
 - (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),*
 - (c) the expert's reasons for each opinion expressed,*
 - (d) if applicable, that a particular issue falls outside the expert's field of expertise,*
 - (e) any literature or other materials utilised in support of the opinions,*
 - (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,*
 - (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).*
- (2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.*
- (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.*
- (4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.*

6 Experts' conference

- (1) Without limiting clause 3, an expert witness must abide by any direction of the court:*
 - (a) to confer with any other expert witness, or*
 - (b) to endeavour to reach agreement on any matters in issue, or*
 - (c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or*
 - (d) to base any joint report on specified facts or assumptions of fact.*
- (2) An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement."*

Obligation of Crown to call all relevant expert witnesses

In **Gilham** [2012] NSWCCA 131 the appellant appealed against his murder convictions of his parents. The CCA found the Crown failed to call an additional expert, Professor C, on the grounds that C was unreliable. C would have given evidence not helpful to the Crown. The CCA said a Crown Prosecutor has obligations to discharge his/her function under the rules of professional practice and is not entitled to discriminate between experts: at [383]-[412]. There was no proper basis to conclude C was unreliable and the failure to call C constituted a miscarriage of justice: at [412].

[404] There is a more fundamental defect in the Crown's decision not to call Professor [C] because it was, in part, expressly based on the fact that he held a different opinion from that advanced by the witnesses the Crown intended to call. **The Crown is simply not entitled to discriminate between experts, in particular between those whose views they have sought, calling only those that advance the Crown case, any more than it is entitled to call some lay witnesses and not others for some perceived tactical advantage.** The fact that there is disagreement between the experts from whom the Crown have sought an opinion provides no basis for the Crown to elect to call only those experts who will give evidence that supports the Crown case, or whose views are consistent with the Crown case theory, and to refuse to call those witnesses whose views do not support the Crown case. This is particularly so where the subject matter about which the opinions are expressed is controversial. The Crown Prosecutor's obligation is to call all relevant evidence at his or her disposal. **That obligation is a continuing obligation which persists until the Crown case is closed. The *Apostilides* principles are not the rules of a game. They are rules designed as a protection against unfairness or the abuse of prosecutorial power** (see *R v Gibson* [2002] NSWCCA 401 (Sully J at [49], Wood CJ and Howie J agreeing)), quoting *Randall v The Queen* [2002] 1 WLR 2237 at 2243).

[405] The expert witness has independent obligations to the Court under the Expert Witness Code of Conduct (see Schedule 7 to the Uniform Civil Procedure Rules 2005). The paramount duty of the expert witness is to the Court and not to any party to the proceedings. An expert is not an advocate for a party. It is in the discharge of the different but allied obligations of the expert and the Crown Prosecutor that the jury is educated and informed about matters in issue between the Crown and the accused which are beyond the jury's experience. **Where the views of the experts differ, the extent and basis for disagreement can then be tested, if necessary, with the Crown seeking leave to cross-examine where the evidence might prove to be unfavourable under s 38 of the *Evidence Act* (as occurred in *Velevski*).** It is in that process that the interests of justice are preserved and advanced. The assertion by the Solicitor for Public Prosecutions that it is not appropriate to utilise s 38 for the purpose of calling an expert witness who the Crown intends to discredit by obtaining leave to cross-examine is not soundly based, whether in the context of this case or generally. On the appeal it was only faintly suggested that this approach to the construction of s 38 provided justification for the Crown's decision not to call Professor Cordner." **[Emphasis added in this Paper].**

As in *Wood's* case (above), the CCA again raised serious criticisms of the 'expert' evidence and the manner in which it was relied upon by the Crown. The expert evidence was wrongly admitted – being evidence of fire demonstrations and likely behaviour of fire elicited; similarity of stab wound patterns; and the expected amount of blood on the applicant and murder weapon. The probative value of this evidence was outweighed by its prejudicial effect.

2. EVIDENCE

Evidence Act s 90 – Admissions by young person to a support person

In *JB* [2012] NSWCCA 12; 215 A Crim R 380 the 15 year old appellant (a Sudanese refugee) was convicted of murder. A youth liaison officer with the Sudanese community attended the police station. Alone in a room, the support person asked "what had happened" to which the appellant replied "he had stabbed a man": at [11]. The appellant submitted the admission should have been excluded under s 90 *Evidence Act*.

Dismissing the appeal, the CCA said there was no error in admitting the evidence and it should not have been excluded under s 90: *Em v The Queen* (2007) 232 CLR 67. The question was entirely neutral, did not require the making of any admission, did not place any pressure on the appellant or create any unfairness. The trial judge was correct to find the admission fell into the category of an "unguarded incriminating statement" and to

record that the relevant inquiry was into the appellant's state of mind, and whether his freedom to speak or refrain from speaking had been compromised. Each of these matters was relevant to the discretionary exercise under s 90: at [41].

The relationship between the support person and the appellant (a juvenile) did not fall within a restricted category of protected relationship and is not a "special relationship" under s 126A or some other privileged communication: at [29].

An application for special leave to appeal to the High Court was refused in this matter on 13 February 2013: see [2013] HC Transcript 28.

Evidence Act s 98 – Coincidence Evidence

In ***DSJ; NS*** [2012] NSWCCA 9 the appellants were charged with insider trading offences. The Crown alleged DSJ obtained inside information through his employment and passed this to NS who used it to buy or sell shares. The trial judge held the evidence was admissible as coincidence evidence so that evidence regarding each count was admissible on each of the other counts. Section 98 ***Evidence Act*** states coincidence evidence is not admissible unless the court "thinks" the evidence will have significant probative value "either by itself or having regard to other evidence adduced or to be adduced".

A five-judge Bench (Whealy JA; Bathurst CJ agreeing with additional comments; Allsop P and McCallum J agreeing with both; McClellan CJ at CL agreeing with Whealy JA) allowed the appeal and remitted the matter to the trial judge.

The judge erred in rejecting the need to recognise the existence of alternative inferences inconsistent with guilt arising from the Crown evidence: at [130]. The judge correctly found the weighing and assessment of inferences was a matter for the jury. However, this does not mean when assessing s 98 a judge must ignore an alternative explanation that properly arises on the evidence inconsistent with guilt: at [130]-[131]. The trial Judge was required to ask whether the available alternative inferences substantially altered his view as to the capacity of the Crown evidence to establish the facts in issue. And whether the alternative inferences deprived the coincidence evidence, taken with the other evidence, of its capacity to prove significantly the Crown case. Alternative possibilities had to be recognised and taken into account and it was an error not to do so: at [130]-[132].

The Court also referred to Simpson J's judgment in ***Zhang*** (2005) 158 A Crim R 504 at [139] where her Honour outlined a formulation regarding the admissibility of coincidence evidence. The Court said that Simpson J's formulation focussed on the evaluation to be performed by the trial judge and sought to explain in a practical manner the 'process' to be undertaken. It did not intend to supplant or replace the language of s 98: at [67]. A judge is required to ask whether a hypothetical jury would be likely to find the evidence of importance or of consequence in coming to a conclusion about matters in issue: at [71]. A judge is required to take the evidence at its highest, and to determine whether it has the capacity to be of importance or of consequence in establishing the fact in issue: at [75]-[76]. In determining whether the evidence has significant probative value under s 98, the judge must consider whether there is a real possibility of an alternate explanation inconsistent with the guilt of the offender: at [78]-[82].

Steps to be taken in determining admissibility of coincidence evidence

In *Gale & Duckworth* [2012] NSWCCA 174 the steps to be taken in determining the admissibility of coincidence evidence were set out by Simpson J (McClellan CJ at CL and Fullerton J agreeing):

“Coincidence evidence

[23] The admission of coincidence evidence in criminal cases is governed by two provisions of the *Evidence Act*, s 98 and s 101. Those sections are relevantly in the following terms:

"98 The coincidence rule

(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Note. One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

(2) ...

101 Further restrictions on ... coincidence evidence adduced by prosecution

(1) This section only applies in a criminal proceeding and so applies in addition to section ... 98.

(2) ... coincidence evidence about a defendant, that is adduced by the prosecution, cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) ...

(4) ..."

[24] By s 100(2), a court may dispense with the notice requirements of s 98(1)(b) by directing that, notwithstanding the failure of the party seeking to adduce the evidence to give notice, the coincidence rule is not to apply.

[25] At its heart, s 98 is a provision concerning the drawing of inferences. The purpose sought to be achieved by the tender of coincidence evidence is to provide the foundation upon which the tribunal of fact could draw an inference. The inference is that a person did a particular act or had a particular state of mind. The process of reasoning from which that inference would be drawn is:

- two or more events occurred; and
- there were similarities in those events; or there were similarities in the circumstances in which those events occurred; or there were similarities in both the events and the circumstances in which they occurred; and
- having regard to those similarities, it is improbable that the two events occurred coincidentally;
- therefore the person in question did a particular act or had a particular state of mind.

[26] What is important to recognise, in my opinion, is that this process of reasoning and the drawing of the inferences (that the person did the act or had the state of mind) is for the tribunal of fact: see *DSJ v R*; *NS v R* [2012] NSWCCA 9. Part of that process involves findings of fact. Did the two (or more) events occur? Were there relevant similarities?

Where the party tendering the evidence relies upon a number of asserted similarities, the tribunal of fact must identify which, if any, of those similarities have been established. Before asking itself the penultimate question - is it improbable that the two events occurred coincidentally? - it must discard any asserted similarities not established.

[27] The task for the judge in determining the admissibility of evidence that would permit the jury to undertake that reasoning process, and draw the ultimate inference, is what is presently in issue. Provided the evidence is such that would permit the jury, acting reasonably, to reach that conclusion or draw that inference, the evidence could be held to have significant probative value. It is a question of the capacity of the evidence to have that effect: *DSJ* at [8], [11], [55]. Subject to s 101, the evidence would, following that reasoning, be admissible.

[28] Before the evidence can be admitted, however, two conditions must be met. The judge must:

(i) be satisfied that reasonable notice has been given; and

(ii) form the opinion that the evidence, either by itself or having regard to other evidence adduced or to be adduced by the party tendering the evidence, will have significant probative value.

[29] Section 98 is framed in the negative. It is, therefore, more accurate to say that it is a provision that prohibits the admission of evidence from which such an inference may be drawn unless the stated conditions are met.

[30] The factual underpinnings of the s 98 decision to admit or reject coincidence evidence are:

- that there is evidence capable of establishing the occurrence of two or more events; and
- that there is evidence capable of establishing similarities in the two or more events; or
- that there is evidence capable of establishing similarities in the circumstances in which two or more events occurred;
- that there is evidence capable of establishing both similarities in the two or more events and similarities in the circumstances in which the two events occurred.

[31] In a case in which it is found that there is such evidence, then, in my opinion, the correct process in the determination of the admission of evidence under s 98 involves a series of steps, as follows:

- the first step is to identify the "particular act of a person" or the "particular state of mind of a person" that the party tendering the evidence seeks to prove;
- the second step is to identify the "two or more events" from the occurrence of which the party tendering the evidence seeks to prove that the person in question did the "particular act" or had the "particular state of mind";
- the third step is to identify the "similarities in the events" and/or the "similarities in the circumstances in which the events occurred" by reason of which the party tendering the evidence asserts the improbability of coincidental occurrence of the events;
- the fourth step is to determine whether "reasonable notice" has been given of the intention to adduce the evidence (or, if reasonable notice has not been given, whether a direction under s 100(2) ought to be given, dispensing with the requirement);

- the fifth step is to make an evaluation whether the evidence will, either by itself or in conjunction with other evidence already given or anticipated, "have significant probative value";
- in a criminal proceeding, if it is determined that the evidence would have "significant probative value", the sixth step is the determination whether the probative value of the evidence "substantially outweighs" any prejudicial effect it may have on the defendant (s 101(2)).
- the sixth step necessarily involves some analysis both of the probative value of the evidence in question and any prejudicial effect it might have: *R v RN* [2005] NSWCCA 413, and a balancing of the two.

[32] It is quite clear that nothing approaching this process was undertaken by the trial judge. In effect, the respondents concede that error has been demonstrated in the *House v The King* sense, in the manner in which his Honour approached the task. That conclusion is correctly made."

Relationship evidence - evidence of earlier domestic violence incidents not admissible in regard to sexual assault offences

In *Norman* [2012] NSWCCA 230 the appellant was convicted of three counts of sexual assault committed between 2002 – 2005 against his wife. The trial judge allowed evidence of two incidents of domestic violence between the applicant and complainant "for the purpose of showing the relationship". The two incidents occurred in 1999 and 2001 and involved slapping and kicking: at [21]-[21].

The CCA held the evidence was wrongly admitted. Evidence "is not relevant merely because it discloses aspects of the relationship between an accused and a complainant. There must be an issue which the evidence may explain or resolve by placing the alleged events in their true context": at [33] referring to *DJV* (2008) 200 A Crim R 206 at [29]. The evidence would not have assisted the jury, in any permissible fashion, in evaluating the complainant's evidence. The evidence was of two incidents occurring between one and six years prior to the offences, and stood as unrelated isolated incidents. The evidence was not "necessary to better explain the complainant's account of what occurred": at [34] (*BBH* (2012) 86 ALJR 357 at [149]), or to place the sexual assaults within a meaningful context.

Evidence of previous manslaughter in substantial impairment case

At a trial for murder in *Potts* [2012] NSWCCA 229 the appellant sought to rely upon the defence of substantial impairment. As part of the evidence of the psychiatric and personal history of the appellant, evidence that the appellant had previously been convicted of manslaughter on the basis of substantial impairment was admitted before the jury. The Court of Criminal Appeal dismissed the appeal against conviction, rejecting the argument that the evidence of the previous homicide should not have been allowed before the jury. The evidence of the previous killing was relevant to the jury's assessment under s.23(1)(b) Crimes Act (NSW) as to whether the impairment of the accused was so substantial as to warrant liability for murder being reduced to manslaughter. Any adverse impact was ameliorated by the total psychiatric and personal history of the appellant and the previous finding of substantial impairment. Moreover defence counsel did not object to the evidence and the jury were given tendency directions.

Evidence of admissions made to mental health nurse

In *Leung* [2012] NSWSC 1451 the accused was on trial for manslaughter. On the morning of the killing the accused had been taken to the police station and became

hysterical A nurse from the Mental Health Crisis Team was called in to assess the risk of self harm. The Crown sought to have things said by the accused to the nurse during her examination admitted at trial. Price J rejected the evidence finding the admissions protected under s.126A **Evidence Act** 1995 (NSW). He distinguished the position of the nurse and a support person, based upon the public interest in ensuring a person in custody is not at risk of self harm.

3. THE ACCUSED

Post-offence conduct – silence by accused

In **McKey** [2012] NSWCCA 1 the applicant was convicted of child sexual assault. The applicant had remained silent when approached by the victim's relatives about the alleged incident. At trial, the prosecutor suggested in cross-examination that the applicant would have protested his innocence "long and loud" if the allegations were not true; and told the jury that, "you might think he'd be protesting his innocence from the rooftops". Allowing the appeal, the CCA held that the prosecutor's cross-examination invited consciousness of guilt reasoning and that the jury ought to have been directed that care should be taken before drawing an inference adverse to the applicant. Per Latham J:

"[40] In the instant case, the appellant's conduct assumed considerable significance in the trial, particularly when the trial was conducted, and the jury were instructed, on the basis that the only evidence of the offence came from the complainant. **It was a "word against word" case, which rendered it more likely that the jury would cast around for evidence tending to support the allegation. The Crown Prosecutor's cross examination, and to a marginally lesser extent, his closing address presented the appellant's post offence conduct as potentially supportive of the prosecution case.**

[41] In so far as consciousness of guilt reasoning involves the drawing of an inference from the relevant conduct in favour of guilt, the trial judge in *Elmasri* [[2010] NSWCCA 11] gave a number of directions concerning the drawing of inferences, and, at one point, went so far as to direct the jury that an inference unfavourable to the accused required satisfaction beyond reasonable doubt. No direction on the drawing of inferences was given in the appellant's trial.

[42] In the circumstances of this case, I have come to the view that it was necessary for the trial judge to give a direction to the jury which would guard against the unjustified drawing of an inference adverse to the appellant. The cross examination of the appellant unequivocally suggested that the appellant's conduct constituted an implied admission. **At the very least, the jury should have been directed that, before they could infer that the appellant behaved as he did because he was conscious of his guilt of the offence, they were required to examine that inference to determine whether it was a reasonable and justifiable one and they were required to exclude any alternative inference that was inconsistent with guilt. The most obvious alternative inference that called for exclusion was that the appellant acted in accordance with his sister's advice, namely, to say nothing about the allegation to anyone, including N, his wife and the complainant.** *[Emphasis added in this Paper].*

Post-offence conduct - delay in reporting to police erroneously used as evidence of consciousness of guilt

In **Kuehne** [2012] NSWCCA 270 the three appellants were convicted of break and enter while armed with a pistol. The trial judge directed the jury that a delay of five days before the appellants presented themselves to the police may be used as evidence of consciousness of guilt. Upholding the appeal, the CCA said the delay was not capable of rationally supporting an inference of guilt. There was a miscarriage of justice and verdicts

of acquittal entered. Per Fullerton J (McClellan CJ at CL and Latham J agreeing):

“[65] Whether or not the consciousness of guilt direction had the effect of infringing the appellants' right to silence in this case, in my view the delay in attending at the police station was not capable of rationally supporting the inference of guilt for which the Crown contended and the direction under challenge should not have been given for that reason.

[66] In *McKey v R* [2012] NSWCCA 1 Latham J (with whom Whealy JA and Hislop J agreed) accepted at [26] that the legitimacy of the Crown's reliance upon inferences capable of being drawn from an accused's post offence conduct as amounting to a fear of the truth or a consciousness of guilt has long been recognised. Categories of so called "post offence conduct" typically include flight, lies, interference with evidence or witnesses, or other proven conduct of an accused. Although on the appeal the Crown was unable to point to a case where a delay in giving an account to police (not otherwise associated with evidence of flight or other potentially incriminating behaviour) was admitted as consciousness of guilt, reliance was placed upon *McKey* as exemplifying the principled approach that should be followed when the admission of evidence of consciousness of guilt is in issue, an approach which the Crown submitted was followed by the trial judge in this case.

....

[68] [In *McKey*] Her Honour did observe that where the Crown intends to rely upon an accused's post offence conduct as evidencing consciousness of guilt, the evidence must be capable of rationally supporting an inference of guilt of the crime charged before it is admitted for that purpose and, as part of that enquiry, the conduct must be identified by the Crown with precision and its capacity to constitute an implied admission of the offence charged made patent. “

The enquiry was not undertaken with sufficient rigour by the trial judge. If the issue of delay was permitted in this case to allow consciousness of guilt reasoning, it would follow that in every case where an accused, knowing or believing that they are suspected of having committed an offence, did not promptly give an exculpatory account to police, the Crown would be entitled to seek a consciousness of guilt direction. The absurdity of that proposition exposes the flaw in the Crown's submissions: at [69].

View conducted in absence of accused who wished to be there – fundamental flaw in trial process – s 53(2)(a) Evidence Act

In *Jamal* [2012] NSWCCA 198 the CCA allowed the conviction appeal of the appellant who was not permitted by the trial judge to attend a view despite indicating he wished to be there. That the view took place in the absence of the appellant was contrary to the mandatory requirement of s 53 (2)(a) ***Evidence Act*** and constituted a fundamental flaw in the trial process: at [29]-[35], [41].

Cross-examination of accused

In *Lysle* [2012] NSWCCA 20 the appellant was convicted of child sexual assault offences. During cross-examination the appellant was asked the following questions by the Crown:

Had you told your barrister about that episode before (the complainant) gave evidence?
Did it concern you that he didn't ask her any questions about that when he was cross-examining her?
Did you bring to his attention when he was cross-examining her that he hadn't ever put to her that there was an occasion where you had carried her from her bed up _?

Did it concern you that your barrister didn't ever put to (N) that she was aware that you were going to go into the caravan and take (the complainant) out?

The CCA held that the first and third questions were unfair and should not have been asked. Although the Appellant could claim professional privilege under s118 **Evidence Act 1995**, an accused person should not be asked for the first time in the presence of a jury about the content of conversations with his legal advisers. For an accused to deal with such a question, he is entitled to legal advice and the potential for prejudice is obvious. The two questions that commenced "Did it concern you ..." were not unfair. However, on the evidence, all questions were irrelevant and inadmissible since they could not substantially affect the assessment of the appellant's credibility as required under ss 102 and 103 **Evidence Act**. The appeal was nonetheless dismissed because there was no miscarriage of justice.

4. THE JURY

Decision to discharge juror and to continue with fewer than twelve jurors – ss 53B, 53C Jury Act

Section 53C **Jury Act** requires that a court consider, once it has discharged a juror, whether to continue with a reduced number or discharge the whole jury. If to continue would give rise to the risk of a substantial miscarriage of justice, the Court is obliged to discharge the jury. If there is no such risk, the Court is obliged to order that the trial continue: at [90]. There are two decisions: first, whether a juror should be discharged, and secondly, whether the trial should continue with fewer jurors, or whether the whole jury ought be discharged. These are distinct steps: **Wu v The Queen** (1999) 199 CLR 99: **BG [2012] NSWCCA 139** at [91].

In **BG [2012] NSWCCA 139** the jury was 'deadlocked' when a juror asked to be discharged due to work commitments. The trial judge made no inquiry into the juror's reasons under s 53C and permitted the trial to continue with less than 12 jurors. The applicant was convicted by majority verdict. The appellant submitted the omission by the judge to make a separate order and to consider the issues required under s 53C caused the trial to miscarry; further, there was an inference available that the juror was preventing a unanimous verdict: at [97]-[98]. The CCA dismissed the appeal.

There are 3 categories of case where dealing with whether a trial should continue when one juror has been discharged (at [103]):

- (1) Where there is no indication how the discharged juror would have voted;
- (2) Where there is evidence from which it can be inferred prospectively that the discharged juror would, if not discharged, have voted for an acquittal; and
- (3) Where it can be inferred, but only with the benefit of hindsight, that the juror who was discharged would, if not discharged, have voted for an acquittal.

It is not appropriate for the trial judge to order that a trial continue with the remaining jurors if the case falls into either the second or the third categories as there is a risk of a substantial miscarriage of justice. It is one thing for an accused person to lose a right to be tried by a jury of 12; it is quite another for such a person to lose a juror whom could reasonably be inferred, to have been unwilling to convict if not determined to acquit. What distinguishes categories 2 and 3 from category 1 is that something is known or can be

inferred about what has transpired in the jury room such as to give rise to a substantial miscarriage of justice if the trial continues: at [104]-[105].

Trial judges commonly examine a juror prior to discharge (*Derbas* (1993) 66 A Crim R 327) but this is not necessary in all cases. In the absence of evidence, it is not open for this Court to infer that the single juror gave a reason that was disingenuous or that either the jury or its foreperson collaborated in misleading the Court as to the reason why the juror felt unable to continue: at [132].

There was no evidence that this fell into the first category of case: at [133]. Suggesting the discharged juror was a dissentient is the only matter giving rise to the risk referred to in s 53C. It did not give rise to a risk of a substantial miscarriage of justice to continue the trial: at [134].

In *Le v R* [2012] NSWCCA 202 the CCA upheld the trial judge's decision to discharge a juror and to continue with a reduced number of jurors. The judge was required to consider two separate questions under ss 53B and 53C of the *Jury Act 1977*. (Section 53B(d) provides a discretion to discharge a juror if: "for any ... reason affecting the juror's ability to perform the functions of a juror, the juror should not continue to act as a juror.") Refusing leave to appeal, the CCA said the grounds of appeal were technical and ignored the practical realities of the trial: The trial judge's decisions had the support of the applicant's counsel or were unopposed and it is unfortunate that they are now being raised: at [72].

Importance of providing reasons under s 53C Jury Act

In *BG*, above, the trial judge's failure to address s 53C explicitly did not affect the result as the decisions to discharge the juror and continue the trial were within a proper exercise of discretion. But the CCA said it is highly desirable that judges state the reasons for discharge or refusal to do so, and also the reasons for continuing the trial or discharging the whole jury to assist the accused and this Court: at [137]-[138]. In *Le*, above, the CCA said that while lengthy reasons for decisions for discharging a juror and continuing a trial will rarely be necessary, it is nonetheless important that sufficient reasons are disclosed: at [66].

5. ACCESSORIAL LIABILITY

In *TWL* [2012] NSWCCA 57 the Court stated that an offence of manslaughter by joint criminal enterprise required an agreement to do an act that was both unlawful and dangerous.

In *May* [2012] NSWCCA 111 the appellant appealed against a conviction for murder. The shooting had been done by a co-accused. The Court held that extended joint criminal enterprise only arises where the offence actually committed can be said to be different from that agreed upon. Where the actual offence committed is the same as the offence alleged to be agreed upon the basis for liability is joint criminal enterprise only. In these circumstances it is an error to direct the jury as to extended joint criminal enterprise. The Court further held that where an agreement was made for the co-accused to shoot on a pre-arranged signal from the appellant, and the co-accused shot without the giving of a signal, the appellant may still be convicted under joint criminal enterprise if the jury is satisfied the appellant was aware of the possibility that the co-accused could shoot without the signal.

In **Markou** [2012] NSWCCA 64 the Court considered the meaning of the term 'in company' and concluded that to be acting in company offenders must have an express or implied agreement or understanding to act together, not just be present and coincidentally seeking the same end. See also **FP** [2012] NSWCCA 182 at [115]-[156]

In **Nolan** [2012] NSWCCA 126 the respondent was charged with aid and abet importation of pseudoephedrine. After importation the drugs were substituted for a controlled delivery to the home of third person. The Court ruled that as the respondent became involved only after substitution there was no act he did that aided and abetted the drug importation. There was no error in directing an acquittal.

6. OTHER CASES

'Sexual intercourse with 16 year old under special care' (s 73(1) Crimes Act) - now applies to 'de facto partner' – Legislative response to JAD [2012] NSWCCA 73

In response to **JAD** [2012] NSWCCA 73, s 73 **Crimes Act** was amended to expressly extend to a "de facto partner": see below under 'Annexure B: Legislation 2012 - Crimes Legislation Amendment Act 2012.'

In **JAD** [2012] NSWCCA 73 the CCA the applicant was convicted of 'Sexual intercourse with a 16 year old person under his special care': s 73(1). At the time, a victim was under 'special care' of another who was the "*step-parent, guardian or foster parent*" of the victim: s 73(3). These terms were not defined. The applicant was the de facto partner of the victim's mother. The indictment named the applicant as the victim's "foster parent". The applicant argued he could not be a "foster parent" on any ordinary use of that term. Simpson J (Hoeben J agreeing; Whealy JA dissenting on this point) said the applicant was a "foster parent" as the term includes a reference to "a de facto living in a familial relationship" with a natural parent of a child: at [60]-[65]. (Both Hoeben J and Whealy JA said the matter needed legislative clarification: at [34]-[35], [170].

Dangerous driving – causation - child born prematurely then later died

In **Whelan** [2012] NSWCCA 147, as a result of a motor vehicle collision caused by the accused, the mother suffered abrupted placenta and her baby was born alive 24 weeks early. The foetus suffered no other injury but after 33 days the baby contracted 'NEC' (necrotizing enterocolitis) and died. The Court held that the accused was properly held responsible for the death of baby under s.52A **Crimes Act**. Per Schmidt J (Allsop P and Davies J agreeing):

"[82] As to the third element of a s 52A(1) offence, in the case of a child delivered alive after an impact, the evidence will establish that the impact caused its death, if it is shown beyond reasonable doubt:

firstly, that the child was in utero at the time of the impact;
secondly, that as the result of the impact it was born alive; and
thirdly, that its later death was the result of that impact. That is, that the impact was a substantial or significant cause of its death.

[83] Such a substantial or significant cause of death may be shown in one of two ways, or by a combination of the two. The first is by evidence which establishes that the impact injured the foetus in such a way that those injuries were a substantial or significant cause of its death, after its birth. The second is by evidence which establishes that the impact caused the baby's birth preterm and that its prematurity at birth was a substantial or significant cause of its death, after birth."

Even if premature birth is not an injury to a foetus, if the child is born alive due to the impact but later dies because of the immaturity of its organs and systems which the impact caused, then death may be treated as if it were the result of the impact: at [88]. Section 52A does not have intention as an element. It concerns only whether a particular death was caused by an impact: **King** (2003) 59 NSWLR 472. The view of the experts was that the accident caused the premature birth and that the baby's death was the result of it succumbing to NEC because of the immaturity of its organs and systems on birth: at [91].

Duties of Prosecutor

In **Wood** [2012] NSWCCA 21 the CCA considered the duty and obligations of the Crown to provide a fair trial (at [571]-[581] and [632]-[634]). The following conduct of the Crown Prosecutor came under criticism:

- . Posing 50 questions for the jury inviting them to consider whether the accused had provided satisfactory answers, breaching **Rugari** (2001) 122 A Crim R 1 at [57] by reversing the onus of proof: at [604]-[617]. The questions also breached s 20(2) **Evidence Act 1995** by suggesting failure to answer the questions pointed to guilt: at [604]-[618].
- . Improperly inviting the jury to draw conclusions on critical factual issues based on how they felt: at [625]-[626].
- . Improperly, and without any basis in evidence, making speculations as to the depression of the victim and the 'typical' behaviour of persons committing suicide, capable of seriously prejudicing the accused: at [627] – [631].

s 35(2) Crimes Act Recklessly cause grievous bodily harm (GBH) – foresight of possible grievous bodily harm is required

In **Lawton** [2012] NSWCCA 16 the Court allowed the applicant to withdraw his plea of guilty to an offence of 'recklessly cause GBH' under s 35(2) **Crimes Act**. The applicant punched the victim who suffered serious injuries when he fell. However, the applicant said he did not foresee any serious injury. The CCA said the applicant did not receive legal advice consistent with the law that a person charged under s 35(2) must foresee that their recklessness might cause the victim some grievous bodily harm: **Blackwell** [2011] NSWCCA 92. The applicant had pleaded guilty without fully understanding the nature of the charge and without intending to admit to all the elements of the offence: at [36].

Maliciously inflict grievous bodily harm – “inflict” does not require an assault

In **Aubrey** [2012] NSWCCA 254 the respondent was charged with maliciously inflict grievous bodily harm under s 35(1)(b) as it was at the time of the offence in 2004. The respondent, knowing he was HIV positive, had infected the victim via consensual sexual intercourse. A stay was granted in the District Court as there was uncertainty as to whether the transmission of HIV amounted to the “infliction” of harm. The CCA allowed the Crown’s appeal and set aside the stay. The appeal concerned the meaning of “inflict” and the case law as it was in 2004. The infliction of grievous bodily harm does not necessarily involve an assault: at [52]-[54]; **Salisbury** [1976] VR 452; **Cameron** (1983) 2 NSWLR 66. (Note that the definition of “grievous bodily harm” was amended in 2007 to include any grievous bodily disease).

STATISTICS

The Judicial Commission Statistics for the Court of Criminal Appeal for 2011 sentencing and Crown appeals are available. The statistics for 2012 are not. The statistics for 2000-2011 are set out below. What can be gleaned from the available statistics is that successful severity appeals have increased to 49.5% in 2011 and that there was a reduction in the number of Crown appeals.

Table 1 — Severity appeals (2000–2011)

| Year | Severity appeals | Allowed | Percentage |
|---|------------------|---------|------------|
| 2000 | 313 | 127 | 40.6 |
| 2001 | 343 | 138 | 40.2 |
| 2002 | 331 | 148 | 44.7 |
| 2003 | 272 | 109 | 40.1 |
| 2004 | 285 | 131 | 46.0 |
| 2005 | 318 | 141 | 44.3 |
| 2006 | 259 | 106 | 40.9 |
| 2007 | 242 | 94 | 38.8 |
| 2008 | 216 | 83 | 38.4 |
| 2009 | 230 | 78 | 34.3 |
| 2010 | 216 | 84 | 38.9 |
| 2011 | 188 | 93 | 49.5 |
| | 3213 | 1332 | 41.5 |
| Source: Judicial Commission NSW Court of Criminal Appeal database | | | |

Table 3 — Crown appeals (2000–2011)

| Year | Crown appeals | Allowed | Percentage |
|---|---------------|---------|------------|
| 2000 | 84 | 42 | 50.0 |
| 2001 | 55 | 34 | 61.8 |
| 2002 | 80 | 49 | 61.3 |
| 2003 | 65 | 32 | 49.2 |
| 2004 | 101 | 52 | 51.5 |
| 2005 | 58 | 34 | 58.6 |
| 2006 | 76 | 47 | 61.8 |
| 2007 | 59 | 35 | 59.3 |
| 2008 | 62 | 32 | 51.6 |
| 2009 | 48 | 31 | 64.6 |
| 2010 | 69 | 49 | 71.0 |
| 2011 | 34 | 15 | 44.1 |
| | 791 | 452 | 57.1 |
| Source: Judicial Commission NSW Court of Criminal Appeal database | | | |

Annexure A - HIGH COURT CASES

1. *Bui v DPP (CTH)* [2012] HCA 1; 284 ALR 445

Appeal from Victoria. Appeal dismissed.

The appellant was sentenced for the Commonwealth offence of import prohibited drugs. The Court considered whether Victorian provisions in relation to double jeopardy apply to the sentencing for Commonwealth offences - ss 289(2), s 290(3) **Criminal Procedure Act (Vic)**; s 80 **Judiciary Act (Cth)**. The Court found that Judge-made law of double jeopardy is not picked up by s.16A **Crimes Act (Cth)**. Although the reference in s 16A(m)(2) to 'mental condition' of the offender could include distress or anxiety, this only included distress or anxiety *demonstrated* to the court, not *presumed* anxiety or distress that applied under double jeopardy principles. This followed the view of Simpson J in *De La Rosa* (2010) 273 ALR: see *Bui* at [21]-[23]. Further, the Court held there was no gap in the Commonwealth sentencing law that required the application of double jeopardy principles under s.80 **Judiciary Act**: at [27]-[28]. The Court concluded that the Victorian provisions are not required because the principle of double jeopardy does not apply to Commonwealth sentences: at [29].

2. *Getachew v R* [2012] HCA 10; 286 ALR 196

Appeal from Victoria. Crown appeal allowed.

The accused was convicted at trial of rape. The Victorian Court of Appeal accepted the appellant's argument that the jury should have been directed that the mental element of rape might not be proven even though the accused's belief in consent was unreasonable because the accused was aware that the complainant might be asleep. By special leave, the prosecution appealed to the High Court. The complainant's evidence was that the accused had disarranged her clothing while she was asleep, and she woke when the accused penetrated her. There was no suggestion or assertion by the accused that the complainant had been woken. The High Court held that in the absence of any evidence, the Court of Appeal erred in concluding that the evidence raised any matter concerning the accused's belief in consent: at [33]; ss 35–37B, 38 Crimes Act 1958. For this reason the appeal by the Crown was allowed.

3. *Baiada Poultry v R* [2012] HCA 14; 286 ALR 421

Appeal from Victoria. Appeal allowed.

The appellant was convicted of failing to provide a safe working environment under s 21(1) *Occupational Health and Safety Act* 2004 (Vic). The Court of Appeal found the trial judge properly failed to direct the jury; however, applying the proviso under s 568(1) **Crimes Act 1958 (Vic)**, upheld the appellant's conviction on the ground that no substantial miscarriage of justice had occurred. (NSW has a similar provision in s 6(1) **Criminal Appeal Act 1912**).

Allowing the appeal, the High Court held it was not open to the Court of Appeal to find the offence was proved beyond reasonable doubt. Therefore the Court of Appeal could not be satisfied that no substantial miscarriage of justice had actually occurred, and the proviso could not have been engaged: at [38]-[39]. The High Court held:

- . Section 568 **Crimes Act** requires a judgment in deciding whether there has been no substantial miscarriage of justice. If that condition is met, the power must be exercised. Thus if the Court of Appeal considers there has been no substantial miscarriage of justice, the appeal must be dismissed in exercise of the power of the proviso. The appellate court could not nevertheless allow the appeal and direct a new trial: at [25].
- . It is wrong to say the proviso confers some "discretion" on the Court of Appeal. The proviso directs attention to whether the errors that occurred at trial are not such as to have occasioned any substantial miscarriage of justice: at [25], [26].
- . In the determination of whether no substantial miscarriage of justice has actually occurred, the significance to be given to the jury's guilty verdict must be assessed paying proper regard to the issues the jury were directed to determine in order to arrive at that verdict: at [28].

- . The proviso cannot be engaged “unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused’s guilt of the offence on which the jury returned its verdict of guilty”: at [29].

4. Aytugrul [2012] HCA 15; 286 ALR 441

Appeal from NSW. Appeal dismissed.

The applicant was convicted of murder. An expert witness for the Crown conducted DNA analysis on hair found on the deceased's thumbnail. The results showed the appellant could have been the donor of the hair; and also how common the DNA profile found in the hair was in the community. The expert gave evidence to the effect that one in 1,600 people in the general population would be expected to share the DNA profile found in the hair ("the frequency ratio") and that 99.9 per cent of people would not be expected to have a DNA profile matching that of the hair ("the exclusion percentage"). The appellant made submissions as to the prejudicial nature of the presentation of the DNA evidence. The appellant alleged the trial judge erred "in admitting statistical evidence expressed in exclusion percentage terms" and that it should have been excluded under ss 137 or 135 **Evidence Act**. Dismissing the appeal, the High Court held the evidence expressing results of the DNA testing as an exclusion percentage was admissible and there was no basis for excluding it under ss135 or 137. The exclusion percentage was accompanied with reference to both the relevant frequency ratio and an explanation of how the exclusion percentage was derived from the frequency ratio. The evidence given was clear. Although the evidence was adverse to the appellant it was not prejudicial or misleading.

5. PGA [2012] HCA 21; 245 CLR 355

Appeal from SA. Appeal dismissed.

The High Court held that the appellant could be prosecuted for raping his wife in 1963. A question in a case stated to the SA CCA was whether the offence of rape by one lawful spouse of another was an offence known to the law of South Australia in 1963. The SA CCA answered “yes”. The High Court dismissed the appellant’s appeal. The Court considered whether the presumption of consent by wife in marriage was part of common law of Australia and held that by at least 1935 at common law a husband could be guilty of rape committed by him upon his wife. Marriage did not provide an immunity from prosecution for a alleged rape in 1963.

6. King [2012] HCA 24; 245 CLR 588

Appeal from Vic. Appeal dismissed.

The High Court held negligence is not an element of the offence of dangerous driving causing death under s 319 **Crimes Act (Vic)**. The applicant was convicted of culpable driving under s.318 **Crimes Act (Vic)** (maximum 20 years). An alternative offence of dangerous driving under s 319 (maximum 10 years) had also been presented at trial. The applicant argued the trial judge erred in instructions to jury as to elements of dangerous driving under s.319 (analogous to s.52A **Crimes Act (NSW)**). The trial judge instructed jury that dangerous driving was established by proof that the accused drove in a way that: “significantly increased the risk of harming others.” Subsequent to the trial, the Victorian Court of Appeal increased the standard of culpability required for s 319 in **R v De Montero** (2009) 25 VR 694 by requiring: driving that created ‘a considerable risk of serious injury or death to members of the public’; and conduct by the accused in his manner of driving which was such as to merit punishment by the criminal law. The applicant argued that instructions based on an old level of culpability could have meant the jury considered s 319 was not a “serious enough” alternative. Dismissing the appeal, the majority considered the authorities dealing with the standard of culpability for dangerous driving offences; and held that culpability rests not on a level of negligence but on the risk-creating characteristics of the manner of driving. The Court said that the offence of dangerous driving causing death does not require the Crown to prove an element of negligence and disapproved **De Montero**.

7. Crump [2012] HCA 20; 286 ALR 658

Appeal from NSW. Appeal dismissed.

The plaintiff challenged s154A *Crimes (Administration of Sentences) Act 1999* which commenced in 2001. The plaintiff had been sentenced in 1974 for murder and was eligible for parole in 2003. Section 154A tightened parole eligibility, stating a person (such as the plaintiff) "may" be released to parole "if and only if" the Parole Authority is satisfied the offender: (a) (i) is in imminent danger of dying or is so incapacitated s/he no longer has the physical ability to harm any person, and (ii) has demonstrated that s/he does not pose a risk to the community, and (b) the Authority is satisfied that such an order is justified. In a special case to the High Court the plaintiff challenged the validity of s 154A. The question for determination was: "Is s 154A ... invalid in that it has the effect of varying or otherwise altering a judgment, decree, order or sentence of the Supreme Court of New South Wales in a 'matter' within the meaning of s73 of the Constitution?". The High Court answered: "No": at [39], [61], [75]. The plaintiff had no right or entitlement to parole. Parole statutes change, a fact over which judges have no control. The words "if and only if" applying to s 154A(3)(a) and (b), qualified the facts which must apply before the Parole Authority could make a parole order: at [60].

8. Khazaal [2012] HCA 26

Crown appeal from NSW. Appeal allowed.

The respondent was convicted of making a document connected with assistance in a terrorist act, knowing of that connection (s 101.5(1) *Criminal Code* (Cth)). The respondent edited an electronic book and submitted it for publication online. The e-book contained material concerning Islam and jihad, and supported the widespread use of assassination. Section 101.5(1) charges making a document "connected with ... assistance in a terrorist act" while knowing of that connection. Section 101.5(5) states no offence is committed under s 101.5(1) "if the ... making of the document was not intended to facilitate ... assistance in a terrorist act". Under s 13.3, the respondent bore the evidential burden of pointing to evidence to suggest a "reasonable possibility" the making of the e-book was not intended to facilitate assistance in a terrorist act. The CCA allowed the respondent's appeal. Evidence at trial that the respondent was a journalist and researcher with an interest in Islam evidence was sufficient to discharge the evidential burden imposed by ss 13.3 and 101.5(5). Allowing an appeal by the Crown, the High Court held that the evidence did not suggest a reasonable possibility that the making of the e-book was not intended to facilitate assistance in a terrorist act.

9. Patel [2012] HCA 29

Appeal from Queensland. Appeal allowed.

The appellant, a surgeon, was convicted of three counts of manslaughter and unlawfully doing grievous bodily harm from operations on four victims on the basis that the decisions to operate deserved criminal punishment. The High Court held a miscarriage of justice had occurred because late into the trial, the prosecution radically changed its case in a way that made much of the evidence that had been admitted irrelevant. The prosecution had led evidence criticising the appellant's surgical skills and post-operative care to prove the appellant had been grossly negligent. However, as the trial progressed the evidence showed the surgery had in fact been performed "competently enough". The prosecution then changed its case to focus on the appellant's decision to perform the surgical procedures. The evidence regarding surgery and post-operative care was no longer relevant and was prejudicial. The Court ordered a new trial.

10. Baker v R [2012] HCA27

Appeal from Victoria. Appeal dismissed.

The appellant and JM were jointly tried for murder. The appellant was found guilty and LM was acquitted. The appellant sought to rely on LM's out-of-court statements to witnesses that it was LM who had pushed the victim to his death. The appellant submitted a limited exception to the hearsay rule should be recognised for joint trials where a co-accused's admission is reliable - and LM's admissions were reliable as they were made against LM's penal interest. It was submitted that a new exception to the hearsay rule for third party confessions should be recognised to align with the uniform Evidence Act provisions. The Court dismissed the appeal. The Court held the exclusion of

the out-of-court statements was not unfair and did not occasion a miscarriage of justice; that LM had not made the admission in that he admitted to pushing the deceased but did not admit sole responsibility; and they were not against LM's penal interest.

11. Douglass [2012] HCA 34

Appeal from South Australia. Appeal allowed.

The appellant was convicted of aggravated indecent assault of his granddaughter CD, aged 3.. The Appellant gave sworn evidence denying the offence. CD's unsworn statement was the only evidence of the alleged offence. The trial judge did not record any finding regarding the appellant's evidence. At issue was whether reasons were sufficient to make clear the appellant's evidence was rejected beyond reasonable doubt. Allowing the appeal, the High Court held the CCA SA erred in finding the trial judge gave sufficient reasons for concluding the charge against the appellant was proved beyond reasonable doubt.

12. Likiardopoulos [2012] HCA 37; 291 ALR 1

Appeal from Victoria. Appeal dismissed.

The appellant was convicted of murder on the basis he was part of a joint criminal enterprise and that co-offenders L and A had committed the murder. Alternatively, that the appellant was liable as an accessory because he had directed and encouraged principal offenders L and A. The Crown accepted pleas to manslaughter by L and A. The High Court held the Crown was allowed to lead evidence to prove L and A murdered the victim because their manslaughter convictions were conclusive in proceedings between each man and the Crown. The Crown could not controvert the conviction for manslaughter by leading evidence against L or A to establish that he had murdered the victim, but L and A were strangers to the proceedings brought against the appellant and their manslaughter convictions were not conclusive against the world of the facts on which they were based: at [35]. Further, it was not an abuse of process to prosecute the appellant as an accessory to murder where pleas were accepted for offences less than murder from L and A. There was no unfairness and the administration of justice was not brought into disrepute: at [36]–[39].

13. Mansfield; Kizon [2012] HCA 49; 293 ALR 1

Appeal from WA. Appeal dismissed.

The appellants were convicted of insider trading: s 1002G, s 1311(1) **Corporations Act 2001** (CTH). The Appellants allegedly possessed inside information regarding a listed public company and bought shares in that company, however, the information was false. The High Court held that a person in possession of false information can nevertheless be in contravention of insider trading prohibitions. The word "information" does not exclude information that is false: at [32].

14. BBH [2012] HCA 9; 286 ALR 89

Appeal from Qld. Appeal dismissed

The appellant was convicted of child sexual assault offences against his daughter. The complainant's brother gave evidence he saw the complainant naked with the appellant and that it was consistent with the applicant looking for an ant bite or a bee sting. The evidence was admitted as propensity evidence showing guilty passion. The High Court held the evidence was relevant to demonstrate propensity:- either as evidence of the applicant's sexual interest in the complainant or as evidence of an act similar to the offences charged: at [104], [152]; **Pfennig v R** (1995) 182 CLR 46.

15. Cooper [2012] HCA 50; 293 ALR 17

Appeal from NSW. Appeal allowed.

Appeal from NSW. Appeal allowed.

The applicant was convicted of murder. V had been killed in the presence of A and his de facto wife, Q, suffering four wounds from two weapons. Q was acquitted of murder in a separate trial and gave evidence against A that he alone had assaulted victim. Another witness, C, gave evidence

that Q had told her Q had struck V with the axe. This was denied by Q. The trial Judge directed the jury to consider joint criminal enterprise if they accepted the evidence of C. On appeal the CCA held there was no evidence to support joint criminal enterprise but no substantial miscarriage of justice had been caused by the direction.

Allowing the appeal, the High Court found the CCA erred in applying the proviso under **s.6 Criminal Appeal Act 1912 (NSW)**. The evidence established V could have been struck by two weapons but did not establish which weapon or blow caused death. On the evidence before it was not open for the Court to be satisfied beyond reasonable doubt that either Q did not say the words attributed to her or that the description of events she gave to C was false. Since it could not be excluded that Q had struck the victim with an axe (as suggested by C's evidence), nor that the fatal blow was from the axe, the Court could not be satisfied beyond reasonable doubt that A had struck fatal blow.

It is well established that there are three propositions fundamental to the application of the proviso. First, the appellate court must decide whether a substantial miscarriage of justice has actually occurred. Second, the task is objective, and is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial. Third, the standard of proof of criminal guilt is proof beyond reasonable doubt: at [20]; **Weiss v The Queen** (2005) 224 CLR 300. Performance of the appellate court's task requires the court to undertake its own independent assessment of the evidence and it further requires the court to determine: "whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty": at [21].

16. Burns [2012] HCA 35; 290 ALR 713

Appeal from NSW. Appeal allowed.

The appellant was convicted of manslaughter. The appellant and her husband supplied methadone to the deceased who died as a result of consuming the drug. Allowing the appeal, the High Court accepted the Crown concession that the mere supply of a prohibited drug to a sane adult who subsequently decides to use the drug, is not sufficient to establish liability for manslaughter. The supply may be unlawful but is not in itself a dangerous act. Any danger lies in ingesting what is supplied: at [76]. The cause of death was the consumption of the methadone and not the anterior act of supply: at [88].

The High Court held no new trial should be ordered as the evidence did not establish the appellant's complicity in injecting, or assisting to inject, the deceased: at [89], [92]. A new trial should not be ordered on the basis of manslaughter by criminal negligence. The appellant was not in a relationship with the deceased which the law recognises as imposing an obligation to act to preserve life. at [101]. There is no general duty on drug suppliers to take reasonable steps to preserve the life of customers: at [106]. Courts must be circumspect in identifying categories of relations that give rise to a previously unrecognised legal obligation to act: at [107]-[108]. A verdict of acquittal was entered.

17. Baini [2012] HCA 59; 293 ALR 472

Appeal from Vic. Appeal allowed.

The Applicant multiple blackmail counts against R, and one count against S. The Court of Appeal ordered a retrial on the one count against S on the basis there was a miscarriage of justice because the count should have been tried separately: s 276 **Criminal Procedure Act 2009 (Vic)**. However, there was no miscarriage in relation to the counts against R. The High Court held that the jury heard prejudicial evidence from S which would not have been admissible in a separate trial of the counts of blackmail against R. Error in refusing to sever the counts could have resulted in a substantial miscarriage of justice in the trial of the counts regarding R. The Court of Appeal did not conclude that the failure to hear the counts separately had no bearing upon the outcome of the trial and did not conclude that the applicant's conviction was inevitable: at [36]-[39]. The Court of Appeal erred in the application of s 276. The High Court remitted the matter to the Court of Appeal to consider whether the error could have had no effect on the outcome of the trial.

HIGH COURT 2013 CASES

Monis; Droudís [2013] HCA 4

Appeal from NSW. Appeal dismissed.

The High Court divided 3:3 in holding that s 471.12 of the **Criminal Code Act 1995** (Cth) does not infringe the implied freedom of political communication. The appellant had sent letters to relatives of Australian soldiers killed in Afghanistan criticising Australia's involvement and the deceased soldiers there. The appellant was charged with using the postal service in an offensive manner. The NSW CCA had found s 471.12 valid insofar as it makes it an offence to use a postal service in a way reasonable persons would regard as offensive. The High Court held unanimously s 471.12 restricted political communication, but divided evenly on the purpose of s 471.12. Thus the appeals were dismissed and, as a result of the High Court's evenly split decision, the decision of the NSW CCA was affirmed under s 23(2)(a) **Judiciary Act 1903** (Cth).

Huynh; Duong; Sem v R [2013] HCA 6, 13 March 2013

Appeal from SA CCA (2011) 110 SASR 296; [2011] SASCFC

The three applicants were convicted of murder that occurred during a fight at a party. In dismissing the appeal against conviction the High Court affirmed that once an understanding or agreement had been reached presence at the fight was sufficient to establish participation in the joint criminal enterprise.

Yates v The Queen [2013] HCA 8, 14 March 2013

Appeal from WA CCA (1987) 25 A Crim R 361.

In 1987 the Applicant, an intellectually disabled man, was sentenced to 7 years imprisonment for sexual offences and ordered to be detained at the Governor's pleasure under s 662 **Criminal Code (WA)**. In allowing the appeal it was agreed that the evidence before the original sentencing judge was incapable of supporting such an order. Leave was granted to appeal 25 years out of time in the unusual circumstances of the case.

HIGH COURT SPECIAL LEAVE GRANTED CASES

Agius v The Queen

Appeal from [2011] NSWCCA 119 - Proof of conspiracy for the offence of conspiracy to defraud under s.135.4 (CTH) **Criminal Code Act 1995** – whether requires evidence of an agreement entered into after the Code began operation on 24 May 2001, or can apply retrospectively to an agreement entered into before that date.

Jason Lee (aka Do Young Lee) & Anor v New South Wales Crime Commission

Appeal from [2012] NSWCA 276 - Recovery of proceeds of crime

Director of Public Prosecutions (Cth) v JM

Appeal from [2012] VSCA 21 Market manipulation

Annexure B – LEGISLATION 2012

1. Crimes Amendment (Reckless Infliction of Harm) Act 2012

Commenced on 21.6.2012

The Act amends the **Crimes Act** in relation to offences involving the reckless infliction of grievous bodily harm and reckless wounding. The **Crimes Amendment Act 2007** replaced 'malice' with 'recklessness' as the fault element in various offences in the **Crimes Act**. In *Blackwell* [2011] NSWCCA 93 the CCA said that the effect of the amendments was that the offence of recklessly inflicting grievous bodily harm now required recklessness as to causing grievous bodily harm, not just some physical harm, as was the case before the amendments.

A new s 35 contains restructured offences of recklessly wounding and inflicting grievous bodily harm. Section 35 provides that a person will be guilty of the offence of recklessly causing grievous bodily harm and related offences if the person causes grievous bodily harm to a person **and is reckless as to causing actual bodily harm** (and not necessarily grievous bodily harm) to that or any other person.

The same structure applies for offences of recklessly wounding or inflicting grievous bodily harm on a police officer, other law enforcement officer, school student or member of school staff. The Act also adjusts the definition of circumstances of special aggravation in the context of breaking and entering offences.

The following provisions are affected:

- (a) section 35 (Reckless grievous bodily harm or wounding),
- (b) section 60 (Assault and other actions against police officers),
- (c) section 60A (Assault and other actions against law enforcement officers (other than police officers)),
- (d) section 60E (Assaults etc at schools),
- (e) section 105A (Definitions) for the purposes of specially aggravated break and enter offences in sections 109–113.

The amendment is to clarify that only recklessness as to causing bodily harm is required.

Transitional provisions

The amendments only apply to offences committed, or alleged to have been committed, on or after the commencement of the amendments: Sch 1[7].

2. Crimes Amendment (Consorting and Organised Crime) Act 2012

Commenced on 9.4.2012

New offences are inserted in the **Crimes Act 1900** including:

s 93GA(1B) - An offence if a person, in the course of an organised criminal activity, fires at a dwelling house or building with reckless disregard for the safety of any person. This creates a new offence of firing at a dwelling-house, with a higher penalty (16 years) where the offence occurs in the course of an organised criminal activity, than the existing general offence for firing at a dwelling-house (14 years).

ss 93T(1), (1A), (4A) - Create new offences of graduated seriousness relating to participating in criminal groups with higher penalties than the existing general offence for participating in a criminal group (s.93T(1) - 5 years), where the defendant directed the activities of a criminal group (s.93T(1A) - 10 years) or directed the activities of a criminal group which was organised and on-going (s.93T(4A) - 15 years).

s.93T(1) - Changes the mental element for the offence of participating in a criminal group so that it is sufficient to prove that the person knew or ought reasonably have known that the group was a criminal group and that the participation contributed to the group's criminal activity.

s 93TA - A new offence of receiving a material benefit from a criminal group that is derived from its criminal activities (5 years).

s 93X - Creates a new offence of consorting (3 years and/or a fine of 150 penalty units). Section 93X replaces the old offence of consorting in s 546A (6 months or 4 penalty units) which has been repealed. The new s 93X clarifies that consorting may be committed by electronic means of communication and provide exemptions for certain relationships.

ss 93W-93Y – Clarifies that a person does not habitually consort with convicted offenders unless s/he consorts with at least two different convicted offenders on at least two different occasions.

All new offences are in Tables 1 or 2, Sch 2 **Criminal Procedure Act 1986** and may be triable summarily.

3. Criminal Case Conferencing Trial Repeal Act 2012

Commenced on Assent on 14.3.12.

The Act repeals the **Criminal Case Conferencing Trial Act 2008**. The **Criminal Case Conferencing Trial Act 2008** introduced a trial scheme for compulsory pre-committal conferences and prescribed discounts for a guilty plea. A guilty plea entered prior to committal entitled a defendant to a 25% discount on sentence. If the defendant pleaded guilty after committal, the court could, under prescribed circumstances, allow a discount of up to 12.5 %. The trial scheme was introduced as a case management process to encourage early plea negotiations before committal for trial. However, evidence showed the scheme was only having limited effect. In 2011, amending legislation ended the trial scheme in respect of proceedings for which a court attendance notice was filed after 8 October 2011. The **Criminal Case Conferencing Trial Act 2008** continued to apply to proceedings for which a court attendance notice was filed on or after 1 May 2008 and before 8 October 2011: **Criminal Case Conferencing Trial Amendment Regulation 2011**.

This 2012 Act completely ends the trial scheme, subject to transitional arrangements contained in Schedule 2, **Crimes (Sentencing Procedure) Act 1999**. The transitional provisions protect an offender's entitlement to a discount of 25 % where the court attendance notice was filed after 1 May 2008 and before 8 October 2011 and the offender entered a plea of guilty in the Local Court before committal. The provisions also provide for the continued application of a discount to an offender who (before the repeal date) had pleaded guilty to an offence at any time after being committed for trial: *Explanatory Memorandum; Minister's Second Reading Speech 22.2.2012; Cl. 65, Sch 2, Crimes (Sentencing Procedure) Act* (cl 65 Continued operation of sentencing discount arrangements).

4. Courts and Crimes Legislation Amendment Act 2012

Commenced on Assent on 21.3.12.

The Act makes miscellaneous amendments to various Acts. The main amendments to the **Criminal Procedure Act 1986** are as follows:

1). Increase in maximum terms for certain Table 1 offences

A new s 267(2) now sets 2 years imprisonment as the maximum term that the Local Court may impose for Table 1 offences. Section 267(4) – which set maximum penalties for certain offences - is repealed. The repeal of s 267(4) means that the jurisdictional maximum term of imprisonment is increased for these offences:

- (a) from 18 months to 2 years for these **Crimes Act** offences:
 - s 51A – Predatory driving
 - s 52A – Dangerous driving
 - s 52AB – Fail to stop and assist after vehicle impact causing death / GBH
 - s 52B – Dangerous navigation

- (b) From 1 year to 2 years for:
 - s 53 **Crimes Act** – Injuries by furious driving

- s 54 **Crimes Act** – Causing GBH
- s 25 **Oaths Act** – False Declaration

The amendments to s 267 apply to offences committed on or after 21.3.12: Sch 1.1[18].

2). Maximum penalties for Table 2 offences

The amendments in regard to Table 2 offences are as follows:

(i) Section 268(2) **Criminal Procedure Act** is re-enacted. The new s 268(2) increases the maximum fine that may be imposed by the Local Court from 20 to 50 penalty units when dealing summarily with these indictable offences:

- s 56 **Crimes Act** – Obstructing member of the clergy
- s 61 **Crimes Act** – Common assault
- s 61N **Crimes Act** – Act of indecency

(ii) A new s 268(2AA) provides that now a fine may be imposed for a Table offence in addition to or instead of any term of imprisonment.

The amendments to s 268 apply to offences committed on or after 21 March 2012: Sch 1.1[18].

3). Indictable offences dealt with summarily by the Local Court

Offences involving more than \$5000 against s 152 ('Fraudulent conversion and false accounts of money received by licensee') and s 153 ('Fraudulent accounts for expenses, fees') of the **Conveyancers Licensing Act 2003** and s 211 ('Fraudulent conversion and false accounts of money received by licensee or registered person') and s 212 ('Fraudulent accounts for expenses, commission') of the **Property, Stock and Business Agents Act 2002**, have been inserted as cl 18AA and cl 23AAA in Schedule 1, Table 1 of the **Criminal Procedure Act**. Offences involving less than \$5000 have been inserted as cl 10D and cl 10E in Schedule 1, Table 2 of the Act.

These amendments apply to offences committed on or after 21.3.2012 unless the offender was committed for trial or sentence before that date: Sch 1.1[18].

4). Protected confidences

Sections 297 and 298 **Criminal Procedure Act** limit the production and disclosure of evidence containing protected confidences in criminal proceedings. Section 299B(1) grants the court power to consider a document or evidence in sexual assault proceedings if a question arises whether it is a 'protected confidence'. A new s 299B(5) is inserted to clarify that the court's powers under s 299B are not affected by ss 297 and 298.

Section 305A is amended so regulations can now be made for subpoenas requiring the production of a document recording a 'counselling communication' (within the meaning of s 296) in connection with any criminal proceedings. Previously it was only for criminal proceedings involving a prescribed sexual offence.

5). Random sample evidence in child abuse material cases

Sections 289A and 289 **Criminal Procedure Act** deal with the use of random sample evidence in child abuse material cases (i.e. offences relating to the production, dissemination or possession of child abuse material). Amendments to ss 289A and 289B aim to simplify the procedures for random samples of child abuse material in prosecutions relating to child abuse material offences. Previously an analyst authorised by the Attorney General or DPP could examine a random sample of child abuse material. The findings of the analyst as to the nature and content of the sample is admissible as evidence of the nature and content of the whole of the material from which the sample is taken. The amendments instead allow a person prescribed by the regulations as an "authorised classifier" to conduct those examinations. The amendments are as follows:

(i) New definitions of "authorised classifier" and "seized material"

The definition of "authorised analyst" in the definition section s 289A is omitted. Two new definitions of "authorised classifier" and "seized material" are inserted in s 289A **Criminal Procedure Act**.

“authorised classifier” means any person, or person of a class, prescribed by the regulations for the purposes of this definition.

“seized material”, in relation to proceedings for a child abuse material offence, means material:

- (a) that came into the possession of a police officer in the course of the exercise of functions as a police officer, and
- (b) some of which is alleged child abuse material that is the subject of the proceedings.

An *“authorised classifier”* is defined in cl 27A of the ***Criminal Procedure Regulation 2010*** as a member of the NSW Police Force who has undertaken training in the classification of child abuse material.

(ii) Section 289B (‘Use of random sample evidence in child abuse material cases’)

Section 289B is amended so that random sample evidence can be based on a sample of all seized material. It is no longer necessary to extract the child abuse material from the material seized before an examination of a random sample is conducted. These amendments extend to proceedings commenced or partly heard, but not finally disposed of, before 21.3.12. The amendments will thus extend to offences alleged to have been committed before 21.3.12: Sch 1.1[18].

(iii) Section 299B – Court may examine documents

Section 299B is amended to confirm that in relation to sexual assault communications privilege, a court may examine documents in order to determine whether they include a protected confidence notwithstanding ss 297 and 298 which provide limits to the production of such documents to a court.

5. Crimes (Criminal Organisations Control) Act 2012

Commenced on assent 21.3.12

The Act repealed the ***Crimes (Criminal Organisations Control) Act 2009***; and re-enacted it to provide as follows:

- . An eligible judge of the Supreme Court may, on application of the Commissioner of Police, declare an organisation to be subject to the Act if its members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and it represents a risk to public safety and order in this State.
- . As a consequence of such declaration, the Supreme Court may, on application of the Commissioner of Police, make a control order against a member of the organisation that prevents the member from associating with other controlled members of the organisation and from holding statutory authorities (e.g. security, firearm and liquor licences).
- . The judge is not bound by rules of evidence but may take into account confidential intelligence. The judge is under an obligation to maintain the confidentiality of criminal intelligence but may provide it to courts, the Attorney General, persons conducting a review under the Act and any other person with the Police Commissioner’s authorisation.

New Provisions:

- . Require a judge to give reasons for a decision to make or revoke a declaration of a criminal organisation, or to refuse an application for a declaration.
- . Clarify that the protection afforded to material properly classified as criminal intelligence by the Police Commissioner, extends to the hearing and determination of the application for a declaration or control order.
- . Extend the obligation to take steps to maintain the confidentiality of the criminal intelligence to persons to whom it has been disclosed under the Act.

6. Criminal Procedure Amendment (Summary Proceedings Case Management) Act 2012

Commenced on 30.4.2012

A new Div 2A in Ch 4 Pt 5 **Criminal Procedure Act 1986** provides case management provisions for summary proceedings in the Land and Environment Court and the Supreme Court.

7. Mental Health Commission Act 2012

Commenced on 1.7.2012

The Act establishes the Mental Health Commission “for the purpose of monitoring, reviewing and improving the mental health system and the mental health and well-being of the people of New South Wales”: ss 3, 5. The Commission’s functions include to prepare a draft strategic plan for the mental health system for the Minister for approval; to review and advise on mental health services. The Commission is to take into account “issues related to the interaction between people who have a mental illness and the criminal justice system”: s 12(2).

8. Crimes Legislation Amendment Act 2012

Commenced 24.9.2012

Amendments to Crimes Act 1900

Kidnapping - New s 86(1)(a1)

The Act broadens kidnapping under s 86(1) which requires the offender to take or detain a person without their consent: (a) with the intention of holding the person to ransom; or (b) with the intention of obtaining any other advantage.

New s 86(1)(a1) is inserted to provide that an offence is also committed where the offender takes and detains a person with the intention of committing a “serious indictable offence” (defined in s 4 to mean an indictable offence that is punishable by imprisonment for life or for a term of five years or more). The Attorney General states in his Second Reading Speech (Hansard, LA, 15.8.2012):

“At present section 86 criminalises detention of another with intent to hold them to ransom or to obtain any other advantage. Therefore, where a person detains another with intent to commit a particular offence other than obtaining a ransom that offence must be nominated as the “advantage” the offender intended to obtain. Addition of the new intention subsection will enable the prosecuting authority to identify the specific offence the accused intended to commit without having to express it as an advantage. Further, the amendment will facilitate the offence of kidnapping being added to the definition of “serious sex offence” in the Crimes (Serious Sex Offenders) Act 2006. The new intent provision is intended to operate as an alternative form of charging, meaning that the prosecution will not be obliged to proceed under the new subsection unless it considers it appropriate to do so in the circumstances.”

The amendment applies only to an offence committed, or alleged to have been committed, on or after the commencement of the amendment: sch 1[5].

s 73 Sexual intercourse with child under special care now extends to ‘de facto partner’

Section 73 makes it an offence to have sexual intercourse with a child aged 16-18 under special care. Section 73(3)(a) had stated that the victim is under the special care of the offender if the “offender is the step-parent, guardian or foster parent of the victim.” The amendment adds - “*or the de facto partner of a parent, guardian or foster parent of the victim*”. This amendment responds to the uncertainty left by the decision in **JAD** [2012] NSWCCA 73 in which the CCA held that accused, who was in a de facto relationship with the victim’s mother, was a “foster parent” and so came within the prohibited relationships in s 73. Whealey JA and Hoeben JJ had recommended the matter for the legislature’s attention: at [34] and [170]. The amendment applies only to an offence committed, or alleged to have been committed, on or after the commencement of the amendment: Sch1[5].

Spousal immunity - A new cl 7 is inserted into Sch 3 to abolish the common law rule that a person cannot be found guilty of an offence involving failure to disclose a crime committed by a husband, wife or de facto partner; see **Australian Crime Commission v Stoddart** (2011) 244

CLR 544 in which High Court concluded that the common law in Australia did not recognise a privilege against spousal incrimination. The amendment applies where the offence involving the failure to disclose is committed, or alleged to have been committed, on or after the commencement of the amendment: Sch 1[5].

Amendment to *Criminal Procedure Act 1986*

Sensitive evidence

An accused person has restricted access to 'sensitive evidence' in criminal proceedings. These provisions seek to protect sexual assault complainants: ss 281A-F.

Section 281B(1A) is inserted to broaden the meaning of "sensitive evidence" to include an audio recording of an offence committed against the victim:-

s 218B (1A) For the purposes of this Part, an audio recording of a person committing an offence against another person (the **protected person**) is **sensitive evidence** if:

- (a) the contents of the audio recording are obscene or indecent, or
- (b) providing a copy of the audio recording to another person without the protected person's consent would interfere with the protected person's privacy.

(1B) The contents of an audio recording are not obscene or indecent merely because they include obscene or indecent language.

The amendment applies to existing prosecutions and investigations: Sch 2[8].

Amendment to *Crimes (Domestic and Personal Violence) Act 2007*

Apprehended violence orders

Section 48 and 72 are amended to provide that an appointed guardian may apply for an apprehended violence order on behalf of a person for whose protection the order would be made.

Amendment to *Crimes (Serious Sex Offenders) Act 2006*

Serious sex offences - Section 5 provides a definition of "serious sex offence". Section 5(1)(b) is amended to provide that the new kidnapping offence (s 86(1)(a1)) and the offences of being armed, disguised, or entering premises with intent to commit an indictable offence (s 114(1)(a), (c) or (d)) are "serious sex offences". **Thus a person sentenced to imprisonment for these offences may be subject to extended supervision orders and continuing detention orders.** The amendment applies only to offences committed on or after commencement: Sch 3.4[3].

9. Graffiti Legislation Amendment Act 2012

Commenced 10.12.2012

The ***Graffiti Legislation Amendment Act 2012*** makes the following amendments:

1. Amends the ***Young Offenders Act 1997*** so that pre-court diversion options (such as warnings and cautions) are removed:-

- . The alternative process to court proceedings for children alleged to have committed graffiti offences through the use of formal cautions, warnings and youth justice conferences under the ***Young Offenders Act 1997*** has been removed. Formal cautions and warnings can no longer be used in relation to offences against the ***Graffiti Control Act 2008***: amended ss 13, 18 and 31 ***Young Offenders Act 1997***.
- . An offender's entitlement to a youth justice conference and the ability of the DPP to refer matters for such conferences are removed: amended ss 37, 40.
- . A specialist youth officer cannot refer a child who is alleged to have committed a graffiti offence to a conference or for caution; amended s 38.

- . A court may still give a caution and will continue to be able to refer a child for a youth justice conference: amended s 40(1A).

2. Amends the **Crimes (Sentencing Procedure) Act 1999** and other Acts to provide that where Community Service Orders (CSOs) are imposed for graffiti offences that offenders be required to perform clean-up work.

- . A court that imposes a CSO for an offence under the **Graffiti Control Act 2008** is required to impose a condition that the work to be performed by the offender include the removal or obliteration of graffiti from buildings, vehicles, vessels and places unless it is not reasonably practicable: amended s 90.

- . Similar amendments are made to the **Children (Community Service Orders) Act 1987** (s 11) and the **Fines Act 1996** (s 79).

3. Courts now have a wider range of penalties available under the **Graffiti Control Act**.

Prior to the amendments, a court could impose a CSO, instead of a fine or sentence of imprisonment, for offences against s 4 (damaging or defacing property by means of graffiti implement) and s 5 (possessing graffiti implement) of the **Graffiti Control Act**: s15. Section 15 has now been repealed. A new Part 4A provides for further penalties for offences against ss 4 and 5:

- . Instead of a fine, a court may make a CSO under the **Crimes (Sentencing Procedure) Act** or the **Children (Community Service Orders) Act**: s 13B(1).

- . In addition to or instead of a fine, imprisonment or any other penalty for an offence under ss 4 or 5, a court may make a driver licence order: s 13B(2). A driver licence order may (i) extend a learner or provisional licence period by 6 months or less: ss 13C(1)(a), 13D; or (ii) require a person not to incur a specified number of demerit points for a period of 6 months or less: ss 13C(1)(b), 13E.

The amendments apply to offences committed after 10 December 2012.

10. Bail Amendment (Enforcement Conditions) Act 2012

Commenced 20.11.2012

This legislation seeks to overcome **Lawson v Dunlevy** [2012] NSWSC 48 in which Garling J held that a bail condition that the accused agree not to consume alcohol and to submit to a breath test if requested by police, was unlawful because it did not comply with the purposes in s 37(1). See under 'Annexure C - Supreme Court Cases' below.

The Act amends the **Bail Act 1978** as follows:

- . A court granting bail may impose a bail condition (an 'enforcement condition') requiring an accused to comply with directions issued by police to monitor or enforce compliance with an "underlying bail condition": s 37AA(1). Underlying bail conditions are bail conditions imposed for a purpose listed in s 37(1): s 37AA(2).

- . An enforcement condition must specify the kind of directions that may be given to the accused, the circumstances in which each kind of direction may be given (in a manner ensuring compliance is not onerous) and the underlying bail condition(s) in connection with which each kind of direction may be given: s 37AA(3).

- . An enforcement condition can be imposed only if the court considers it reasonable and necessary in the circumstances having regard to (a) the history of the accused, including their criminal history, particularly where the accused has a history involving serious or a

large number of offences; (b) the likelihood of the accused committing further offences while on bail (c) the extent to which compliance with a direction may unreasonably affect persons other than the accused: (s 37AA(4)).

A court can impose an enforcement condition only at the request of the prosecutor: s 37AA(5).

A new s 32(8) states that the criteria taken into consideration when determining whether to impose an enforcement condition are in addition to the criteria in s 32 which a court considers when deciding whether to grant bail.

11. Director of Public Prosecutions (Disclosures) Amendment Act 2012

Commenced 1.1.2013

The **DPP Act 1986** required "police officers", when investigating alleged indictable offences, to disclose to the DPP all relevant material that may reasonably be expected to assist the case for the prosecution or defence. The Amendment Act extends the duty of disclosure to investigative commissions by replacing references to "police officers" with "law enforcement officers": amended s 15A(1). "Law enforcement officer" applies to the NSW Crime Commission, Police Integrity Commission and Independent Commission Against Corruption: s 15A. "Law enforcement officers" are not obliged to forward sensitive material to the DPP. However, they are required to inform the DPP of its existence and the nature of any claim relating to it: s 15A(6). Such material must be provided where the DPP makes a request for it: s 15A(7).

STOP PRESS – 2013 BILLS

Evidence Amendment (Evidence of Silence) Bill 2013

Introduced 13 March 2013

"The object of this Bill is to amend the **Evidence Act 1995** so that in proceedings for a serious indictable offence an unfavourable inference may be drawn from the defendant's failure or refusal to mention a fact during official questioning that the defendant could reasonably have been expected to mention and that is later relied on by the defence in the proceedings.

Such an inference will not be able to be drawn unless, before the questioning, a special caution was given to the defendant in the presence of a legal practitioner acting for the defendant.

Such an inference will also not be able to be drawn if it is the only evidence that the defendant is guilty of the offence.

The Bill will not apply to a defendant who, at the time of the questioning, is under 18 years of age or incapable of understanding the general nature and effect of a special caution." (Overview of Bill)

Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Bill 2013

Introduced 13 March 2013

"The object of this Bill is to amend the **Criminal Procedure Act 1986**:

(a) to expand the matters that must be disclosed by the defence and the prosecution before a trial for an indictable offence, and

(b) to enable the court (and other parties with the leave of the court) to make proper comments in a trial for an indictable offence in circumstances where the accused person fails to comply with certain pre-trial disclosure requirements, and

(c) to enable the court or the jury in such circumstances to then draw such unfavourable inferences as appear proper." (Overview of Bill)

Annexure C - Supreme Court Cases

Possess prohibited weapon s 7(1) Weapons Prohibition Act 1998 - Crown need not prove offender knows location of weapon

In *DPP (NSW) v Fairbanks* [2012] NSWSC 150 a flick knife was found in the respondent's backpack at the airport. The respondent said the knife was left there after a camping trip and that he thought it was at home. "Possession" of a prohibited weapon is defined to include any case where a person knowingly has custody of the weapon: s 4. The Magistrate held the prosecution needed to prove the respondent knew the weapon was in his bag. Rothman J held this was an error - the offence requires proof by the prosecutor that the accused knows s/he possesses the prohibited item, but does not require proof the accused knows the location of the item, or that the item is physically on or about the accused at the time of the offence. Once the respondent knew the knife was in his possession, the prosecution did not need to prove he knew it was in his bag at the airport: [28]-[31].

Possess prohibited weapon s 7(1) Weapons Prohibition Act 1998 - Crown need not prove offender "used" the weapon

In *DPP (NSW) v Starr* [2012] NSWSC 315 Adamson J held that mere possession will be sufficient where the charge is possessing and the prosecution does not need to prove the person "used" the weapon: at [40]-[47]. A belt buckle shaped like a knuckle duster was found in the defendant's airport luggage. The defendant was charged with possessing a prohibited weapon under s 7(1). Allowing the Crown appeal, Adamson J found the Magistrate erred in dismissing the charge on the basis that the knuckle duster did not fit the defendant's hand and so did not come within the definition: at [16]. The prosecution need not prove that the knuckle duster actually fit his hand because the "user" referred to in the definition need not be the same person charged with the possession: at [55]. Section 7(1) contains both "use" and "possession" offences. The words "the user" will apply where the person is charged with use; whilst mere possession is enough where the charge is possessing: at [40]-[47].

Bail condition requiring person to submit to alcohol breath test if requested by police officer is unlawful

In *Lawson v Dunlevy* [2012] NSWSC 48 Garling J held that a bail condition that the offender not consume alcohol for any reason, and to submit to a breath test when requested by a police officer, was unlawful. The condition was not capable of fulfilling any of the purposes in s 37 *Bail Act* ("Restrictions on imposing bail conditions"). Section 37 states that bail shall be granted unconditionally unless the authorised officer or court is of the opinion that one or more conditions should be imposed for the purpose of promoting effective law enforcement, the protection and welfare of any specially affected person and other specified purposes.

In response to *Lawson v Dunlevy*, the *Bail Act* has now been amended by the *Bail Amendment (Enforcement Conditions) Act 2012*. The *Bail Act* now allows for 'enforcement conditions' requiring an accused to comply with directions issued by police. (See above under "Annexure B – Legislation".

Police search and seizure in domestic violence offences – Law Enforcement (Powers and Responsibilities) Act 2002 ("LEPRA") – Evidence Act s 138

In *DPP (NSW) v Tamcelik* [2012] NSWSC 1008 (Garling J) the police attended the respondent's home in response to a domestic violence complaint. Following completion of the investigation, the police entered the bedroom of the accused and found drugs (steroids). There was no search warrant. The respondent was charged with possessing a prescribed restricted substance. The Magistrate refused to admit the evidence and the respondent was acquitted. The DPP appealed. Garling J upheld the Magistrate's decision: (a) the right of the police officers to be on the premises was covered by Part 6 of LEPRA which deals with search and seizure powers for

domestic violence offences; these statutory powers excludes any common law powers to search; (b) by engaging in conduct which had nothing to do with the investigation of a domestic violence offence, or any of the other purposes in Part 6 of LEPRA, the police officers were acting outside the authorisation provided by LEPRA for them to be on the premises; and (c) the search of the bedroom and the seizure of the items was unlawful.

The DPP also argued the Magistrate failed to exercise his discretion under s 138 **Evidence Act** to determine whether the desirability of admitting the impugned items into evidence outweighed by the undesirability of so doing. Garling J outlined the procedure under s 138: at [104]-[110]. A court must be invited to address the balancing exercise under s 138. Where evidence is ruled to be improperly obtained then the party tendering the evidence must seek to enliven the court's discretion under s 138. The prosecution did not do so in this case. To exclude the evidence contained no error of law, and there was no denial of procedural fairness in the way in which the Magistrate went about his decision making: [111]-[122].

Double jeopardy – error by Magistrate

In **DPP (NSW) v Sukhera** [2012] NSWSC 311 the respondent was charged with driving while licence suspended and drink driving. In the Local Court, a bond was imposed for the driving while suspended offence. The drink driving offence was dismissed on the basis that the respondent's liability for one offence depended on his liability for the other: at [5]. Allowing the DPP appeal, Fullerton J held that the Local Court failed to provide adequate reasons for dismissing the charge and had also erroneously applied some form of double jeopardy reasoning. The suspension offence and drink driving offence were each separate and distinct and the laying of the two charges did involve any abuse of process. The matter was remitted to the Local Court for re-hearing.

Confiscation – expenses incurred in “defending a criminal charge” include expenses incurred relating to a conviction appeal to the CCA

In **NSW Crime Commission v Lee** [2012] NSWSC 437 a restraining order was obtained by the NSW Crime Commission against A's property following A's conviction for drug offences. A applied for a variation of that order to allow for payment of his legal expenses for his conviction appeal to the CCA. Under s 10B(3)(b) **Criminal Assets Recovery Act 1990** a restraining order may provide for “reasonable legal expenses of any person whose interests in property are subject to the restraining order ... incurred in defending a criminal charge.” Hidden J dismissed the NSW Crime Commission's motion, holding that legal expenses in relation to appeals to the CCA were expenses in “defending a criminal charge.” The appeal process is an integral part of the criminal justice system and should properly be seen as part of the defence of the criminal charge in question: at [10]-[11]. Similar provisions have been held to apply to bail and representation in committal proceedings: at [10]; **DPP (Cth) v Saxon** (1990) 28 NSWLR 263

Annexure D – Stop Press 2012 - 2013

People smuggling – prosecution choice between statutory provisions where one offence carried mandatory minimum sentence - provisions constitutionally valid - mandatory sentencing provisions are within the authority of Parliament

In ***Karim & Ors*** [2013] NSWCCA 23 the appellants were sentenced for people smuggling. The prosecution could choose to prosecute an offence of ‘Aggravated people smuggling’ under either s 233A or s 233C ***Migration Act (Cth)***. Section 233C carried a mandatory minimum sentence under s 236B. The appellant (Karim) argued the provisions were invalid and that the overlapping of the offence provisions, with mandatory minimum sentences applying to only one of the offences, violated the principle of equal justice: at [51].

A five-judge bench of the CCA dismissed the appeal (Allsop P; Bathurst CJ, Hall and Bellew JJ agreeing; McClellan CJ at CL agreeing with additional comments). Firstly, the recognition and development of a constraint on the Commonwealth’s power to legislate for different offences and sentence provisions for the same conduct is a matter of fundamental Constitutional significance and is for the High Court, not an intermediate appellate court: at [59]. Secondly, subject to specific restrictions and implications arising from the federal structure, no implication has yet been drawn from the Constitution that it contains an implied guarantee of equal protection: at [60]; ***Leeth v Commonwealth*** (1992) 174 CLR 455 at 467. Thirdly, in ***Fraser Henleins*** (1945) 70 CLR 100 the High Court held Constitutionally valid an Act which provides for mandatory minimum sentences for offences identical to other offences created under other Commonwealth legislation with different and lower sentences; it was a decision of the High Court on a relevantly identical legislative structure, with cognate Constitutional arguments. To put ***Fraser Henleins*** to one side would be to employ a new argument contrary to a holding of the High Court to undermine the authority of that decision: at [78]-[79].

Mandatory sentencing provisions are within the authority of Parliament, that Parliament can provide for the mandatory sentence upon a condition or request effected by a third party, being a member of the Executive, that that legitimate condition or request includes the prosecutorial choice between two offences for the same conduct carrying differing sentencing regimes, one having a mandatory minimum penalty, that such a choice does not involve conferral of judicial power on the prosecution or any direction of the Court by the prosecution and that such laws are valid even in circumstances where they operate with gross injustice: at [94]; ***Fraser Henleins*** (above); ***Palling v Corfield*** (1970) 123 CLR 52.

Note: Special Leave to the High Court is to be sought in this matter.

Victorian Court of Appeal in Dupas [2012] VSCA 328 disapproves Shamouil (2006) 66 NSWLR 228 - s 137 Evidence Act

Section 137 ***Evidence Act*** states a court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. The NSWCCA had held in ***Shamouil*** (2006) 66 NSWLR 228 that reliability and credibility cannot be considered by a court in determining questions of admissibility of evidence. In ***Dupas*** [2012] VSCA 328 a five judge bench of the Court of Appeal of Victoria disapproved ***Shamouil***:

“[63] For the following reasons, we are compelled to the view that Shamouil and the other decisions that have applied it are manifestly wrong and should not be followed. We are compelled to the conclusion that we should depart from the reasoning and conclusion in Shamouil as error can be demonstrated with a degree of clarity by the application of the correct legal analysis. Our conclusions are as follows:

(a) The common law did require the trial judge, in assessing probative value, to evaluate the weight that the jury could rationally attach to the evidence. The contrary conclusion was inconsistent with a continuous line of High Court authority.

(b) The legislative intention, as disclosed by the language of s 137 and its context, is that the task under s 137 is the same as that at common law.

(c) The trial judge undertaking the balancing task is only obliged to assume that the jury will accept the evidence to be truthful but is not required to make an assumption that its reliability will be accepted. The phrase 'taken at its highest' is more appropriately used in considering a no case submission, when the judge must accept that the jury may find the evidence credible and reliable.

(d) In order to determine the capacity of the evidence rationally to affect the determination of a fact in issue, the judge is required to make some assessment of the weight that the jury could, acting reasonably, give to that evidence. Where it is contended that the quality or frailties of the evidence would result in the jury attaching more weight to the evidence than it deserved, the trial judge is obliged to assess the extent of the risk. That does not require the trial judge to anticipate the weight that the jury *would* or *will* attach to it. The judge is obliged to assess what probative value the jury could assign to the evidence, against which must be balanced the risk that the jury will give the evidence disproportionate weight.

(e) So to construe s 137 accords with the language of the statute and its context. To construe it otherwise does not.

(f) Such a construction does not involve any enlargement of the powers of a trial judge or any encroachment upon the traditional jury function."

MA [2013] VSCA 20 - Admissibility of expert evidence as to the general behaviour of child victims of sexual abuse - evidence concerning common parental reactions – Relevance of evidence concerning counter-intuitive behaviour – s 108C Evidence Act 2008 (Vic)

Under s 108C ***Evidence Act 2008 (Vic)*** (and s 108C ***Evidence Act 1995 (NSW)***) a party may call "credibility evidence" from a witness who has specialised knowledge based on their training, study or experience concerning the evidence of another witness' credibility. (This is known as an exception to the 'credibility rule' in s 102). The evidence must be evidence of an opinion of the person that is wholly or substantially based on that knowledge; and must substantially affect the assessment of the credibility of the witness. Specialised knowledge includes a reference to specialised knowledge of child development and child behaviour, including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse.

In ***MA [2013] VSCA 20*** the appellant was convicted of sexual offences against his daughter. The appellant submitted it was an error to allow the Crown to call a psychiatrist to give expert evidence with respect to the behavioural framework within which the evidence of the complainant's reactions to the alleged abuse should be assessed and understood: at [2]. In particular, evidence that: (a) the failure of the complainant to cry out during the sexual assaults when other members of the family were nearby was not an unusual behavioural reaction; (b) the failure of the complainant's mother to accept the truth of a complaint made to her by the complainant was not an unusual behavioural reaction and could be regarded as relevant to the complainant's behaviour thereafter; and (c) that the complainant maintained an ongoing relationship with her father for many years after the alleged abuse, despite both its occurrence and the failure of her mother to accept her complaint, was not demonstrative of an unusual behavioural reaction: at [3].

The VSCA dismissed the appeal. The expert witness' evidence as to patterns of victims' behaviour was relevant to rebut the defence case as to counter-intuitive behaviour on the complainant's behalf. The evidence bore upon the complainant's credibility as contemplated by s 55 in the specific manner contemplated by s 108C(2). It was capable of substantially affecting the assessment of the complainant's credibility as required by s 108C(1): at [34]. The evidence relating to parental response and, in particular, maternal response to complaints by a child of sexual abuse was sufficiently interrelated with and directly relevant to the evidence of potential responses by a

victim of sexual abuse as to fall within s 108C **Evidence Act** (and s 388 **Criminal Procedure Act** – which provides an alternate basis for the admission of such evidence): at [51].

Aggregate sentencing – s 53A Crimes (Sentencing Procedure) Act 1999

In **Rae** [2013] NSWCCA 9, a Crown appeal, the sentencing judge “indicated” the sentences for the offences before imposing an aggregate sentence. s 5D(1) **Criminal Appeal Act** states the DPP may appeal against any sentence “pronounced” by the court of trial. The CCA said that the Crown cannot appeal against the “indicative” sentences as they were not “pronounced”. However, the correct approach would be to consider all of the submissions as to the inadequacy or otherwise of the indicative sentence: at [32]-[33]; **PD** [2012] NSWCCA 242 at [44]. The judge erred in failing to impose some degree of partial accumulation. Merely because an offender is to receive an aggregate sentence does not mean that accumulation, whether partial or complete, need no longer be taken into account: at [45].

Directions as to voluntariness and felony murder

In **Penza and Di Maria** [2013] NSWCCA 21 the appellants had been charged with murder after the occupant of a house they broke into was fatally shot. The Court of Criminal Appeal found that the directions in relation to felony murder had erroneously removed consideration of the issue of voluntariness from the jury. Following **Ryan** (1967) 121 CLR 205 the Court concluded that a trial judge must direct the jury that an act causing death must be a voluntary or willed act of the accused and that the identification of the act causing death was a question of fact for the jury. In this case the directions erroneously suggested to the jury that they could convict on the basis of felony murder regardless of how the gun was discharged. Further, manslaughter by unlawful and dangerous act ought to have been left to the jury on the bases set out at [171]-[176].

Liability in medical assault cases

In **Reeves** [2013] NSWCCA 34 an obstetrician was convicted of maliciously inflicting grievous bodily harm with intent on the basis that the removal of the complainant’s genitalia by operation was unnecessary and done without consent. The Court of Criminal Appeal considered directions as to consent for criminal liability in medical assault cases and concluded that the failure to explain possible risks involved in a procedure, or a failure to explain alternative treatments, do not vitiate consent. It also noted that ‘in order for a patient to be taken to have consented they must have been informed, in broad terms, of the nature of the procedure, in terms which they have understood’ and mere signing of a form was insufficient. There is also no consent where the procedure performed is different to, or goes beyond, that which was agreed to. In this case directions to the jury were in error, but the proviso was applied on the basis that the appellant had no honest belief that the complainant had consented to the operation.

False imprisonment where person kept in prison not mental health facility as ordered under limiting term

At a special hearing under the **Mental Health (Criminal Procedures) Act** (now **Mental Health (Forensic Procedures) Act**) the respondent in **State of New South Wales v TD** [2013] NSWCA 32 was found guilty of an offence and a limiting term of twenty months set under s.23(1). Under s.24(2) the Mental Health Review Tribunal found the respondent suffered from a mental illness, and under s.27 Woods DCJ ordered the respondent detained in a mental health facility. The respondent was subsequently detained in a section of Long Bay Prison that was not gazetted as a hospital. A five judge bench of the Court of Appeal held that the respondent had been unlawfully detained while being held in the cell contrary to the orders of the court, and was entitled to damages for false imprisonment.

The Court held that once a limiting term is set under the Act the court has no discretion to release a person from custody and that person is deprived of their liberty. The only discretion lies in choosing whether the person is to be detained in a mental health facility or not. The Court further held that an order entitling the State to detain a person under s.27 did not entitle the State to detain the person anywhere – the lawfulness of the detention depended upon compliance with the terms of the order.

