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Sentence Appeal Cases

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Annexures

INTRODUCTION

In 2016 there were a significant number of restricted decisions. Included therefore in this paper are a number of restricted judgments.

Restricted NSWCCA judgments are those judgments of the Court of Criminal Appeal which have not been published on the internet and are not available to the general public. They are made available on a limited basis for the profession in order to avoid trial courts falling into error. The judgments, however, can be accessed on the Judicial Commission's Judicial Information Research System (JIRS) by legal practitioners only for use in connection with legal proceedings.

We have confirmed with the Judicial Commission that there is no issue in citing and using a case (Restricted Decision, then year and number) on a point of principle but without reference or a very minimal reference to the facts. The importance of access to restricted judgments is that the profession must know the law, and lower courts must apply and follow appellate decisions. The need for access to the restricted decisions was triggered by the profession not being aware of the CCA position on the High Court decision of ***HML*** (2008) 245 ALR 204 (articulated in the then restricted judgment of ***DJV*** (2008) 200 A Crim R 206) and later the issue of ss 97,98 *Evidence Act* and concoction (when ***BJS*** (2013) 231 A Crim R 537 was inaccessible). If the description of the case is framed in terms of principle with no or restricted facts the "potential jurors" problem will not arise.

NSW CCA SENTENCE CASES 2016

1. GENERAL SENTENCING

Reasons for judgment

In ***Lee*** [2016] NSWCCA 146 the CCA reiterated the judicial obligation to give proper reasons for judgment. First, failure to give proper reasons is an error of law. Second, the reasons must be adequate to demonstrate the absence of a real "possibility" the judge failed to apply correct legal principle. Thus where the possibility of error was open, the appellate court should not have assumed that, because the legal principle was well known and fundamental, it had been applied: at [24]-[26]; *Douglass v The Queen* (2012) 86 ALJR 1086 at [14].

In ***Van Ryn*** [2016] NSWCCA 1 the sentencing judgment comprised many statements of general principles but exposed very little reasoning. It is one thing to state a principle; more important is some explanation of how it is being applied: at [123]. The sentencing process miscarried, either by the judge failing to make any assessment of the seriousness of the offences or, if he did, failing to say anything about his reasoning and conclusions as a result of such assessment: at [141].

Degree of specificity required when determining objective seriousness of an offence

In ***Van Ryn*** [2016] NSWCCA 1 the CCA emphasised a sentencing judge's duty to assess the objective seriousness of an offence: at [133]-[137]. Apart from reciting the facts of the offences the judge made no assessment of their objective seriousness or, if he did, said nothing about it: at [133]. The assessment of objective seriousness is a critical component of

the sentencing process - there is nothing in *Muldrock* (2011) 240 CLR 120] that cuts across this principle: at [134] citing *Campbell* [2014] NSWCCA 102 at [27] per Simpson J.

Whilst acknowledging the importance of an assessment of objective seriousness, in ***Ridgeway*** [2016] NSWCCA 184 the CCA said that caution has also been expressed about prescribing too closely the use of a particular verbal formula in making an assessment of the objective seriousness. In ***Ridgeway***, the CCA found that the judge did not expressly determine the objective criminality but did so implicitly and clearly gave careful consideration to the nature of the offending and the circumstances in which it occurred: at [20], [24]–[26]; applying *Delaney* (2013) 230 A Crim R 581 per Hoeben J at [56]:

> "While it is true that his Honour did not in terms assess the objective gravity of the offending, he did specifically refer to the factors which bore upon its objective seriousness. His Honour took account of the amount involved, the role of the appellant, the nature of the conduct and the period over which it took place. *While it may have been preferable for his Honour to have made a specific assessment of the objective seriousness of the offending, he did implicitly do so. I am satisfied that the factors to which his Honour referred were relevant and important and were given proper weight in the sentencing process. While his Honour may not have expressly determined the objective criminality of the offences, he clearly took that into account*. " (italics added).

2. MITIGATING FACTORS

Aboriginal offender – Bugmy (2013) 249 CLR 571 - *disadvantaged background*

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

The CCA allowed the applicant's appeal on the basis that the applicant's social disadvantage was not adequately taken into account: at [36]-[37].

The CCA referred to what the High Court said in ***Bugmy*** (2013) 249 CLR 571 at [40] that:

> "*the circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence <u>may</u> mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way." (emphasis added).*

The use of the word "may" does not suggest this factor is optional, rather, there are factors which may reduce or eliminate its effect. Per Hoeben CJ at CL:

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

Drug addiction from young age - may be a mitigating factor in the particular circumstances of an individual case

In ***Hayek*** [2016] NSWCCA 126 the CCA affirmed that there is no principle that drug addiction commenced when an offender was young is a mitigating feature for crime committed thereafter: at [75].

Cases such as *SS; JC* [2009] NSWCCA 114 at [102] and *Todorovic* [2008] NSWCCA 49 at [58] do no more than allow for the possibility that there will be exceptions to the general rule that drug addiction is not a mitigating feature. One exception may be that an addiction to drugs was formed in youth, but that is dependent upon the circumstances of the case: at [76]. An addiction formed as a child may be a mitigating factor in the particular circumstances of a case, but it is an entirely different proposition to suggest it will always operate in that way, and for any person who began using drugs in youth: at [80].

In *SS; JC,* JC was introduced to cannabis at 12 by an abusive uncle who assaulted and threatened him. His addiction continued in the context of a troubled childhood until he committed the offences at 17: at [77]. The present case has different circumstances: at [81]-[83].

3. AGGRAVATING FACTORS

s 21A(2)(e) - in company

White [2016] NSWCCA 190 considered the meaning of "in company" in s 21A(2)(e). A was sentenced for armed robbery. A walked with C towards a restaurant. A entered alone and C walked away. A committed the offence, fled and re-joined C. The CCA found that the sentencing judge erred in finding the offence aggravated by having been committed "in company" under s 21A(e).

Simpson J (Bathurst CJ agreeing) discusses in detail the authorities dealing with the meaning of "in company" in the 'sexual assault' and 'robbery' aggravated offence provisions (where the offence being committed in company is an element of the aggravated offence): at [81].

These authorities are relevant to the construction to be given to s 21A(2)(e). They are not an exhaustive statement of what might be held to be "in company". Each case will depend upon its own facts: at [94]. It is appropriate to focus on at least three questions:

> (i) whether the presence of the other person is such as to have a potential effect on the victim, by way of coercion, intimidation, or otherwise;
>
> (ii) whether the presence of the other person is such as to have a potential effect on the offender, by offering support or encouragement, or "emboldening" that person;
>
> (iii) whether the evidence establishes that the other person is present, sharing a common purpose with the offender: at [94].

Simpson J found the offence was not committed "in company". C was not in the presence of the victims, did not share a common purpose with A, there was no encouragement or support or emboldening by C. There was evidence C parted with A because she did not agree with A's plan: at [96]-[97].

s 21A(2)(eb) – offence committed in home of the victim or "any other person" – not restricted to circumstances where offender is an intruder

The CCA has put to rest conflicting views on the application of s 21A(2)(eb) – whether it is restricted to cases where the offender is an intruder or may apply where the offender is lawfully on the premises.

In ***Jonson*** [2016] NSWCCA 286 a five judge bench held that s 21A(2)(eb) does not impose as a pre-condition for its operation that the offender be an intruder into the victim's home. Further, it is not limited to the home of the victim but extends to the home of "any other person". Such a construction promotes the purpose of the section, namely, that a home is a place which should be safe for persons who reside, or are present, at such a place. Thus, it would extend to persons (for example, children) visiting a relative's home or persons in a domestic relationship at the home of the offender: at [40]-[42].

The CCA held that those decisions restricting s 21A(2)(eb) to where the offender is an intruder are wrong and are overruled: at [50]. (*EK* (2010) 79 NSWLR 740; *Ingham* [2011] NSWCCA 88; *BIP* [2011] NSWCCA 224; *MH* [2011] NSWCCA 230, *Essex* [2013] NSWCCA 11, *DJM* [2013] NSWCCA 101, *Pasoki* [2014] NSWCCA 309 overruled).

That s 21A(2)(eb) can extend beyond offences committed by an intruder does not mean that in all cases the fact the offence occurred in a home will be an aggravating factor. It is necessary for the Court to conclude that, having regard to ordinary sentencing principles, it actually aggravates the offence: at [52]; *Gore* (2010) 208 A Crim R 353 at [29].

See also ***Lulham*** [2016] NSWCCA 287.

s 21A(2)(eb) – offence committed in home of the victim or "any other person" – area adjacent to house can be considered a "home"

In ***Lulham*** [2016] NSWCCA 287 (five judge Bench) the CCA held that s 21A(2)(eb) was correctly applied where the respondent had assaulted the victim in the driveway of the victim's home. The CCA held that "home" would extend not only to the actual physical residence but to the area on the same premises, at least reasonably adjacent to that building: at [5]-[6].

s 21A(2)(l) – vulnerable victim - engagement of s 21A(2)(l) does not depend upon a causal connection (in a case of murder) between vulnerability and death

In ***Sumpton*** [2016] NSWCCA 162 the applicant was sentenced for murder. The deceased was a slightly built woman with a pronounced limp which required her to use a walking stick. She was very intoxicated. The applicant attacked her with an object and a knife. The applicant submitted the judge erred in assessing the objective seriousness as "comfortably above the middle range."

The CCA dismissed this ground. Section 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* provides that it will be an aggravating factor on sentence if:

> "the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant).

The CCA stated that s 21A(2)(l) is concerned with the weakness of a particular class of victim (citing *Betts* [2015] NSWCCA 39 at [29]). It is the fact of a victim's vulnerability which aggravates the offence. The fact that there may not have been evidence to support a conclusion that the deceased's vulnerability contributed to her death is not to the point. The engagement of s 21A(2)(l) does not depend upon there being a causal connection (in a case of murder) between vulnerability and death: at [147].

s 21A(2)(l) – vulnerable victim – error in finding victim vulnerable in context of domestic violence and Aboriginal background

In ***Drew*** [2016] NSWCCA 310 the applicant seriously assaulted his female partner. The judge erred in finding the victim was vulnerable under s 21A(2)(l) on the basis of the judge's generalised conclusion that "there is a culture of silence within the Aboriginal community .. such that those who complain tend to be ostracised" and thus "the victim was reluctant to seek help": at [3]-[4].

The judge erred in forming her opinion about vulnerability on the basis of generalisations concerning the culture of Aboriginal communities. Further, s 21A(2)(l) is only engaged where the victim is one of a class that is vulnerable by reason of some common characteristic: at [8].

However, an ultimate finding of the individual vulnerability of the victim in the more general sense of being under an impaired ability to avoid physical conflict with the applicant or to defend herself was open. That individual vulnerability had the same consequence for assessment of the objective seriousness of the offence as the judge's finding: at [5], [8].

4. PROCEDURAL FAIRNESS

Refusal by judge to view CCTV footage tendered by Crown – fact finding

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

First, the accused's oral evidence raised the suggestion that he was provoked by the victim based upon a version of a conversation not included in the agreed facts. To the extent that the CCTV material potentially suggested the accused might have been provoked, the Crown was entitled to rebut it. Secondly, the judge was critical of the Crown's submissions because they appeared to go beyond the agreed facts, even though the agreed facts mentioned the CCTV material. It was unfair to the Crown to adopt the position that the Crown's submissions were inaccurate if the judge was not at the same time prepared to permit the Crown to produce the very material that would arguably have justified those submissions: at [20]-[21].

5. SENTENCING OPTIONS

Aggregate sentence cannot exceed the sum of indicative sentences – indicative sentence is reference to overall sentence not the non-parole period, unless judge expressly states indicative sentence is a fixed term

In ***Dimian*** [2016] NSWCCA 223 the sentencing judge gave the applicant an indicative term of 2 years for Detain for advantage (s 90A *Crimes Act*) and an indicative term of 5 years, 6 months for Aggravated sexual assault (s 61J). The judge imposed an aggregate sentence of 9 years, NPP 6 years under s 53A *Crimes (Sentencing Procedure) Act* 1999.

Allowed the applicant's appeal, the CCA held:

. The judge erred in imposing an aggregate sentence which exceeded the sum of indicative sentences. The indicative sentences referred to by the sentencing judge must be regarded as the head sentences for each of the offences, not the non-parole

period as submitted by the Crown. On any proper construction of s 53A(2), the "sentence that would have been imposed" (called the indicative sentence) must be a reference to the overall sentence: at [41]-[49].

. The only circumstance where an indicative sentence might be thought to equate with a non-parole period would be where the sentencing judge expressly states the indicative sentence was to be treated as a fixed term: at [47]; *McIntosh* [2015] NSWCCA 184 at [139].

Aggregate sentences - s 166 certificate offences can be included in aggregate sentence

Price [2016] NSWCCA 50 held that sentences for offences placed before a judge on a "s 166 Certificate" pursuant to the *Criminal Procedure Act* 1986 may be included in an aggregate sentence.

The sentencing judge imposed an aggregate sentence for two serious culpable driving matters as well as three "related offences" on a s 166 Certificate. Those three offences were possess prohibited drug, goods in custody (being wholly summary offences) and supply prohibited drug (an offence which if dealt with in the Local Court is subject to a jurisdictional limit of 2 years imprisonment).

The Crown appealed against the sentence on the grounds of manifest inadequacy and that the inclusion of the s 166 offences in the aggregate sentence was not in accordance to law.

The CCA dismissed the Crown's appeal. There is nothing to suggest a Local Court offence before the District or Supreme Court, pursuant to s 166, cannot be "picked up" by an aggregate sentence imposed under s 53A *Crimes (Sentencing Procedure) Act*: at [76]. Of course, in sentencing for offences on a s 166 Certificate, the applicable maximum penalty (with regard to wholly summary offences) and jurisdictional limit (with regard to indictable offences being dealt with summarily) must be respected: at [80]. The aggregate sentence imposed was within the discretion of the judge, and did not demonstrate error: at [88].

Relevance of Local Court jurisdictional limit in District Court - No principle that District Court should not impose sentence in excess of jurisdictional limit of Local Court

The CCA in ***Turner*** [2016] NSWCCA 208 observed there are many cases which reflect a view that the possibility a matter could have been dealt with in the Local Court is relevant to sentence. However, in both ***Turner*** at [25] and ***SM*** [2016] NSWCCA 171 at [26] the CCA noted observations by Basten JA in ***Baines*** [2016] NSWCCA 132 at [10] that *how* the fact that a matter could have been dealt with in a Local Court contributes to mitigation is by no means clear.

In ***Turner*** [2016] NSWCCA 208 there was no error in the judge omitting to mention the possibility that the nature of the charge meant it could have been dealt with in the Local Court (the appeal was allowed on manifest excess). Grounds of appeal claiming that the jurisdictional limit of the Local Court was not taken into account can only be meaningful if this Court determines the total sentence for the offence should not have exceeded that limit. Unless it is plainly wrong that the offence is in the District Court, it is difficult to see how an offender can succeed on this ground: at [30]; citing *Zreika* (2012) 223 A Crim R 460 at [109] – [112].

SM [2016] NSWCCA 171 held the District Court is not limited to the 2 year jurisdictional limit in the Local Court: at [23]; *Palmer* [2005] NSWCCA 349. The judge was not bound to accept the concession made by the prosecutor that it would have been appropriate for the matter to proceed in the Local Court: at [24]. If the judge is satisfied a term of imprisonment exceeding 2 years is required, the fact the prosecutor might have taken a different view would not appear to be a relevant consideration: at [25]. The judge expressly stated he took into account the Local Court jurisdictional limit and there was no obligation to indicate in any arithmetical sense how it affected sentence: at [26].

Special circumstances - rehabilitation

In ***Lulham*** [2016] NSWCCA 287 the CCA said that in dealing with rehabilitation, a judge would be entitled to find special circumstances if there is evidence that demonstrates that the offender has prospects of rehabilitation and that these prospects would be assisted if a longer non-parole period was allowed. It is not necessary that there exists significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful as opposed to a mere possibility: at [7], [8], [11], [65].

6. DISCOUNTS

Voluntary disclosure – Ellis discount to be quantified – CMB v Attorney General for NSW [2015] HCA 9 - s 23 Crimes (Sentencing Procedure) Act 1999

In ***Panetta*** [2016] NSWCCA 85 and ***Mooney*** [2016] NSWCCA 231 the CCA held it is an error of law not to quantify the discount allowed for voluntary disclosure under s 23(4) *Crimes (Sentencing Procedure) Act* 1999. In both of these cases the appellants had been sentenced prior to the High Court delivering judgment in *CMB v A-G for NSW* (2015) 243 A Crim R 282; [2015] HCA 9.

In ***Panetta*** [2016] NSWCCA 85 the primary judge had sentenced in proper accordance with then accepted authority that any *Ellis* discount should not be specified (*Borkowski* (2009) 195 A Crim R 1 at [32]). However, four days after sentence the High Court in *CMB v A-G for NSW* held that the general principle that there is to be no separate quantified discount for the "Ellis discount" for voluntary disclosure is no longer applicable: at [33].

The CCA affirmed that *CMB* held that the *Ellis* discount falls within s 23 *Crimes (Sentencing Procedure) Act*, in particular s 23(4), imposing a requirement to make explicit the nature and extent of any reduction of the sentence. That the High Court in *CMB* did not refer to s 23(4) does not affect this reasoning: at [33]-[34].

Failure to comply with s 23(4) is an error of law. Section 23(4) is in obligatory terms and it is not possible for this Court to correct the omission since the judge's reasons do not indicate which penalty "would otherwise have [been] imposed" as required by s 23(4)(b). Moreover, this is information to which the offender has a right and the subsection reflects important public policy considerations: at [36].

Section 23(6) states failure of a court to comply with s 23(4) "does not invalidate the sentence". However, s 101A permits the court to consider a failure to comply with it "in any appeal against sentence even if this Act declares that the failure to comply does not invalidate the sentence" (*Tuncbilek* [2004] NSWCCA 139): at [35].

In ***Mooney*** [2016] NSWCCA 231 the applicant, charged with two offences of aggravated sexual assault, had made voluntary admissions to the police. The CCA said that whatever

may have been the understanding earlier, it is now clear that the assistance the applicant provided by confessing to the offences constitutes assistance within s 23 (citing *CMB v Attorney General (NSW)*; ***Panetta*** [2016] NSWCCA 85 at [33]-[34]). The CCA held that the assistance given by the applicant was significant enough to entitle him to a discount under s 23(2). It is not apparent from the sentencing judge's reasons that the judge took s 23 into account, which leads to the conclusion that her Honour erred: at [46]-[47].

Guilty plea - mandatory consideration in reasons for judgment - whether omission always synonymous with legal error

In ***Lee*** [2016] NSWCCA 146 the CCA allowed the applicant's sentence appeal on the ground the sentencing judge failed to state that the applicant's guilty plea had been taken into account. The Crown had accepted the applicant was entitled to a 25% discount, however, there was no reference in the judge's reasons to any discount.

The CCA said that while it would be surprising if the judge in this case had not taken the pleas into account, due to the uncertainty as to whether the pleas were into account and a discount applied, the failure to make any reference to those matters constituted error: at [39].

The CCA stated:

. A sentencing judge "should explicitly state" a plea of guilty has been taken into account and how. Whether failure to do so will indicate the plea "was not given weight" falls into a different category: it will depend upon the circumstances of the case and content of the reasons. The issue is whether the omission is always synonymous with legal error: at [31]; *Thomson; Houlton* (2000) 49 NSWLR 383.

. The plea is a mandatory consideration (s 22 *Crimes* (*Sentencing Procedure) Act* 1999). If the appellate court can be satisfied the plea was taken into account and a discount allowed, failure to so state in the sentencing judgment may be an immaterial error. Where there is a real possibility it was not properly considered, failure to refer to it in the judgment is treated as a material error: at [37].

The CCA referred to 2 cases:

. *Convery* [2014] NSWCCA 93: no reference was made to the plea of guilty, however, the Court found it was taken into account because had the relevant discount been applied, the starting point of the sentence would have exceeded the maximum penalty for the offence.

. *Woodward* [2014] NSWCCA 205: the consequence of the failure to identify the discount was not addressed, the Court accepting that the sentence was manifestly excessive: at [39]-[40].

Guilty plea – delay – where attributed to mental illness – exceptional case – insufficient discount

In the following cases the CCA found the entering of the guilty plea was delayed due to the applicant's mental illness and that the discount for the plea was insufficient.

In ***Haines*** [2016] NSWCCA 90 (murder) a psychiatrist had advised the applicant's legal advisers that the defence of mental illness was available. The applicant entered a plea of not guilty at arraignment. Nine months later the psychiatrist changed his opinion stating the defence was not available. The applicant thereupon entered a plea of guilty five days later shortly before the day of the trial. The judge gave a discount of 15%. The CCA allowed the applicant's appeal and applied a discount of 25%. The judge erred in finding the applicant failed to plead guilty at the first reasonable opportunity: at [30], [33].

The CCA said that generally the reason for the delay in the plea is irrelevant. However, there may be exceptional cases where a maximum discount might properly be awarded: at [24] (*Borkowski* (2009) 195 A Crim R 1 at [32]). The principles have to be applied by reference to the "particular circumstances in any case" (*AB* [2011] NSWCCA 229 at [3)]. Previous exceptional cases include *Atkinson* [2014] NSWCCA 262 and *Villalon* [2015] NSWCCA 229: at [27]-[28].

In this case, the delay was for the purpose of awaiting psychiatric assessment. There was almost no delay once the psychiatrist changed his opinion. It can be inferred that had the psychiatrist been of that opinion from the outset, a guilty plea would have been entered when the applicant was first arraigned: [31]. In the exceptional circumstances the reason for the delay had to be taken into account. Further, the applicant had cooperated in confining the issues to be dealt with at the judge-alone trial to the testing of the psychiatric evidence. The effect of the latter is that the utilitarian value of the guilty plea, though only shortly before the trial date, remained high: at [32].

In ***Shine*** [2016] NSWCCA 149 (causing grievous bodily harm with intent to murder) the applicant entered a guilty plea 12 months after the date of arrest, six months after committal for trial and four months after receipt of a psychiatric report stating the defence of mental illness was available. The judge gave a discount of 20%. The CCA held the judge erred in finding the plea was entered "not at the earliest opportunity" and allowed a discount of 25%. The applicant's plea was delayed due to awaiting the outcome of a psychiatric evaluation and then conferring with counsel to consider his position. The delay of the plea can be attributed to the applicant's mental illness and could not be said to be unreasonable: at [95]; [110]-[111] (***Haines*** applied).

Guilty plea to murder – insufficient discount - circumstances in which offender indicated intention to plead guilty - s 22(1)(c) Crimes (Sentencing Procedure) Act 1999

In ***Barbieri*** [2016] NSWCCA 295 (murder) the applicant ought to have received a 15% discount rather than the 10% provided by the sentencing judge: at [98].

The applicant had stabbed a police officer acting in the execution of duties, an offence attracting mandatory life imprisonment (s 19B *Crimes Act*). An exception is where the offender has "significant cognitive impairment" (s 19B(3)(b)).

The applicant offered to plead guilty to manslaughter on the basis of substantial impairment under s 23A *Crimes Act*. The DPP rejected the offer. However, the DPP offered the concession that a life sentence was not mandated because the applicant had a "significant cognitive impairment" within s 19B(3)(b). The applicant thereupon pleaded guilty to murder on the first day of the trial.

The CCA referred to s 22(1)(c) *Crimes (Sentencing Procedure) Act 1999:*

> *s 22(1):"(1) In passing sentence for an offence on an offender who has pleaded guilty to the offence, a court must take into account:*
> *(a) the fact that the offender has pleaded guilty, and*
> *(b) when the offender pleaded guilty or indicated an intention to plead guilty, and*
> *(c) the circumstances in which the offender indicated an intention to plead guilty,*
> *and may accordingly impose a lesser penalty than it would otherwise have imposed."*

The CCA said that the reach of s 22(1)(c) has not been explored by the Court. Section 22 is susceptible of a less rigid interpretation than may appear to be derived from decisions such as *Thomson & Houlton* (2000) 49 NSWLR 383 and *Borkowski*: at [95].

In this case, the applicant was placed in a uniquely difficult position. He had psychiatric evidence on which to proffer a plea of guilty to manslaughter on the basis of substantial impairment but which was refused. Had the applicant gone to trial on that basis, and failed to persuade the jury of the defence of substantial impairment, he ran the risk of being subject to the mandatory life sentence (s 19B(1)). That is because he had no way of knowing whether the failure of the defence might be equated to failure to establish that he had a cognitive impairment. The evidence does not disclose when the prosecution indicated willingness to make the concession the applicant did suffer from a cognitive impairment (s 19B(3)) which was determinative in the applicant's decision to plead guilty. In these circumstances, a greater reduction in sentence was warranted: at [91]-[98].

Note: The Crown is seeking Special Leave to appeal to the High Court in this matter.

7. PARITY

Parity – aggregate sentences – indicative sentences may be a guide

In ***Thangavelautham*** [2016] NSWCCA 141 the applicant was sentenced for conspiracy to defraud and three other offences for which he received an aggregate sentence. A ground of appeal was disparity with the lesser aggregate sentence imposed upon a cooffender J, sentenced for the same conspiracy to defraud offence, another conspiracy offence and further offences on a Form 1.

The CCA allowed the applicant's appeal.

The CCA said that in considering the parity principle, it is necessary to have regard to the aggregate sentence. However, the indicative sentences may be a guide to whether the aggregate sentence is excessive: at [70]; *JM* [2014] NSWCCA 297.

Further, it is not a necessary condition to the application of the parity principle that charges be identical, despite the practical difficulties in comparing the sentence of participants in the same criminal enterprise charged with different crimes: at [71]; *Green & Quinn* (2011) 244 CLR 462.

The principle cannot be ignored in the case of aggregate sentences involving not only the same crimes but separate crimes which the persons whose sentences are being compared have committed: at [72].

In the circumstances, it was not inappropriate to compare the respective indicative sentences for the conspiracy. The applicant and J were convicted of the same conspiracy: at [73]. The Court went on to examine the charges that the applicant and J each faced, the facts and matters such as allowance for pleas of guilty and special circumstances.

The CCA concluded that comparing these sentences would have left the applicant objectively with a justifiable sense of grievance and that the disparity in sentence was not warranted: at [75]-[77]. The sentencing judge erred in making no reference to the sentence he imposed on J and did not consider the question of parity in that context: at [78].

8. MENTAL ILLNESS

Failure to provide reasons for rejecting conclusion of psychiatrist - failure to consider effect of mental illness on moral culpability – custodial sentence may weigh more heavily by reason of mental condition

In ***Shine*** [2016] NSWCCA 149 (wound with intent to murder) a psychiatrist found the applicant suffered a psychotic illness which affected his ability to recognise his actions were wrong.

The CCA allowed the applicant's appeal. The judge erred in finding, contrary to the psychiatric report, that the applicant knew what he was doing was wrong. If the sentencing judge was to reach a contrary conclusion on a critical matter, he should have set out his reasons and failure to do so was an error of law: at [70], [108], [115]; *Thomson & Houlton* (2000) 49 NSWLR 383 at [42]-[44]. The sentencing judge's reasons were inadequate: at [67].

It was also an error to fail to properly evaluate the extent to which the appellant's mental illness operated to reduce the sentence imposed. Attention was not given to the question of whether and in what way the applicant's moral culpability was reduced by his mental illness: at [74]-[77]; *Elturk* (2014) 239 A Crim R 584. The CCA found that the applicant's moral culpability was lessened by his mental illness. The psychiatrist's conclusion that the applicant did not know that what he was doing was wrong can be taken into account in assessing the gravity of his conduct: at [99]-[101].

It was also an error not to take into account that a custodial sentence may weigh more heavily on an applicant by reason of his or her mental condition: at [81] (*Hemsley* [2004] NSWCCA 228).

9. VICTIM IMPACT STATEMENT

Statement of support by victim for the applicant did not meet definition of Victim impact statement (VIS)

In ***AC*** [2016] NSWCCA 107 the judge was correct in refusing to take into account as a VIS a statement by the 12 year old victim supporting the applicant charged with persistent sexual abuse of the victim. The applicant and victim had been married in an Islamic ceremony.

Section 26 *Crimes (Sentencing Procedure) Act* defines a "victim impact statement" to mean "… a statement containing particulars of any personal harm suffered by the victim".

The statement did not disclose the victim had suffered any harm. The victim stated she was being caused harm through her "tears" and wanted her husband back to "have the happy life I deserve". It did not identify the personal harm the victim suffered including an ectopic pregnancy and miscarriage.

The statement could not be taken into account as a VIS under s 28. Section 30(3) states a "court may receive and consider a victim impact statement only if it is given in accordance with and complies with the requirements prescribed by or under this Division": at [42]-[45].

Child sexual assault – presumption of substantial risk of emotional harm – Victim Impact Statement to be taken into account to either confirm or contradict presumption

In ***Nelson*** [2016] NSWCCA 130 the applicant, aged 18-19, was sentenced for a number of counts child sexual assault offence against the female victims aged 13-14.

The sentencing judge erred in omitting any reference to the Victim Impact Statement (VIS) provided by one of the victims. There is a presumption that child sexual abuse causes a substantial risk of emotional harm: at [17]-[20]; *DBW* [2007] NSWCCA 236. The judge should be prepared to have regard to a VIS which may either confirm or contradict the presumption; and accept it in the absence of any challenge and rely upon it to support the presumptive position that significant harm was caused to the victim: at [20]-[22].

Victim impact statements (VIS) – "impact" not to be narrowly construed – whether any part "offensive"

In ***Turnbull (No.24) [2016] NSWSC 830 (Johnson J)*** the offender objected to parts of the VIS by the murder victim's wife (M) on the basis they went beyond what is the *"impact"* of the death of the victim and contained "offensive" content (Clause 10(6) *Crimes (Sentencing Procedure) Regulation 2010*). Parts of the VIS referred to M's perception concerning the offender's motivation in killing the victim and to the impact of the trial upon her. Strong terms were used: at [2]-[7].

Johnson J overruled the objections. *"Impact"* in s.26 *Crimes (Sentencing Procedure) Act 1999* (in the definition of *"victim impact statement"*) should not be construed narrowly. The impact of the death of a person on members of immediate family extends to the influence or effect of the death. It is not confined to immediate impact or to immediate issues of grief, but to the devastation that can be caused to the family. It can extend to thought processes which may involve strong feelings toward the perpetrator, and what (in their view) may have motivated the perpetrator. To exclude such matters would artificially confine the process by which VIS are made: at [8].

Whether any phrase contained in a VIS may be "offensive" (Clause 10(6) *Regulation*), it is necessary to bear in mind the context of the VIS including the facts of the case and related issues. Strong feelings may be expressed: at [9].

10. PARTICULAR OFFENCES

Offence committed in domestic setting -– general deterrence – forgiveness of victim of little assistance

In ***Eftithimiadis (No 2)*** [2016] NSWCCA 9 the applicant appealed against the sentence imposed for the offence of solicit to murder his wife. Dismissing the appeal, the CCA stated that general deterrence has significance in the present case. Too often partners in a domestic relationship resort to violence. The community cannot tolerate violence in any domestic setting, but the community's abhorrence of a crime intended to secure the custody of a young child by the murder of the mother needs to be expressed in the sentence to deter others: at [86].

Further, the victim's forgiveness cannot interfere with proper exercise of the sentencing discretion for the reason that a serious crime is a wrong committed against the community and the community is entitled to retribution: at [87]; *Palu* (2002) 134 A Crim R 174; *Efthimiadis* [2013] NSWCCA 276.

Domestic violence – individual vulnerability of victim – phrase "worst category" should be avoided - The Queen v Kilic [2016] HCA 48

In ***Drew*** [2016] NSWCCA 310 the applicant was sentenced to 12 years 6 months imprisonment, NPP 9 years 4 months after pleading guilty to wound with intent to cause GBH (s 33(1) *Crimes Act*) committed against his female partner. The sentence was the third highest sentence imposed under s 33(1) since the introduction of standard non-parole periods in 2003: at [92]. The judge found the offence fell into "the worst category of offences for offences of its kind": at [10].

The CCA held the judge erred in finding the victim was vulnerable under s 21A(2)(l) *Crimes (SP) Act* on the basis of generalisations concerning the culture of silence and ostracism in Aboriginal communities faced by the victim (see discussed above under 'Aggravating Factors'): at [3]-[4]; [8], [90]. The CCA also said that the use of the phrase "worst category" offence should now be avoided unless the finding is made in the context of imposing the maximum penalty, following ***The Queen v Kilic*** [2016] HCA 48 (handed down after the applicant had been sentenced): at [104]-[105]. However, although error had been established, no lesser sentence was warranted and the appeal was dismissed: at [128].

Individual vulnerability

Although the judge erred in her finding of vulnerability under s 21A(2)(l), a finding of the individual vulnerability of the victim in the more general sense of being under an impaired ability to avoid physical conflict with the applicant or to defend herself was open. It was a circumstance relevant to determining sentence, that because of the victim's emotional and intimate attachment to the applicant she was less likely than any other potential victim of his violence to try to avoid him: at [7]. That individual vulnerability had the same consequence for assessment of the objective seriousness of the offence as the judge's finding: at [5], [8].

"Worst category" of offence

Following ***The Queen v Kilic*** [2016] HCA 48 the phrase "worst category" should be avoided unless the finding is one made in the context of imposing the maximum penalty available for that offence: at [104]-[105]. However, it was open to the judge to make her finding of objective seriousness for these reasons:

. The serious nature of the victim's injuries; sustained to particularly vulnerable areas of the victim's body, resulting in the victim being airlifted to Sydney for treatment and in critical condition: at [106]

. Although the injuries did not result in any permanent disability or disfigurement, it is not necessary for the injuries to be of the "worst type" for an offence to fall into the "worst case" category. The nature of the offender's conduct can bring a case within that category (*Westerman* [2004] NSWCCA 161 at [17]): at [107].

. The attack was sustained; and there were previous threats made to the victim: at [109]. The attack was prolonged with the victim begging the applicant to stop, escaping and being attacked again: at [110].

. The offence occurred in the context of a domestic relationship marked by violence for some time; was committed in breach of an ADVO which increases objective seriousness: at [109]

. The offence is aggravated by the fact it occurred in the victim's home under s 21A(2)(eb) *Crimes (SP Act)* (***Jonson*** [2016] NSWCCA 286) . Although there is a degree of overlap with this factor and the fact that the offence occurred within a domestic relationship, it is nonetheless a relevant consideration in assessing the objective facts overall that the offence occurred in the victim's home: at [111].

. Although the applicant was heavily intoxicated, the judge found by his words uttered before and after the stabbings that he intended to inflict very serious injuries: at [112].

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

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

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

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

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

Dangerous driving cause grievous bodily harm – s 52A(3)(c) Crimes Act – applicant drove into back of group of cyclists - not a case of momentary inattention - speed and distance during which offender was inattentive aggravating factors - moral culpability not at lowest end of range

In ***Kerr*** [2016] NSWCCA 218 the applicant was sentenced for Dangerous driving cause grievous bodily harm (s 52A(3)(c) *Crimes Act*). The appellant ran into the back of a group of cyclists. The appellant was travelling within the speed limit at 70 kp/h. The appellant submitted he had been attentive up to the time of the accident and it was only momentary inattention which caused the accident.

The CCA held the judge was correct to find this was not a case of momentary inattention. Either the applicant did not see a group of seven cyclists because of inattention for at least 17 seconds, or, seeing them, he approached at a speed of 70 kp/h up until a point of momentary inattention, which caused the accident, making no attempt to slow down or avoid the cyclists. The latter finding would mean the applicant, being aware of the cyclists, did nothing to take account of them until momentary inattention led to the collision. The judge was justified in coming to the alternative conclusion: at [91]-[92].

The CCA also found that speed may be taken into account as an aggravating factor where it is excessive in light of the surrounding circumstances. Although the applicant was within the speed limit, driving at 70 kp/h in the near vicinity of a group of cyclists was excessive.

This not being a case of momentary inattention, then the distance travelled (300 metres over 17 seconds) without regard to the cyclists ahead is an aggravating factor and relevant to determining objective seriousness: at [94]-98].

It was open to the judge to conclude moral culpability was not at the lowest end of the range but was above the lowest end of the spectrum, although closer to that end than the higher end: at [99].

s 66C Crimes Act - Sexual intercourse with child – offences not "consensual" – not a "boyfriend/girlfriend" relationship

In ***Nelson*** [2016] NSWCCA 130 the CCA allowed a Crown appeal where the respondent received suspended sentences and good behaviour bonds for a number of counts of sexual intercourse without consent with a child (s 66C *Crimes Act*). The applicant was aged 18-19 and the three female victims aged 13-14. The victims lived in the same home of the respondent, his mother and his siblings.

There were material errors of principle in the way the sentencing judge approached the task of assessing the objective gravity of the offending: at [30].

The sentencing judge erred in referring to the sexual activities as "consensual." Lack of consent is not an element of such offences Threats or force in overcoming resistance would be an aggravating factor; however, mere lack of opposition is otherwise irrelevant and not a mitigating factor in child sexual assault: at [23]. Child sexual assault may have negative lifelong consequences. Where such consequences are supported by the victim impact statement, the sentencing court should generally treat the risk of such harm as having materialised: at [24]. Furthermore, this material tends to contradict the proposition that an age difference between a 13 year old girl and an 18 year old man is not significant: at [25].

It was also highly misleading to describe the offender and each victim as being in a "boyfriend/girlfriend" relationship. The fact that the sexual aspect of the relationship was unlawful was a critical factor and ought to have been taken into account: at [26]-[27].

Child sexual assault – historical offences

Flaherty [2016] NSWCCA 188 referred to *Magnuson* [2013] NSWCCA 50 which reviewed sentencing patterns applicable to sexual offences against children in the late 1970s and early 1980s. The CCA said it must be recognised that the review in *Magnuson* does not constitute a statement of principle regarded as binding. Rather, the product of the review is closer to a finding of fact, dependent upon the evidence adduced in the particular case. The judgment contains useful historical data for subsequent courts. In those circumstances, *Magnuson* shows that at the times relevant to the current offences, sentencing for child sexual offences was significantly more lenient than at present: at [64].

Fraud offences

A few notable fraud cases.

Insider trading: In ***Curtis (No 3)*** [2016] NSWSC 866 at [24] McCallum J referred to a number of authorities establishing it is wrong to regard white-collar crime as victimless. It causes loss (albeit unquantifiable) to individual traders and harm to the community by damaging the integrity of the market as a level playing field. Punishment by a sentence of imprisonment is a powerful deterrent to others in the case of white-collar crime, a field in which offending is often a choice freely made by well-educated people from privileged backgrounds, prompted by greed rather than poverty, mental illness or addiction: at [51].

Art dealing fraud: In ***Coles*** [2016] NSWCCA 32 (number of counts under ss 117, 125,178A-BA *Crimes Act*) a prominent art dealer dealt fraudulently with artworks held for clients worth around $6 million dollars. He received an aggregate sentence of 8 years 6 months, NPP 4

years 9 months. Objective seriousness was well above mid-range having been the result of a deliberate, well planned and systematic fraud committed over many years. The dishonest dealings were a "brazen breach" of his clients' trust. The applicant's motivation was greed and desire for financial gain. Subjective circumstances, including good character, did not attract leniency: at [13]-[14].

Common law conspiracy to defraud - Maximum penalty for substantive offence: In ***Thangavelautham*** [2016] NSWCCA 141 the applicant intended to skim 1000 credit cards but was foiled due to police intervention. He received an aggregate sentence of 11 years, NPP 8 years 3 months. The applicant submitted that although the penalty for common law offence of conspiracy was at large, the proper approach was to have regard to the penalty imposed for the substantive offence (*Auimatagi* [2011] NSWCCA 248; 216 A Crim R 179) - being obtain financial advantage by deception under s 192E *Crimes Act* which carries a maximum penalty of 10 years. The CCA held the sentence was not manifestly excessive. Although the attempt was foiled, it did not lessen the seriousness of what was intended to be achieved by the conspiracy, and did not require that the applicant be sentenced by reference to a single offence under s 192E. The element of concert may justify a more severe penalty for conspiracy than the penalty imposed for the substantive offence (*Hoar* (1981) 148 CLR 32): at [80]-[84].

Credit card fraud: In ***Thangavelautham*** the CCA, in the context of a conspiracy to defraud, referred to the need for general and specific deterrence for offences which have the potential to cause serious financial hardship and embarrassment to a large number of consumers and which also have the capacity to undermine confidence in this country's financial system: at [86].

Identity fraud: In ***Thangavelautham*** the CCA again noted the need for both personal and general deterrence, and imposition of severe punishment, in cases of identity fraud: at [37], [104]-[105].

Double punishment - offences of police pursuit and aggravated dangerous driving occasioning grievous bodily harm - elements in common between two offences

In ***Priovolidis*** [2016] NSWCCA 201 the applicant received separate sentences for Fail to stop whilst under police pursuit (s 51B(1) *Crimes Act*) and Aggravated dangerous driving cause grievous bodily harm (s 52A(4) *Crimes Act*). The s 52A(4) offence occurred very shortly after police stopped their pursuit of the applicant.

The applicant submitted the overlapping elements between the two offences meant the sentences involved double punishment as outlined in *Pearce* (1998) 194 CLR 610.

The CCA dismissed the appeal. The elements of dangerous driving and police pursuit are common to both offences, however, the existence of overlapping elements between the two offences does not itself engage the double punishment principle in *Pearce*. A closer examination of the facts is required: at [50]. The CCA said the critical issue is whether the applicant's driving is a single act or episode (as the applicant contended) or two separate and discrete acts giving rise to two separate offences (as the Crown contended) and found the charges and facts supported the Crown: at [51]-[54].

This is not a case like *Pearce* where the two charges arose out of a single episode (the appellant having broken into the victim's home and beaten him) or *Johnson* (2004) 205 ALR 346 (where two charges arose out of possession of one package of drugs): at [54].

Money laundering – judge's speculative consideration of intended use of money contemplated criminality significantly worse than encompassed in plea and Crown case.

In ***Islam*** [2016] NSWCCA 233 the applicant was sentenced for dealing with money intending that the money would become an instrument of crime, under s.400.3(1) *Criminal Code* (Cth). The money ($1 million) was found by airport Customs officers in the applicant's luggage as he was attempting to leave Australia. The Crown adopted the approach that the future intended use of the money, as an *"instrument of crime"*, was the removal of the funds from Australia without report contrary to s.53(1) *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)*.The Crown did not put its case on by reference to what may be done with the money once it reached overseas{ at [72].

However, the sentencing judge considered that the element of *"instrument of crime"* consisted of the future use of the money overseas in some *"criminal activity".* The CCA held the judge's finding was based upon the intended use of the money for a more serious unidentified criminal purpose than that which the Crown had relied upon at the sentencing hearing and had fallen into error: at [47], [73]-[74].

11. SENTENCE APPEALS

Appellant's sentence appeal allowed on errors identified by Crown in Crown appeal

In ***Flaherty*** [2016] NSWCCA 188 both the appellant and the Crown appealed against sentence. The CCA found none of the appellant's asserted errors were established but did find that errors identified by the Crown were. The Crown appeal against sentence was dismissed, however, the CCA allowed the appellant's appeal on the errors identified by the Crown.

The error pleaded by the Crown was not adopted on behalf of the appellant as a ground of his appeal. However, it would be a distortion of justice if this Court were to find the appellant had not been sentenced according to law but nevertheless refrain from intervention because the error has been exposed, not by the appellant, but the Crown. There is no reason why the statements in *Kentwell* (2014) 252 CLR 601 do not apply to sentencing affected by error of principle, by whomever the error is exposed.

Section 5D *Criminal Appeal Act* permits this Court (where error is shown) to vary the sentence imposed and substitute "such sentence as to [this] Court may seem proper", which parallels the re-sentencing discretion in s 6(3) following an appeal under s 5(1)(c). In criminal matters the Crown occupies a special position, not as a party-party litigant, but a litigant having an obligation of fairness to draw any identified error to the Court's attention, or to the offender, even if that opens the potential for a reduction in sentence (or, in the case of error in conviction, if it opens the potential for a re-trial or acquittal): at [90]-[96].

Kentwell (at [42]) made clear that, once error is established, it is not the role of this Court to assess the effect of the error on the outcome, but to recommence the sentencing process: at [97].

Procedural fairness denied - extent of discount applied for guilty plea - appellate court must re-exercise sentencing discretion where only discrete component affected by error

In ***Lehn*** [2016] NSWCCA 255 (five judge bench) there was denial of procedural fairness where the sentencing judge allowed a discount of only 20% for the applicant's plea of guilty entered at the earliest opportunity in the Local Court. The Crown conceded error given it had not submitted that anything less than 25% was appropriate, and the sentencing judge had not indicated an intention to grant a lesser discount: at [45].

The CCA considered whether the failure to accord procedural fairness in determining the discount vitiated the entire sentencing discretion or only a discrete component. The CCA found that the error was not related to only a discrete component of the sentencing discretion. The discount given for the guilty plea was directly connected to a sentencing purpose, namely, ensuring that the penalty reflected the objective gravity of the offence: at [64] (Bathurst CJ); [118] (Beazley P); [128] (Schmidt J).

The CCA considered where the error affects only a discrete component, whether the Court is required to re-exercise the sentencing discretion generally or only in respect of the component affected by error. The CCA held that where the discretion has miscarried in respect of a discrete component of the sentencing process, as where it has miscarried generally, it is the duty of the Court to exercise the discretion afresh: at [68]-[71], [75]-[78], [80]-[87] (Bathurst CJ); [118] (Beazley P); [125] (R A Hulme J); [128]-[129] (Schmidt J); [141]-[142] (Wilson J).

The CCA observed that an applicant in an appeal under s 5(1) need not demonstrate substantial injustice: at [77] - [79]; *Kentwell* (2014) 252 CLR 601. If there is an error affecting the exercise of the sentencing discretion, s 6(3) *Criminal Appeal Act 1912* requires the Court to form its own view of the appropriate sentence, although not necessarily to resentence. It is an essential pre-condition to resentencing that the Court forms a positive opinion that some other sentence is warranted in law: at [68], [73]-[74]; *Kentwell*; *Baxter* (2007) 173 A Crim R 284.

In this case, the CCA concluded a lesser sentence was warranted in law and allowed the applicant's appeal.

Zreika v R (2012) 223 A Crim R 460 - exception - where justice demands intervention

In ***White*** [2016] NSWCCA 190 the sentencing judge erred in finding an armed robbery was aggravated by being committed 'in company' under s 21A(2)(e) when defence counsel mistakenly made this concession. The judge also erred in failing to take delay into account when counsel omitted to draw delay on sentence to the judge's attention: at [98], [124].

Simpson J (Bathurst CJ agreeing) found that both errors are of the kind which an appeal court will normally not entertain, an appeal not being the occasion for the revision and reformulation of the case below: at [126] citing *Zreika* per Johnson J at [81]. However, the intervention of this Court is not precluded where justice demands that it intervene: at [127]. Johnson J in *Zreika* continued at [82]:

> "in rare circumstances, …. it may '*render a serious injustice*' if an offender was not able to correct the error in such a case. Appeal courts should be able to correct a miscarriage of justice, or serious injustice, in those clear and rare cases."

Simpson J concluded that in this case both errors came within the exception referred to by Johnson J in ***Zreika*** in [82] and was a case where justice does demand intervention: at [128].

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

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

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

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

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

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

That the victim was able to ride a jet ski and a trail bike after the assault did not contradict his VIS. He said he was unable to work and rarely left his house for "several months" but did not assert he had been unable to return to outdoor activities: at [46].

Fresh evidence – diagnosis of Alzheimer's disease

In ***Wright*** [2016] NSWCCA 122 the applicant had been sentenced on the basis that his health was declining. On appeal the applicant submitted there was fresh evidence he had been subsequently diagnosed with Alzheimer's disease. The CCA refused leave to appeal.

RA Hulme J set out the principles in relation to fresh evidence and their application at [71]-[73] (taken from the written submissions of senior counsel for the Applicant):

> "1. "Fresh evidence" is to be distinguished from "new evidence": fresh evidence is evidence which was not available or which could not have been obtained with reasonable diligence at the time of sentence; new evidence is evidence which was available but not used or which could have been obtained with reasonable diligence: *R v Goodwin* (1990) 51 A Crim R 328 at 330.
>
> 2. Generally, neither fresh evidence nor new evidence is received on appeal, as a reflection of the principle of finality: *Cornwell v R* [2015] NSWCCA 269 at [39]. Fresh evidence or new evidence will only be received where a miscarriage of justice is shown: *R v Fordham* (1997) 98 A Crim R 359 at 377-378; or where it is in the interests of justice: *Cornwell v R* at [59].
>
> 3. Evidence of events or circumstances that have arisen entirely since sentence is not received. However, evidence may be received of events or circumstances which existed at the time of

sentence but which were unknown, or the significance of which was unappreciated. The rationale for reception of the evidence is that the court proceeded on an erroneous view of the facts: *Khoury v R* at [110]-[115].

4. The determination to receive the evidence is discretionary. Caution must be exercised and a proper basis for admission of the evidence must be established: *Khoury v R* at [117].

5. Factors relevant to the determination to receive the evidence include the circumstances of, and any explanation for, the failure to produce the evidence at first instance and the potential significance of the evidence to the outcome: *Khoury v R* at [121]."

Three examples of the application of the principle concerning the receipt of evidence derived after sentencing were set out in *Turkmani* [2014] NSWCCA 186 per Beech-Jones J at [66]:

"(a) Where the offender was diagnosed with a condition after sentence but was affected by it at the time of sentence.

b) Where, although the symptoms of a condition may have been present, their significance was not appreciated at the time of sentencing.

c) Where a person was sentenced on the expectation that they would receive a particular level of medical care and attention in custody but they did not."

Although the evidence qualifies as fresh evidence that the Court *could* receive, the Court was not persuaded it should exercise its discretion to receive it because it is insufficient to warrant a fresh assessment of sentence. The applicant's advanced age, ill-health and that the his incarceration would be difficult already resulted in a lenient outcome: at [86].

NSW CCA CONVICTION APPEALS and OTHER CASES

1. EVIDENCE

ss 103, 104 – credibility - cross-examination of accused - prosecutor questioned accused as to prior convictions without leave of Court

In ***Tieu*** [2016] NSWCCA 111; (2016) 92 NSWLR 94 the CCA allowed the appellant's appeal on the basis that the trial judge failed to consider the application of s 103 (*Exception: cross-examination as to credibility*) and s 104 (*Cross-examination of defendant as to credibility)* and applied the incorrect test regarding cross-examination of the appellant: at [123]-[127], [136]-142].

A general summary of s 104 is given at [26]-[47], [135]-[136]:

A defendant cannot be cross-examined about a matter relevant to the assessment of the defendant's credibility unless the court grants leave: s 104(2).

Leave to cross-examine a defendant by the prosecutor is *not* required where it is directed to whether the defendant: is biased or has a motive to be untruthful; is unable to recall matters to which his/her evidence relates; or, has made a prior inconsistent statement: s 104(3).

Leave must not be given for cross-examination by the prosecutor under s 104(2) unless evidence adduced by the defendant has been admitted that: tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and is relevant solely or mainly to the witness's credibility: s 104(4).

Once it is accepted that leave is required, it is necessary for the prosecutor to fall outside the prohibition on the grant of leave under s 104(4), on the basis that each limb of the exception was engaged: at [34].

There are other considerations which operate with respect to a grant of leave:

> Section 192(2) prescribes certain matters to be taken into account in determining whether to give leave, including unfairness to a party or to a witness.
>
> Section 135 - The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to a party
>
> Section 136 - The court must refuse to admit evidence if its probative value is outweighed by the danger of unfair prejudice: at [36].

In this case, cross-examination by the prosecutor of the accused on his criminal record ensued without an express grant of leave or ruling from the trial judge addressing the requirements of ss 103 or 104.

The judge did not turn his mind to the test under s 103 - the trigger to the exception to the credibility rule requires a determination that the evidence "could substantially affect the assessment of the credibility of the witness": at [124]. The cross-examination contravened s 104(2). Evidence led by the appellant's counsel from the appellant came out in the presence of the jury raising an awkward problem but it had to be addressed in an orderly way: at [128].

The cross-examination having proceeded without leave, the first task was for the judge to make a determination as to leave and to make any such determination in accordance with the requirements of the Act: at [126], [136]-[139]. The judge also failed to consider s 192(2) or s 137: [143], [149].

Coincidence evidence – evidence to be considered cumulatively - s 98 Evidence Act

In ***Restricted Decision*** [2016] NSWCCA 174 the CCA allowed in part the Crown appeal against the trial judge's ruling that coincidence and tendency evidence was inadmissible. The Crown sought to rely on CCTV footage of robberies as tendency or coincidence for other counts. The CCA ruled the evidence was admissible as coincidence evidence but not as tendency evidence: at [86]-[92].

The following points were made regarding *coincidence evidence.*

Separate or cumulative consideration.

. The authorities for the admissibility of coincidence evidence are discussed: at [70]-[71].

. Further, it is necessary to give consideration to the evidence sought to be tendered as a whole, rather than separate consideration of each particular circumstance relied upon: at [72]-[73]; *MR* [2013] NSWCCA 236.

. The trial judge stated he considered the cumulative factor of the evidence, however, his conclusion was not supported by any analysis so that he erred in considering the individual similarities separately: at [75].

Considering the probative value of the evidence.

. In determining whether to admit evidence as coincidence evidence, regard must be had to all the evidence sought to be relied on by the party seeking to tender the coincidence evidence: at [71]; *DSJ* (2012) 84 NSWLR 758.

. The trial judge erred in failing to take into account other evidence relied upon by the Crown, relevant to whether the proposed coincidence evidence had significant probative value: at [75].

Whether the evidence should have been admitted as coincidence evidence.

. The task of the Court is discussed: at [70]-[71].

. "Significant probative value" in s 98(1)(b) means probative value which is "important" or "of consequence". The significance of the probative value must depend on the nature of the facts in issue to which the evidence is relevant and the significance or importance which that evidence may have in establishing those facts. Thus the evidence must be influential in the context of fact-finding: at [77]-[78]; applying *IMM v The Queen* [2016] HCA 14; 90 ALJR 529.

s 59, s 106 Evidence Act – Hearsay – "not admissible" means "not admissible over objection" – forensic decision by trial counsel not to object – s 106 does not require a mechanistic approach whereby every proposition contained in the evidence is put to the witness

In ***Perish; Perish & Lawton*** [2016] NSWCCA 89 the first appellant and others were charged with murder.

Section 59 - Second hand hearsay. At trial, counsel for the first appellant made a forensic decision not to object to the following second hand hearsay evidence: Witness C gave evidence Witness E told him the deceased died before he got to him and the first appellant had said, that "it didn't matter, that's how he would have ended up anyway".

The first appellant submitted a miscarriage of justice was occasioned by the admission of the evidence of Witness C; and that the trial judge erred in directing the jury that the second hand hearsay evidence was available as evidence of an admission by the first appellant.

The CCA rejected the submissions.

Admission of the second hand hearsay evidence. Trial counsel made a conscious decision not to object to the evidence and there was, objectively speaking, a rational basis for not objecting to the evidence. In the circumstances, admission of the evidence did not mean the first appellant lost the chance of an acquittal fairly open to him: at [254]-[259]; *TKWJ v The Queen* (2002) 212 CLR 124.

Trial judge's direction regarding the second hand hearsay evidence. There is a consistent line of authority that in s 59 *Evidence Act* the words "not admissible" mean "not admissible over objection". This is consistent with the adversarial nature of a trial. The words "not admissible" may be contrasted against the use of words of prohibition, "shall not be adduced", in s 118 and the obligation of the court to refuse to admit evidence if the preconditions in s 137 of the Act are met: at [261]-[269].

The trial judge still has an overriding obligation to ensure a fair trial according to law, to exclude inadmissible evidence or direct a jury not to take account of evidence if it would deny a fair trial: at [272]; *Pemble* (1971) 124 CLR 107.

Even if the decision not to object was not a rational forensic decision, and even if the judge's direction was erroneous, the first appellant did not lose a real chance of acquittal. The Crown did not place reliance on the evidence, there was a caution regarding its use and both parties contended the witness was unreliable: at [274]-[277]; *ARS* [2011] NSWCCA 266; *Poniris* [2014] NSWCCA 100.

Section 106 - ('Exception [to the credibility rule s 102]: rebutting denials by other evidence'). The third appellant submitted the recorded interview of Witness E, who was determined to be an unfavourable Crown witness, ought not to have been admitted into evidence (Ex AA). None of the trial counsel had objected to the tender of Ex AA. The third appellant submitted Ex AA was only admissible under s 106 but that the pre-requisites contained in s 106(1)(a) were not satisfied - namely the substance of the evidence be put to the witness; and the witness deny or not admit to the substance of the evidence.

The CCA rejected the submission.

> Given that Ex AA was admitted without objection, it was admissible irrespective of the provisions of s 106: at [475]; *WC* [2015] NSWCCA 5.
>
> In any event there was compliance with the provisions of s 106. Prior to the admission of Ex AA, Witness E had refused to acknowledge what he had said to the police when previously interviewed.
>
> *Section 106 does not require a mechanistic approach*. Section 106 does not require the adoption of a mechanistic approach, in which each and every proposition contained in the evidence in question is put to the witness. It requires only that the substance of the evidence be put. In the circumstances of the present case, that requirement was met: at [479]-[480].

Section 165(1)(d) Evidence Act – warnings – witness criminally concerned in events – warning not requested by parties – warning not required - miscarriage of justice

s 165(1)(d) *Evidence Act* 1995 states:

> "*This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:*
> *… (d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding,…"*

In ***Decision Restricted*** [2016] NSWCCA 44 applicant was convicted of murder after being tried jointly with co-accused. She gave evidence denying her involvement. The trial judge directed the jury that the appellant's evidence be treated with caution under s 165(1)(d). That no such warning had been requested by the parties was raised by the appellant's trial counsel in the jury's absence. The trial judge then gave the jury a second direction that it was the Crown submitting the appellant's evidence was unreliable and that he had "no view or opinion about that."

The CCA found that as the s 165 warning was not requested by the parties, s 165 was not engaged. However, that is not determinative, given the judge is empowered by s 165(5) to give a warning regardless of any request. The question is whether a warning was appropriate and, if not, whether it was productive of a miscarriage of justice: at [57].

The CCA found that a s 165 warning was not required. The appellant's evidence was only relevant to the first co-accused who had been discharged to be tried separately. The appellant's evidence was not relied upon by the Crown in relation to the other co-accused and thus should have been assessed by the jury in the ordinary way: at [69]-[71].

The CCA allowed the appeal and ordered a new trial. It cannot be said there was no miscarriage of justice: at [74]. The second direction did not remove the damaging aspects of

the earlier warning which gave the jury a variety of reasons why her evidence might be unreliable over and above what the jury might have considered when assessing her evidence. These further reasons were extraneous and irrelevant because this was not a "case in which the Crown relies upon the evidence of a witness who might reasonably be supposed to have been criminally concerned in the events … ". Rather, the Crown vigorously disputed her evidence: at [73].

Section 89 Evidence Act – right to silence – not impugned by Crown – relevance of silence of trial defence counsel

In ***Van der Vegt*** [2016] NSWCCA 279 the appellant was convicted of possess child abuse material (s 91H *Crimes Act*). After being cautioned, the appellant voluntarily told the police that discs found at his home during a police search contained adult pornographic material only. At trial, the Crown asked during cross-examination: "*You didn't at any time say to the police, "Look, I've never seen that DVD before in my life," did you?"* and in closing address told the jury: *"at no point in time did he say I've never seen that before, never seen that before, because he knew what was in them and he knew what was on them"*.

The appellant submitted the Crown impugned his right to silence contrary to s 89 *Evidence Act*. The CCA dismissed the appeal. Section 89 states:

> ***"s 89 Evidence of silence generally***
> *(1) ….. an inference unfavourable to a party must not be drawn from evidence that the party … failed or refused:*
> *(a) to answer one or more questions, or*
> *(b) to respond to a representation,*
> *put … by an investigating official … ..*
>
> *……..*
>
> *(4) In this section:*
>
> ***"inference"*** *includes:*
> *(a) an inference of consciousness of guilt, or*
> *(b) an inference relevant to a party's credibility. "*

The CCA held that applicant did not exercise his right to silence at all during the search warrant. Thus the Crown was not asking the jury to draw any inference from silence on the part of the applicant. It follows that the applicant's has not been wrongly impugned: at [40].

There was a continuous flow of discussion between police and the applicant by which the applicant exercised his right to silence neither completely (that is, by saying nothing at all about the contents of the safe), nor even partially (that is, by commenting on some items as they were produced, but not others). At no time during discussions did the applicant say he did not recognise any of the discs: at [40]-[42].

In particular, the Crown's closing address must be seen as being a submission that the applicant's version at trial (that he had never seen the discs before, and they must have been planted at his house) was not consistent with the version originally given to police (that the discs depicted adults, drawing no distinction between discs he recognised and discs he did not): at [43].

The fact that neither defence counsel nor the trial judge interpreted the Crown's final address adversely supports this interpretation. Silence of defence counsel also plays a role in finding

the Crown was drawing a distinction between two inconsistent versions, not between silence and a version subsequently given: at [46]-[47].

Sections 97, 101 Evidence Act – tendency evidence – risk of contamination or concoction

In ***Decision Restricted*** [2016] NSWCCA 78 the CCA discussed, in relation to tendency evidence under s 97 and s 101 *Evidence Act*, how consideration should be given to evidence of a risk of concoction or contamination in a sexual assault matter and how such evidence should be treated: at [87].

The Crown sought to rely on the evidence of other complainants and witnesses as tendency evidence in a multiple child sexual assault trial. The trial judge ruled the evidence was inadmissible as tendency evidence within s 101 *Evidence Act*; that the risk of concoction of contamination significantly reduced the probative value of the evidence. The CCA allowed the Crown appeal against the judge's ruling (s 5F *Criminal Appeal Act*).

A number of authorities were discussed: *Hughes* [2015] NSWCCA 330; *Jones* [2014] NSWCCA 280; *Mcintosh* [2015] NSWCCA 184; *IMM v The Queen* [2016] HCA 14.

Section 97

. If the possibility of concoction or contamination arises, it is a relevant consideration when determining whether evidence has significant probative value under s 97.

. The judge erred in not taking that matter into account when considering whether the tendency evidence had significant probative value; it was an error to determine the issue of concoction or contamination separately from the issue of whether the tendency evidence had significant probative value. The judge made a number of further errors: see at [100]-[108].

Section 101

. The difficulties with the correct test under s 101 were noted: see at [109]-[110].

. The test under s 101 is: "Does the evidence in this matter amount to a real risk of contamination or concoction so as to give rise to a competing inference sufficient to deprive the tendency evidence of significant probative value. Put another way, is there a competing inference to be drawn from the evidence such as to render the tendency evidence inherently implausible. In carrying out that evaluative exercise, questions of credibility, reliability and weight should be disregarded": at [111]; *Mcintosh* [2015] NSWCCA 184; *DJW* [2015] NSWCCA 164.

The CCA assessed the evidence and concluded it did not meet this test: at [114]. The evidence of the complainants and witnesses, for the purposes of s 97 and s 101, was of significant probative value and has not been eroded by inherent implausibility nor is there a competing inference sufficient to deprive the tendency evidence of its significant probative value: at [121].

There is evidence which would enable cross-examination at trial as to the possibility of contamination or concoction. However, those are matters for the jury not for a trial judge ruling as to the admissibility of evidence at commencement of trial. This is particularly so when such a ruling of necessity would involve making of findings as to the credibility and reliability of that evidence: at [121]; (*IMM v The Queen* [2016] HCA 14 - discussed at [105].

The probative value of the tendency evidence does substantially outweigh any prejudicial effect on the respondent (s 101(2)). Just because the tendency witnesses are related and had the opportunity to talk, does not create unfairness of the type envisaged by the section, particularly when that evidence can be tested at trial: at [122]. In considering s 101, it must be kept in mind that clear directions would remove any potential unfairness: at [123].

2. PROCEDURE

Trial by judge alone – appeal challenge to findings in judge-alone trial - whether verdict unreasonable - Filippou v The Queen [2015] HCA 29; 89 ALJR 776

In ***Gittany*** [2016] NSWCCA 182 (murder) the CCA discussed the task of the appellate court on an appeal from a trial by judge alone. The CCA rejected the challenges to the trial judge's findings (Grounds 1 and 2): the judge did not err in discounting expert evidence nor failed to properly assess the reliability of the evidence of an eyewitness. The appeal was dismissed.

In rejecting that the verdict was unreasonable (Ground 3), the CCA stated:

. The finding of guilt by a judge in a judge alone trial is to be equated "for all purposes" with a jury verdict (s 133(1) *Criminal Procedure Act 1986).* Thus the finding is not to be disturbed under the first limb of s 6(1) *Criminal Appeal Act* unless there is no or insufficient evidence to support the finding, or the finding is otherwise unreasonable, or the evidence was all the one way, or the judge has so misdirected himself or herself on a matter of law as to result in a miscarriage of justice": at [111]; citing *Filippou v The Queen* [2015] HCA 29; 89 ALJR 776 at [12].

. In most cases a doubt experienced by an appellate court will be a doubt the judge ought to have experienced. If the court is not satisfied the judge's advantage in seeing and hearing the evidence is capable of resolving the doubt, the appeal should be allowed: at [112].

. Nevertheless, the manner in which an appeal is run in this Court may demonstrate the unreasonableness of the ultimate finding of guilt depends upon identifiable errors by the trial judge: at [113].

. The manner in which an appeal under the first limb of s 6(1) is presented is of particular importance in considering the judgment of a trial judge sitting alone. A jury verdict is opaque in a way in which a judgment in a judge alone trial can never be, because s 133 *Criminal Procedure Act* requires the judge explain in reasons the law applied and findings of fact made: at [114].

. Having rejected the challenges to the judge's findings (Grounds 1 and 2), including the specific errors raised by the applicant, there is no basis for concluding the judgment was "unreasonable" in the sense identified in s 6(1): at [115].

Summing-up unbalanced – judge erred in asking why would Crown witness lie? – failure to put each defence case separately

In ***Decision Restricted*** [2016] NSWCCA 202 the CCA allowed the applicants' appeals against their conviction for murder. The CCA held that the judge erred in posing to the jury the rhetorical question, "Why would "I" (who was a Crown witness) lie"? Further, that the summing-up was unbalanced.

The Crown relied on evidence by I, who had driven one of the applicants to the scene, and who was given an indemnity against prosecution.

Inviting the jury to consider whether I had a reason to lie was to deprive the warning under s 165(1)(d) *Evidence Act* (that he was criminally concerned) of any force. It also gave the jury the impression that if they could not identify another reason why he would lie, they should accept his evidence: at [221]. There were several reasons why he might have lied (he was criminally involved, there was a reward offered, he had been indemnified) but it was not for the judge to invite the jury to speculate as to whether there was any other reason or to understand that they ought to believe him unless they were able to identify a reason why he would lie: at [264]. The judge impermissibly instructed the jury as to how they could reason towards a verdict of guilt for each applicant by accepting I's evidence: at [269].

A summing-up must summarise the competing cases of the Crown and the accused fairly and adequately, particularly where the conduct said to implicate each accused was so different. The judge did not summarise the defence cases individually, referring to the "defence case" as if there was only one. This may have led the jury to consider all the accused were in the same position notwithstanding the standard direction they needed to consider the case of each accused separately: at [224], [267]-[268]; *Towle* (1954) 72 WN 338.

The judge also made inappropriate remarks in raising a matter adverse to the accused which had not been relied on by the Crown: at [247].

Prosecutor's duty to call witness – error of judgment in failing to call witness

In ***Geitonia P/L v Inner West Council*** [2016] NSWCCA 186 the CCA held the prosecutor made an error of judgment in failing to call witness F because of his decision that F was unreliable. The prosecutor's decision was founded upon F's attempts to create false evidence. However, this conduct occurred more than three years before trial, F had not been conferenced by the prosecution and steps taken to contact F in 2015 fell short of what could have been done: at [78]. What F would have said could only be a matter of speculation and the prosecutor's decision was based on no more than intuition or suspicion: at [79].

It would have been sufficient for the prosecutor to call F so the appellants could cross-examine him and then, if necessary, be re-examined: at [80]; *Apostilides* (1984) 154 CLR 563. The prosecutor could also have questioned F as though he was being cross-examined about evidence by him unfavourable to the prosecution: at [81]; s 38 *Evidence Act*.

However, failure to call F did not result in a miscarriage of justice and the appeal was dismissed.

3. JURY

Defence appeal against discharge of whole jury – s 5G Criminal Appeal Act 1912 - a judge who is minded to discharge a juror or jury, over the opposition of one party, should stay his / her decision to allow an application to be made to this Court

In ***Barber; Zraika*** [2016] NSWCCA 125 (murder) the CCA dismissed an appeal by the defence against the trial judge's order discharging the jury. The applicants were two of four accused on trial for murder. Due to evidence being admissible only against Barber and Zraika, the jury considered first their verdicts for co-accused H and SA only. H was convicted of murder. The jury were unable to reach a verdict on SA. The judge discharged the jury

with respect to SA as well as Barber and Zraika. The applicants, who lost an opportunity for an acquittal following a lengthy trial, appealed the judge's order of discharge under s 5G(1) *Criminal Appeal Act 1912*.

The CCA held:

Error to discharge jury. Error in the sense of *House v The King* is established and leave to appeal is granted: at [24]. Barber and Zraik were entitled to have verdicts unless the trial had miscarried: at [29]. The trial judge was concerned about the length of the trial which had exceeded expectations and had the impression from the demeanour of the foreman and jury that "they had had enough": at [30]-[31]. The material before the Court did not warrant the discharge of the jury over the objection of the applicants: at [32].

Not an appropriate case in which to intervene: at [48]. After discharge, the jury may have considered extraneous material and it would be difficult to make the proper inquiries of jurors: at [43].

A judge should stay his / her decision to discharge a juror or jury, over the opposition of one party, to allow an application to be made to this Court. An application by Barber that the discharge be stayed was declined by the trial judge. The right to appeal the discharge or non-discharge of a juror or whole jury is to be dealt with expeditiously and a determination made "as soon as possible" (s 5G(2)). In all but exceptional cases, a judge who is minded to discharge a juror or the jury, over the opposition of one party, should stay his or her decision to allow an application to be made to this Court, if requested. There will be circumstances where the decision should be given effect immediately. However, those cases will be the exception to the rule: at [49].

Crown appeal against discharge of jury – s 5G Criminal Appeal Act 1912

In ***Lamb; Mason & Hill*** [2016] NSWCCA 135 the trial judge discharged two jurors following some communication between them and the accused. The trial judge then decided to discharge the remaining jurors on the basis that to continue the trial would lead to a substantial miscarriage of justice. However, the judge did not formally discharge the jury but granted a short adjournment to allow the Crown to make an application for leave under s 5G *Criminal Appeal Act*.

The CCA dismissed the Crown appeal.

The procedure adopted by the trial judge was appropriate - it permitted the parties to exercise their rights with regard to the decision, and permitted this Court to exercise its jurisdiction: at [35]; *Barber* [2016] NSWCCA 125 at [49].

Only *House v The King* error will suffice to overturn a decision of this kind: at [36]; *Barber* [2016] NSWCCA 125 at [24] (above). Merely because a different judge may have come to a different view does not mean that the test in *House v The King* for appellate review of the exercise of judicial discretion (or the making of an evaluative judgment) has been made out. The trial judge would have been in an immeasurably better position than this Court to judge the atmosphere in the courtroom at the time when the decision needed to be made: at [38]-[40]; *Crofts* (1996) 186 CLR 427 at p 458.

Majority verdicts – s 55F(2)(b) Jury Act 1977

Section 55F(2) *Jury Act 1977* states:

> "(2) A majority verdict may be returned by a jury in criminal proceedings if:

(a) a unanimous verdict has not been reached after the jurors have deliberated for a period of time (being not less than 8 hours) that the court considers reasonable having regard to the nature and complexity of the criminal proceedings, and

(b) the court is satisfied, after examination on oath of one or more of the jurors, that it is unlikely that the jurors will reach a unanimous verdict after further deliberation."

In ***Tabalbag*** [2016] NSWCCA 48 the appellant's conviction appeal was allowed on the basis the trial judge failed to comply with the requirements in s 55F(2)(b) *Jury Act*.

The judge failed to state in the terms of the *Jury Act* that he was satisfied it was unlikely the jurors would reach a unanimous verdict after further deliberation. Not only does the *Jury Act* require that state of satisfaction in the trial judge but it needs to have been arrived at "after examination on oath of one or more of the jurors". Although there was an examination of a juror, it could not be said the juror's response ("We'd like to think we're likely to get there" and "We'll hopefully get there") supported the proposition that it was unlikely that the jurors would reach a unanimous verdict after further deliberation. The requirement in s 55F(2)(b) for evidence to be taken from one or more jurors is not a mere procedural step and it did not occur in this case. It is only if the examination on oath produces a result consistent with the jury being unlikely to reach a unanimous verdict after further deliberation, that the next step can be taken, i.e. giving a majority verdict direction: at [59]-[62].

Moreover, the form in which the judge expressed the majority verdict direction was incorrect. The *Jury Act* requires the necessary state of satisfaction be experienced by the trial judge. The judge was not entitled to delegate to the jury the requirement to be so satisfied. The effect of directing the jury that "if it becomes clear that you are unable to reach unanimity" conferred on the jury a decision-making process which should be carried out by the trial judge: at [63].

Jury – discharge – jurors observed apparent threat to Crown witness by appellant

In ***Penfold*** [2016] NSWCCA 101 the trial judge erred in refusing to discharge the jury after the jury had seen the appellant raise his fist at a Crown witness. The trial judge watched the incident on camera footage and directed the jury: "*I do not see his action in any way being intimidatory or any other matter …. It may be interpreted that way, but I don't see it,*…"

The judge's direction was inadequate: at [27]. Its effect was to ignore the incident and put it entirely to one side. The fair-minded observer would also have noticed that in addition to the judge expressing his personal view about the camera footage he also allowed for the possibility it was intimidatory conduct. Given the proximity of the jury to the incident compared to the disadvantage of the judge interpreting footage recorded from a distant camera, the direction did little to dispel concern the fair-minded observer might have had about the jury being prejudiced against the appellant: at [24].

The exhortation by the judge to decide the case on the evidence and not to take into account anything observed in the court room was appropriate and would in many circumstances be sufficient to avoid the risk of a miscarriage of justice: (for example, *Gilbert* (2000) 201 CLR 414 at [31]). But leaving it open to the jury to consider the judge thought their concern could be valid tainted the affair, such that it cannot be concluded the fair-minded informed observer could think the jury might not have an impartial mind: at [25].

4. DEFENCES

Self-defence – ss 418, 419

In ***Decision Restricted*** [2016] NSWCCA 268 the judge's written directions to the jury on self-defence were held to be incorrect.

The judge directed that, in regards to the appellant, "the Crown had to prove beyond reasonable doubt that he did not act in self-defence either by proving that the accused did not believe the action he took was necessary or by proving that there was no reasonable grounds for holding that particular belief" (emphasis added). The CCA held the directions incorrectly referenced the old common law position (*Zecevic v DPP* (1987) 162 CLR 645 at 661).

The directions did not correctly set out for the jury the second of the conditions necessary for self-defence under s 418(2) *Crimes Act*, that is, that "the Crown must prove beyond reasonable doubt the appellant did not believe his conduct was necessary in order to defend himself *or* that the conduct was not a reasonable response to the circumstances as he perceived them (a question requiring an objective assessment of the proportionality of that response to the situation which the appellant actually believed he faced):" at [8].

The CCA held the misdirection amounted to a substantial miscarriage of justice. The conviction was quashed and new trial ordered.

Self-defence – ss 418, 419, 421 – erroneous directions as to manslaughter by excessive self-defence

In ***Decision Restricted*** [2016] NSWCCA 275 the appellant at trial was found by jury to be not guilty of murder but guilty of manslaughter. The relevant provisions of the *Crimes Act* state:

> ***"418 Self-defence--when available***
> *(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.*
> *(2) A person carries out conduct in self-defence if .. the person believes the conduct is necessary:*
> *(a) to defend himself or herself or another person, .*
> *……..*
> *and the conduct is a reasonable response in the circumstances as he or she perceives them."*
>
> ***419 Self-defence--onus of proof***
> *In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.*
>
> ***421 Self-defence--excessive force that inflicts death***
> *(1) This section applies if:*
> *(a) the person uses force that involves the infliction of death, and*
> *(b) the conduct is not a reasonable response in the circumstances as he or she perceives them,*
> *but the person believes the conduct is necessary:*
> *(c) to defend himself or herself or another person, …….*
> *……..*
> *(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally*

responsible for manslaughter.

The trial judge had given written directions to the jury in relation to s 418(2) as follows**:**

> *"Para [5] For the Crown to eliminate self-defence as an issue, it must prove beyond reasonable doubt one or the other of these matters. It does not have to prove both of them. If you decide that the Crown has failed to prove at least one of them beyond reasonable doubt, then the appropriate verdict is one of "not guilty of murder" but you need to consider the alternative verdict of manslaughter."*

By majority (Button J, Campbell J agreeing with additional comments, Hoeben CJ at CL dissenting) allowed the appeal and ordered a new trial on manslaughter.

The judge's directions were incorrect. From s 418(2), in the circumstances of this trial, self-defence had two relevant "legs". The first leg was the question of whether the applicant believed her conduct was necessary to defend herself. The second leg was whether that conduct was a reasonable response in the circumstances as the applicant perceived them: at [95]-[97].

If the Crown failed on *both* legs of self-defence, the applicant was entitled to a complete acquittal; that is, a verdict of not guilty of murder and not guilty of manslaughter: see s 418(1), the statement of onus in s 419, and s 421 *Crimes Act* (which only plays a role if the Crown succeeds in satisfying the jury beyond reasonable doubt the conduct was *not* a reasonable response in the circumstances as the accused perceived them).

The last sentence of the judge's directions (in para [5] above) is to the contrary effect: it instructed the jury that even if *"the Crown has failed to prove at least one of [the legs of self-defence] beyond reasonable doubt, then the appropriate verdict is one of "not guilty of murder" but you need to consider the alternative verdict of manslaughter"*: at [98]-[100]. The last sentence provided an erroneous pathway to the jury, whereby they could have come to a verdict of guilty of manslaughter (by way of excessive self-defence). If not satisfied the Crown had succeeded with regard to the first leg, and not satisfied that the Crown had succeeded with regard to the second leg, the appropriate verdict was simply not guilty of murder *and* not guilty of manslaughter: at [109].

This is an error with regard to a fundamental aspect of the structural interaction between complete self-defence (leading to a complete acquittal) and excessive self-defence (leading to a verdict of not guilty of murder but guilty of manslaughter): at [101].

In the particular context of the inter-relationship between homicide and self-defence, sequential reasoning (by the jury) generally is of significance. The significance of the erroneous sequence contained in the judge's written direction is heightened: see at [106]-[108].

Sections 418 and 42, and the whole of the provisions relating to self-defence in Div 3, Part 11 *Crimes Act*, constitute an overarching statutory regime. The sections constitute, and must be explained to the jury as, an integrated conceptual whole: at [112].

Criminal Code (Cth) ss 10.2, 13.3 - Duress

In ***Mirzazadeh*** [2016] NSWCCA 65 the CCA allowed the applicant's appeal against conviction for a Commonwealth drug offence. The trial judge applied the wrong test in determining that duress should not be left to the jury.

Section 10.2 of the *Criminal Code (Cth)* states the three limbs which must be proved for the defence of duress. Under s 13.3 the burden of proof for defences is an evidential burden only. The Code states: "*evidential burden*, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist": s 13.3(6).

The trial judge failed to apply s 13.3 and the decision in *The Queen v Khazaal* [2012] HCA 26; 246 CLR 610 to the evidence of duress. In accordance with *Khazaal*, s 13.3 merely requires consideration of whether the defendant is able to point to "no more than slender evidence" that suggests a reasonable possibility of each of the requirements of duress under s 10.2: at [55].

By not applying s 13.3 (and relying on other authority) the judge applied too stringent a test. By challenging in a number of respects the evidence of the applicant as to his process of reasoning, the judge went beyond what was required by s 10.2 and trespassed in part, on the function to be performed by the jury. *Khazaal* also required the judge to treat the evidence at its most favourable to the applicant, yet by setting out inferences favourable to the Crown his Honour did not do so: at [65].

The evidence at trial discharged the slender evidentiary burden required under s 13.3: at [70].

5. PARTICULAR OFFENCES

Sexual intercourse without consent – s 61HA(3)(c) Crimes Act – reasonable grounds for believing the other person consents

In ***Decision Restricted*** [2016] NSWCCA 52 the appellant's appeal against his conviction for sexual intercourse without consent was allowed.

Under s 61HA(3) *Crimes Act*, knowledge as to lack of consent can be established where: (a) A knows the other person does not consent; or (b) A is reckless as to whether the other person consents; or (c) A has no reasonable grounds for believing that the other person consents.

The trial judge erred in directing the jury to "consider whether such a belief [that the complainant was not consenting] was a reasonable one". The direction suggested the jury ask what a reasonable person might have concluded about consent.

The CCA said that the test under s 61HA(3)(c) is whether the Crown has proved *the accused* "has no reasonable grounds for believing" that there was consent. The correct test is what the accused himself might have believed in all the circumstances; and then to test that belief by asking whether there might have been reasonable grounds for it: at [155].

The test is not completely objective. Rather, the subjective element - that is, the claim to having an honest belief in consent - is to be tested against whether there are reasonable grounds to hold it. Whether that belief amounts to a guilty state of mind depends on whether the accused honestly held it, and if so, whether he had reasonable grounds for that belief: at [148]; citing *O'Sullivan & Ors* [2012] NSWCCA 45.

"Grievous bodily harm" – meaning - conviction quashed

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

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

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

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

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

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

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

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

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

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

Verdicts of acquittal set aside

The victim died in a house fire allegedly caused by the ignition of a ring burner used for drug manufacture. The Crown case was that the respondent engaged in a joint criminal enterprise with the victim to manufacture a large commercial quantity of methylamphetamine and was

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

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

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

"Malicious" in s 18(2)(a) Crimes Act

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

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

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

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

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

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

> "Every act done of malice … and without lawful cause or excuse … shall be taken to have been done maliciously."

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

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

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

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

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

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

NOTE: The High Court has granted Special Leave to Appeal in this matter.

"Manufacture" drugs – extraction of cocaine from sheets of paper - s 24 Drug Misuse and Trafficking Act 1985 (DMTA)

In ***Bucic*** [2016] NSWCCA 297 the process of extracting cocaine from sheets of paper via evaporation and dissolution was said to constitute an offence of "manufacture" drugs within s 24 *DMTA*. This was despite the process would extract the cocaine and there was no difference in the form of the cocaine which was ultimately extracted.

The CCA said that reading the relevant definitions of 'manufacture' in s 3 and s 6 into the operative part of s 24, the section reads:- "a person… who knowingly takes any step in the process of extracting… a prohibited drug is guilty of an offence". Adapting the words of the substantive provision as amplified in this way, the evidence was capable of proving beyond reasonable doubt the offender had knowingly taken a step in the process of extracting cocaine from the paper: at [24]; *Kelly v The Queen* (2004) 218 CLR 216 at [103].

To be guilty of an offence under s 24, it is not necessary the person charged is responsible for all necessary steps in the manufacture of the drug from acquisition of raw materials to realisation of the drug as a "marketable commodity". Participation in *any* one of the various steps along the continuum of a process of manufacture is sufficient: at [42].

"Manufacture" drugs – knowledge of precursor not sufficient to satisfy mental element for manufacture prohibited drug - s 24 Drug Misuse and Trafficking Act 1985 (DMTA)

In ***Siafakis*** [2016] NSWCCA 100 the applicant was convicted of various drug offences including one count of knowingly taking part in the manufacture of a prohibited drug, namely, 3,4-Methylenedioxy-phenyl-2-propanone - also known as 'MDP2P' (s 24 *DMTA*). MDP2P is both a precursor and a prohibited drug under the DMTA.

The CCA (by majority) allowed the appeal and quashed the conviction on the MDP2P count. The judge erred in accepting that the mental element in s 24(2) could be satisfied by the applicant's knowledge that a precursor was being manufactured.

There were 2 possible ways for the Crown to prove the mental element created by s 24(2):

1. by proving that the person knew s/ he was manufacturing a prohibited drug (although without necessarily knowing precisely which prohibited drug was being manufactured); or
2. by proving that the person knew s/he was manufacturing MDP2P specifically: at [27]-[28].

As to 1. the judge applied an erroneous test: at [52]. The intention which must be proved is an intention of doing an act of the defined kind which constitutes the offence. The mental element in s 24(2) is an intention of manufacturing a substance which was a prohibited drug (as opposed to an intention to manufacture *some* substance, which happened as it turned out to be a prohibited drug: at [38]. This reasoning and degree of specificity in the mental element of the offence has been confirmed in relation to s 23(2) DMTA (*CWW* (1993) 32 NSWLR 348) and s 25(2) DMTA (*Yousef Jidah* [2014] NSWCCA 270): see discussed at [37]-[43].

As to 2. the Crown did not prove beyond reasonable doubt the appellant knew it was MDP2P which was being manufactured. While the primary judge found that the appellant was aware of the "fundamental steps" in manufacturing the 'ketone' (the precursor), there is no reasoning linking that finding with the finding that the appellant was aware of the particular ketone being manufactured. The CCA noted the lack of direct evidence the appellant knew the substance was MDP2P specifically, his lack of knowledge of chemistry, and the way in which the term "ketone" was used by the participants: at [69]-[72].

Aggravated detain for advantage s 86(2)(a) Crimes Act – "Recklessness" as to lack of consent to being detained

For 'Aggravated detain for advantage' under s 86(2)(a) *Crimes Act* the Crown is required to prove, inter alia, that the complainant did not consent to being detained; and the accused knew the complainant did not consent to the detention.

In ***Castle*** [2016] NSWCCA 148 the CCA held that the element of knowledge of lack of consent under s 86(2)(a) can be satisfied by recklessness: at [32], [63], [130]; *DMC* (2002) 137 A Crim R 246. The CCA (Bathurst CJ, Hall J agreeing) stated:

. Recklessness under s 86 can be satisfied by a knowing disregard of an appreciated risk that the person was not consenting to being detained: at [55]; [63]; [130].

. Recklessness under s 86 can be satisfied where the accused has an "intention to commit the act willy-nilly not caring whether the victim consents or not": at [48]-[50]; [60]; [130]; *Banditt v The Queen* (2005) 224 CLR 262 following *Morgan* [1976] AC 182.

. The proper test under s 86 is "advertent recklessness" as to lack of consent (as where the accused person realised there was a possibility that the complainant was not consenting but went ahead anyway whether or not he was consenting): at [47], [97]. It is not the reaction of some notional reasonable man but the state of mind of the accused which the jury is obliged to consider. Recklessness under s 86(1) is to be taken as meaning subjective recklessness: at [63]; *Banditt* (2005) 224 CLR 262.

. Recklessness under s 86 will not be satisfied where the accused did not turn his mind to the question in circumstances where lack of consent would be obvious if the accused had

considered it: at [38]-[39], [97]. It is the state of mind of the accused, not an objective standard (or "inadvertent recklessness") that must be considered: at [39]; [63], [96]; *Banditt v The Queen* (2005) 224 CLR 262; *Tolmie* (1995) 37 NSWLR 660 distinguished.

In the present case the trial judge erred in importing an objective test in her directions to the jury. However, taking the directions as a whole in the circumstances of this case the appeal was dismissed: at [54]-[55].

Affray – elements – conviction quashed

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

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

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

Common law conspiracy to defraud – credit card skimming – offence made out whether conspiracy was to on-sell the customers' data once harvested or to use data personally

In ***Thangavelautham*** [2016] NSWCCA 141 the CCA dismissed the applicant's appeal against his conviction for conspiracy to defraud where he was the ringleader of a plan with his co-offenders to "skim" approximately 1000 credit cards. The police intervened after only four cards were skimmed. The Crown particulars were that the applicant "by deception, dishonestly obtaining the property belonging to another person/persons, namely the credit card particulars and PIN's and/or obtaining a financial advantage or causing a financial disadvantage".

The CCA, referring to the authorities, held that the offence was made out regardless of whether the conspiracy was to on-sell the customers' data once harvested or to use the data personally:

. Conspiracy to defraud is made out where the conspirators have an intention to defraud; an expectation that the offence of fraud will be committed is not enough: at [18].

. It involves an agreement to bring on a situation which will prejudice or imperil the legal rights or interests of others. It is sufficient that the conspirators intend to take some advantage to themselves by putting another's property at risk or depriving a person of a lawful opportunity to obtain or protect property: at [23].

. Taking credit card information puts at risk the accounts to which the cards relate to by providing means for unauthorised access to those accounts. Where this risk was produced either by selling the data or using it personally, and by means that were admittedly deceptive and dishonest, the offence of conspiracy to defraud was made out: at [22], [24].

Dishonestly obtain financial advantage by deception – s 192B(1)(b) Crimes Act

In ***Moore*** [2016] NSWCCA 260 the CCA quashed the appellant's conviction for obtain financial advantage by deception. The appellant opened a bank savings account which he overdrew by over $2.1 million over many months. The appellant had made no representations to the bank that had any causative role in the funds being made available to him: at [24], [59].

As there was no deception in the appellant's conduct, the Crown relied on the expanded statutory notion of "deception" in s 192B(1)(b), which states that deception includes "conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make": at [44]. However, the CCA held that the bank account's terms and conditions "authorised" the appellant to request funds to be lent to him in excess of his account balance. Thus the appellant's conduct did not come within s 192B(1)(b): at [36]-[46].

There was some consideration of whether s 192B(1)(b) deems there to be a deception, or whether some form of deception as otherwise understood in the law of criminal fraud is also required: see at [51]-[53] (Fagan J); [59]-[62] (N Adams J).

Child prostitution – ss 91D(1)(a), 91F Crimes Act

In ***Glover*** [2016] NSWCCA 316 the appellant had clients to his home or a motel room to see two girls aged 14-15. The CCA held there was no duplicity or double jeopardy where the appellant had been convicted of offences under s 91D(1)(a) and 91F *Crimes Act*. Section 91D(1)(a) states it is an offence for "any person who by any means, causes or induces a child to participate in an act of child prostitution". Section 91F states any person "who is capable of exercising lawful control over premises at which a child participates in an act of child prostitution" commits an offence.

There was no duplicity. Duplicity arises where one count on an indictment charges two or more separate offences. Both charges were substantiated by proof of a course of conduct (count 1) or a continuing situation and relationship (count 2) which endured over more than a year. Each provision was capable of being infringed, in a single offence, by such a course of conduct or continuing situation. Neither the Crown case on count 1 or count 2 constituted an attempt to prove any more than one infringement of each of the sections respectively: at [35]-[36].

There is no double jeopardy. The appellant has been convicted of two offences in which a common circumstance is the use of his home for child prostitution, in one case as a particular of actively causing the prostitution and in the other case as an offence in itself. It is not a matter which has given rise to double jeopardy which would have justified a stay of prosecution on one of the charges as an abuse of process or which affects the validity of the convictions on both counts. It is a matter to be taken into account on sentence by way of careful regard for the totality of criminality involved: at [54].

6. OTHER CASES

Onus and standard of proof – written directions in form of question trail as to whether there is a 'reasonable possibility' – written directions overriding oral directions

In ***Hadchiti*** [2016] NSWCCA 63, a murder trial, the trial judge gave the jury written directions asking eight questions (referred to as a "question trail") repeatedly asking: "Is there a "reasonable possibility…?" in relation to issues of intention, provocation and self-defence. The issues were framed in terms of whether the Crown had established a matter beyond reasonable doubt, however, the questions largely did not refer to 'beyond reasonable doubt' at all: at [31].

The CCA allowed the appellant's appeal. The written directions reversed the onus of proof. The 'reasonable possibility' established by the evidence was one that the Crown had to eliminate or remove beyond reasonable doubt: at [106]. That possibility was not linked to a statement that it was for the Crown to remove or eliminate it, amounting to a material departure from the established formulation of the standard of proof: at [107]. The effect of the written directions was to deny the appellant the right to assess whether the Crown had established the issues beyond reasonable doubt: at [152]. (The Judicial Commission has noted the Criminal Trials Bench Book accordingly.[1])

Moore [2016] NSWCCA 185 (murder) was a similar case. However, the use of "is there a reasonable possibility" did not reverse the onus of proof. The trial judge gave written directions containing the question "Is there a reasonable possibility …" the appellant held the necessary belief for self-defence. The CCA (by majority) dismissed the appeal. Posing a question in terms of "is there a reasonable possibility" is not by itself wrong. ***Hadchiti*** can be understood in the context of it being "the repetition of the … terminology throughout a written direction" - not evident in the present case: at [114]. The jury were constantly reminded of the Crown bearing the onus of proof beyond reasonable doubt: at [49], [127]. Asking whether there is a reasonable possibility that the accused *did* hold an exculpatory belief does not distract attention from either the burden or standard of proof; it is consistent with both: at [43].

The CCA in ***Moore*** also found that the question "is there a reasonable possibility" can be answered only "Yes" or "No". There is no middle-ground answer of "Not sure": at [36], [129].

Written directions. Regardless of whether a question trail is erroneous, the force of the written directions which the jury has in the jury room will be likely to override the jury's recollection of oral directions: ***Hadchiti*** at [52], [70]; *Justins* (2010) 79 NSWLR 544 at [242]. Whether an error causes a trial to miscarry will depend on circumstances such as the nature of the error, the jury given the written directions at the end of the oral directions and a transcript and exhibits being in the jury room: ***Moore*** at [53]-[60].

Prior sexual history – "fear" and "anxiety" do not come within s 293(4)(c) Criminal Procedure Act 1986

[1] Judicial Commission NSW, *Criminal Trials Bench Book*. The Bench Book states at "[3-600] Suggested direction — where the defence has no onus [*Where the Crown must negative a defence/issue to the criminal standard a long accepted direction which can be given (after making clear that the Crown must prove all ingredients of the charge beyond reasonable doubt) is as follows:* "Has the Crown eliminated any reasonable possibility that the accused acted in self-defence/ was extremely provoked/ acted under duress, etc?"]". At "[3-603] Notes - 3. If a judge gives the jury written directions it is essential that the directions make clear where the legal onus is on the Crown to eliminate any reasonable possibility: *Hadchiti* [2016] NSWCCA 63 at [106], [112]."

Evidence of a sexual assault complainant's prior sexual history is inadmissible, however, an exception is where:

> " (i) … the accused person does not concede the sexual intercourse so alleged, and
>
> (ii) the evidence is relevant to whether the presence of ….. injury is attributable to the sexual intercourse alleged to have been had by the accused person,
>
> … and if the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission." (s 293(4)(c*) Criminal Procedure Act* 1986)

In ***GP*** [2016] NSWCCA 150 the CCA held that there is no principle that evidence of a complainant crying or exhibiting anxiety when describing an alleged sexual assault years after the event is a relevant "injury" which was "attributable to the sexual intercourse alleged to have been had by the accused person": at [34].

The complainant MP was sexually assaulted aged 3-4. MP reported the offences at 10 years old and at that time also alleged the applicant's cousin NP had committed sexual offences against her. The appellant applied to cross-examine the complainant about her prior sexual history involving NP under s 293(4)(c) submitting her fear and anxiety when telling her family of the offences was "injury". The application was correctly refused by the trial judge.

Other cases could not be relied upon:- *JAD* [2012] NSWCCA 73 where the complainant's psychological condition (voices, suffering symptoms of depression and suicidal ideation) was a "disease or injury" under s 293(4)(c)(ii) bears no relationship to the limited evidence of MP's distress when she disclosed the assault to her family.

7. BAIL ACT 2013 CASES

Bail decisions of single Supreme Court justices rarely of precedential value

In ***DPP (NSW) v Zaiter*** [2016] NSWCCA 247 the Court noted that judgments of single judges of the Supreme Court presiding in the Common Law Division Bails List do not often lay down anything of precedential value for "bail authorities" (as defined in the *Bail Act*). The doctrine of precedent is concerned with decisions on points of law (*Fleming v White; Gamble v Hiles* [1981] 2 NSWLR 719 at 725-6) A decision by a single judge of the Supreme Court regarding, for example, delay as a decisive factor in determining whether cause has been shown under s 16A is no more than the view taken by that particular judge in the circumstances of the particular case at hand: at [30]-[33].

Show cause offence – matters which have been found to or may satisfy 'show cause' requirement

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

The CCA refused the bail application. The applicant's personal circumstances of his partner expecting a child, his grandmother's death, mother's ill-health and intention to plead not

guilty were not sufficient to show cause why his continued detention is not justified: at [6]-[7], [10].

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

. *Kangas* [2015] NSWSC 1294 (McCallum J): opportunity to enter residential rehabilitation relevant to a show cause requirement.

. *Boyd* [2015] NSWSC 1065 (Hamill J): combination of factors could operate to satisfy the show cause requirement including prospect of a very lengthy period on remand before trial.

. *Mawad* [2015] NSWSC 1237 (Hamill J): applicant having children with severe disabilities in need of special care (hearing impairment and autism spectrum disorder) was sufficient in combination with other matters to satisfy show cause requirement.

. *McCormack* [2015] NSWCCA 221: show cause requirement satisfied by not certain accused would be sentenced to full time custody, being a man of 65 years of age with no prior history of violent offending and with ill- health.

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

. Length of time that an accused is likely to spend in custody if bail is refused.

. Need for the accused to be free to prepare for their appearance in court or to obtain legal advice.

. Prospect applicant suffering from a life threatening or even only a significant medical condition that could not adequately be managed in correctional facility.

Detention application by Crown granted – "Principle of restraint" - Nothing in Bail Act supports proposition that any court or other bail authority must exercise a "principle of restraint" – ss 16A, 16B, 50

In ***Marcus*** [2016] NSWCCA 237 the applicant was charged with shoot with intent to murder and other offences. The respondent was granted conditional bail in the Supreme Court. The Crown made a detention application to the CCA under s 50 *Bail Act*. The CCA granted the detention application and revoked the respondent's bail.

As the respondent has been charged with a serious indictable offence and the use of a firearm was involved (s 16B(1)(f)), the "show cause" requirement under s 16A applies. The respondent relied upon various matters to satisfy the show cause requirement: at [12]-[13].

In particular, the respondent argued that the "principle of restraint" applied when the CCA was hearing a Detention Application after a Release Application which had already been heard by a single judge of the Supreme Court. The respondent relied on various authorities including the Court of Appeal in *Roberts & Lardner* (1997) 97 A Crim R 456 at 459 where Mason P stated: "[it is] obviously a matter in which an appellate court should exercise restraint having regard to the fact that a trial judge will be in a much better position than the appellate court to weigh up the various factors supporting or negating an application for bail."

The CCA held the respondent's submission that there is a "principle of restraint" and that it ought to be applied by this Court is wrong and must be rejected: at [28]. These cases are of historical interest only. The practice of bail applications to the Supreme Court being removed into the Court of Appeal where the application arose from a matter pending in the District or Supreme Courts was firmly laid to rest in *DPP (NSW) v Tikomaimaleya* [2015] NSWCA 83.

Moreover, the CCA has jurisdiction by virtue of s 68 *Bail Act* and is required to determine applications on a de novo basis by reference to the relevant provisions of the Act. Nothing in the *Bail Act* supports the proposition that any court or other bail authority must exercise a "principle of restraint": at [27].

The CCA rejected also the argument as to the 'double jeopardy' which an accused faces in respect of a detention application such that the restraint exercised should be similar to that adopted by the Courts in relation to Crown appeals against sentence. That contention is also based upon an historical legal notion that no longer exists. The "double jeopardy" principle in the CCA's determination of Crown appeals against sentence pursuant to s 5D *Criminal Appeal Act* 1912 (NSW) was abolished viz s 68A *Crimes (Appeal and Review) Act 2001* (NSW) in 2009: at [29].

The CCA concluded that the show cause requirement was not satisfied given the seriousness of the offending, the delay, and the strength of the identification evidence: at [31]-[32].

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

Table 1 — Severity Appeals (2000–2015)

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

Table 2 — Crown Appeals (2000–2015)

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

* We have confirmed with the Judicial Commission that 2016 final statistics are not available.

ANNEXURE A

HIGH COURT CASES 2016

1. GW v The Queen [2016] HCA 6. Appeal from ACT.
s 13 Evidence Act – Evidence Act is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn. Held: Appeal allowed.

The High Court held that the *Evidence Act* is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn: at [46], [56].

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

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

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

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

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

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

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

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

3. IMM v The Queen **[2016] HCA 14*.*** Appeal from NT.
ss 97(1)(b), 101 and 137 Evidence Act – Shamouil (2006) 66 NSWLR 228 approved - Dupas [2012] VSCA 328 disapproved. Held: Appeal allowed. Convictions quashed. New trial ordered.

The Court approved the NSW CCA in *Shamouil* (2006) 66 NSWLR 228: that in determining the probative value of evidence for the purposes of ss 97(1)(b) and 137, a trial judge should assume the

jury will accept the evidence and thus should not have regard to the credibility or reliability of the evidence: at [51]-[58]. The Court disapproved *Dupas* [2012] VSCA 328 which requires a judge to make a determination concerning reliability: at [52]-[54].

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

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

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

***4. Mok v The Queen* [2016] HCA 13**. Appeal from NSW CA.
s 89(4) Service and Execution of Process Act 1992 - creates federal offence of escape lawful custody – did not require proof appellant was an "inmate". Held: Appeal dismissed.

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

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

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

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

***5. Zaburoni v The Queen* [2016] HCA 12**. Appeal from Qld.
s 317 Criminal Code (Qld) – unlawfully transmit disease with intent – proof of actual intention required. Held: Appeal allowed.

The appellant was convicted of unlawfully transmit disease with intent under s 317 *Criminal Code* (Qld). The appellant had unprotected sex with his girlfriend over a 21 month period knowing he was HIV positive.

Allowing the appeal, the High Court held the evidence was not capable of establishing the appellant intended to transmit HIV. Section 317(b) requires proof of actual intent and intention requires there be a "directing of the mind, having a purpose or design": at [7]-[8]. The prosecution was required to prove beyond reasonable doubt that when the appellant had unprotected sexual intercourse his object or purpose was to transmit HIV: at [19]. Awareness of the risk of conduct resulting in harm, without more, does not support an inference the person intended to produce the harm. Apart from this conduct there was no evidence supporting the inference the appellant had that intention: at [42]-[44].

***6. Nguyen v The Queen* [2016] HCA 17**. Appeal from NSW CCA.
Irrelevant when assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of murder – De Simoni (1981) 147 CLR 383 principle not applicable. Held: Appeal dismissed.

The High Court dismissed the appellant's appeal. The NSW CCA was correct to hold that the sentencing judge erred in her assessment of the objective gravity of the offence of manslaughter. It is irrelevant in assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of murder. It is likely to result in an assessment of the relative gravity of the subject offence which ill-accords with its objective gravity relative to other cases of that kind. The comparison resulted in the judge concluding the objective gravity of the manslaughter ranked lower in the range of gravity of offences of manslaughter than in fact it did: at [43], [59]-[60].

The High Court held it was not correct for the NSW CCA to find that the sentencing judge breached the *De Simoni* principle when, in assessing the objective gravity of manslaughter, she contrasted it with what would have been the gravity of the offence if the appellant had committed murder. *De Simoni* prohibits a judge taking into account, as an aggravating circumstance, a circumstance which would render the offence a different more serious offence. It says nothing about taking into account the absence of a circumstance which, if present, would render the offence a different offence. This is irrelevant to, and likely to distort, the assessment of objective gravity: at [28]-[29], [60].

***7. Alqudsi v The Queen* [2016] HCA 24**. Appeal from NSW.
Section 80 Constitution does prevent a trial by judge alone for Commonwealth trials. Held: Motion dismissed.

The High Court considered whether provisions for trial by judge alone under s.132 *Criminal Procedure Act* 1986 (NSW) are inconsistent with s 80 *Constitution* and therefore unavailable for trials for Commonwealth offences. The Court held that s 80 does prevent a trial by judge alone for Commonwealth trials, upholding *Brown* (1986) 160 CLR 171.

***8. Betts v The Queen* [2016] HCA 25**. Appeal from NSW.
Principles governing admission of new evidence on appeal apply to the re-sentencing discretion. Held: Appeal dismissed.

In re-exercising its sentencing discretion under s 6(3) *Criminal Appeal Act*, the NSW CCA declined to take into account new material (psychiatric and a psychotherapist report) presented by the applicant.

The High Court dismissed the applicant's appeal. As a general rule, the appellate court's assessment of whether some other sentence is warranted in law is made on the material before the sentencing court and any relevant evidence of the offender's progress towards rehabilitation since the sentence hearing. An offender is not permitted to run a new and different case. An appellate court has the flexibility to receive new evidence where necessary to avoid a miscarriage of justice: at [2], [11]; *Kentwell v The Queen* (2014) 252 CLR 601.

The principles governing the admission of new evidence on the appeal apply to the re-sentencing discretion: at [8], [13]-[14]; *Deng* (2007) 176 A Crim R 1 at [45] approved.

Forensic choices are made at the sentence hearing, including material relied upon in mitigation and whether facts are to be contested. Exceptional cases apart, the question of whether some other sentence is warranted in law is answered by consideration of material before the sentencing court and relevant post-sentence conduct: at [14].

The appellant's forensic choice at sentence was to accept responsibility for the offences: at [59]. The general rule applied because the new evidence was inconsistent with the case run in the sentencing court and its rejection did not cause justice to miscarry: at [2], [59].

***9. Graham v The Queen* [2016] HCA 27**. Appeal from QLD.
'*Consensual confrontation'. Held*: Appeal dismissed.

The appellant was convicted of attempted murder and unlawful wounding following a confrontation between the appellant and victim, members of rival bikie gangs. During address to the jury the Crown referred to the idea of a 'consensual confrontation' – suggesting the jury would be satisfied that everything preceding the firing of the gun, including the brandishing of the knife, was part of a 'consensual posturing' and therefore there was no assault that could form the basis for self-defence.

Under the *Criminal Code (QLD)* all forms of self-defence require an assault. An assault may include a threat and must be non-consensual. The Crown sought to negate the idea of an assault by suggesting that the actions of the victim were all part of a 'consensual confrontation.'

The High Court dismissed the appeal. It was surprising that the Crown raised such an idea but it was clearly not considered an issue by either defence counsel or the trial judge: at [34].

***10. Miller; Smith; Presley v The Queen* [2016] HCA 30**. Appeal from SA.
High Court declined to reconsider principle of liability under extended joint criminal enterprise as stated in McAuliffe (1995) 183 CLR 108. Held: Appeal dismissed.

The primary issue was whether Australia should follow the English case of *Jogee* in relation to criminal liability for murder under principles of extended joint criminal enterprise (JCE). This would involve reconsidering the principle stated in *McAuliffe* (1995) 183 CLR 108 that a person is guilty of murder if they are a party to an agreement to commit an offence and foresee the possibility that death or GBH might be occasioned by a co-offender acting with murderous intent.

Jogee [2016] UKSC 8; [2016] 2 All ER 1 held that the doctrine of extended JCE should no longer be a basis for criminal liability. The English courts were wrong to hold that foresight of the possibility of the offence was a lower test for a secondary party than a perpetrator. This departed from the well-established rule that the mental element required of a secondary party is an intention to assist or encourage the principal to commit the crime. The correct rule is intention to encourage or assist - foresight as to possibility is simply evidence of that intention.

The High Court declined to reconsider and overturn principle of liability under extended JCE as stated in *McAuliffe:* at [39]-[43].

However, the Court allowed the appeal and remitted the matter to the CCA to reconsider whether the convictions were unreasonable in view of the evidence. The NSW CCA failed to properly consider the effect of intoxication of offenders on the question of agreement and their foresight as to the possibility of murder: at [78]-[82].

Of particular note is the dissenting judgment of Gageler J in which His Honour held the doctrine of extended joint criminal enterprise to be anomalous and unjust and has created a problem of over-criminalisation. His Honour would reopen and overrule *McAuliffe*. His Honour stated: "Where personal liberty is at stake, no less than where constitutional issues are in play, I have no doubt that it

is better that this Court be "ultimately right" than that it be "persistently wrong" **(***Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350 [65]): at [128]-[129].

11. NH, Jakaj; Zefi & Stakaj v DPP (SA) **[2016] HCA 33**. Appeal from SA.
No power to look behind the verdicts delivered by the foreperson of the jury. *Held*: Appeal allowed.

The High Court allowed the appellants' appeals from the SASCFC. The Appellants were jointly charged with murder. The jury foreperson announced that the jury found the appellants not guilty of murder and guilty of manslaughter. It transpired that the foreperson mistakenly answered "yes" to the question whether at least 10 members of jury had agreed on verdict of not guilty murder, when this was not the case. Section 57 *Juries Act* 1927 (SA) states a jury who have found a person not guilty of an offence may find the person guilty of an alternative uncharged offence. It also provides that a verdict of not guilty requires a majority of at least 10 jurors.

The High Court held that the Full Court did not have power to look behind the verdicts delivered by the foreperson of the jury, in open court in the sight and hearing of the other jurors without any dissent or action by them, to quash the appellants' acquittals of murder and convictions of manslaughter: at [4]-[5], [75].

The High Court further held there was no power to receive affidavits from a jury to impeach a verdict:at [5], [82]. However, where a verdict is not delivered in sight and hearing of one or more jurors, evidence may be adduced that they did not agree with it. The Court has power to correct a verdict in such a case, as well as in cases of fraud, intimidation, or where a juror lacks capacity to understand proceedings: at [82].

12. Sio v The Queen **[2016] HCA 32**. Appeal from NSW.
Hearsay evidence – error in taking compendious approach to s 65 Evidence Act – "likely" to be reliable. Held: Appeal allowed.

The High Court allowed the appellant's appeal and quashed his conviction for armed robbery with wounding. The trial judge erred in admitting hearsay evidence by F, who stabbed the victim, that the appellant had given F the knife. F refused to give evidence at the appellant's trial. The prosecution tendered two electronically recorded interviews and statements by F in which he named the appellant as the person who had given him the knife, which the trial judge admitted under s 65 *Evidence Act* 1995.

The High Court held:

. The trial judge and CCA erred in taking a compendious approach to s 65(2) whereby an overall impression was formed of the general reliability of F's statements and then holding all of them were admissible: at [58]-[61], [72].

. Section 65(2) proceeds upon the assumption that a party is seeking to prove a particular fact relevant to an issue. It then requires the identification of the particular representation to be adduced in evidence as proof of that fact. The circumstances in which that representation was made may then be considered in order to determine whether the conditions of admissibility are met. This process must be observed in relation to each relevant fact sought to be proved by tendering evidence under s 65: at [57].

. Section 65(2)(d)(ii) requires a trial judge to be positively satisfied that the representation which is tendered was made in circumstances that make it likely to be reliable notwithstanding its hearsay character: at [64]. The evaluation of the likely reliability of F's assertions must be made having regard to the circumstance that F was an accomplice. Accomplice evidence has long been recognised as less than inherently reliable: at [65]. F's statements that the appellant gave him the knife was to minimise his culpability by maximising the appellant's: at [68]. While it was a statement against F's interests, it did not follow the statement was "likely"

to be reliable under s 65(2)(d)(ii): at [68]. It was not open to the trial judge to be satisfied positively of the likely reliability of F's assertion: at [73].

13. The Queen v Baden Clay **[2016] HCA 35**. Crown appeal from QCA.
Appellant convicted of Murder - Court of Appeal substituted verdict of Manslaughter – High Court restored verdict of guilty for Murder. Held: Crown appeal allowed.

The appellant was convicted by jury of the murder of his wife. At trial, the respondent gave evidence denying he had fought with his wife, killed her and disposed of her body. On appeal to the QCA, the respondent submitted for the first time that the prosecution had not excluded the hypothesis that he had struck his wife during a struggle and she had died in some way that did not involve intent to kill or cause grievous bodily harm: at [3]. Accepting the submission, the QCA substituted manslaughter for the murder conviction on the bases that the evidence did not allow the jury to be satisfied beyond reasonable doubt the respondent intended either to kill her, or to cause her grievous bodily harm.

The High Court allowed the Crown's appeal and restored the verdict of guilty of Murder. The respondent's evidence did not support the hypothesis held by the QCA. The hypothesis on which the QCA acted was not available on the evidence: at [5]. The QCA's conclusion was mere speculation or conjecture: at [55]. The QCA was wrong to conclude that it was unreasonable for the jury to find on the whole of the evidence that the deceased's death at the respondent's hands was intentional: at [5].

It is wrong, as occurred before the QCA and again to this Court, "to contend for a hypothesis which was not put to the jury for tactical reasons, which is directly contrary to evidence of the respondent at trial, which is directly contrary to the way in which the respondent's counsel conducted the defence and which, in response to direct questions from the trial judge, was expressly rejected by the respondent's counsel": at [63]. The hypothesis identified by the QCA was not open. Once that hypothesis is rejected, no other hypothesis consistent with guilt of manslaughter, but innocence of murder, has ever been identified at trial, before the QCA or in this Court: at [63].

A court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty: at [66]; *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487. The Court explained why the jury were entitled reasonably to regard the whole of the evidence as satisfying them beyond reasonable doubt that the respondent acted with intent to kill or cause grievous bodily harm when he killed his wife and so reject the alternative verdict of manslaughter: at [64]. The Court discussed the evidence before the jury including motive and post-offence conduct: at [71]-[76].

14. Lyons v The Queen **[2016] HCA 38**. Appeal from QCA.
Appellant, who was deaf, summonsed for jury service – Appellant required assistance of Auslan interpreters to participate as juror – Appellant excluded from jury panel – Exclusion was not unlawful discrimination. Held: Appeal dismissed.

The High Court held it was not unlawful discrimination to exclude the Appellant, who was profoundly deaf, from a jury panel. The appellant would have required two Auslan interpreters. The Deputy Registrar properly excluded the appellant from jury service under s 4(3)(1) *Jury Act* 1995 (Qld): "a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror" is not eligible for jury service; correctly found there was no provision under Act to administer an oath to an interpreter for a juror and that an interpreter was not permitted to be present in the jury room during deliberations: at [38].

The common law has long required the jury be kept separate. The presence of a person other than a juror in the jury room during deliberations is an incurable irregularity regardless of whether the person takes any part in the deliberations: at [33].

Note s 14A(b) *Jury Act* 1977 (NSW) states a person has good cause to be exempted or excused from jury service if "some disability associated with that person would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror".

15. Castle; Bucca v The Queen **[2016] HCA 46**. Appeal from SA CCA.
Fairness of summing-up – judicial comment. Held: Appeal allowed.

The appellant C submitted her case was not fairly left for the jury's consideration. Further, that the trial judge in summing-up made favourable comments with respect to the reliability of a critical Crown witness M, by commenting M was a "fairly decent woman."

The High Court held that the SA CCA did not err in holding C's defence was fairly left for the jury's consideration. The submission the jury would have taken from the tenor of the summing-up that C's evidence should be summarily rejected is to be assessed taking into account the summing-up as a whole and the conduct of the parties: at [63]. How the judge structures the summing-up and the extent to which the judge reminds the jury of the evidence is a matter for individual judgment and will reflect the complexity of the issues, and the length and conduct of the case**.** The essential requirements of the summing-up include that the judge must fairly put the accused's case, an obligation which extends to explaining any basis upon which the jury might properly return a verdict in the accused's favour: at [59]; *Pemble v The Queen* (1971) 124 CLR 107. C was competently represented by counsel. The trial judge reminded the jury of C's case by reference to the submissions put by counsel: at [63].

It would have been preferable for the judge not to have expressed the view that M was a "fairly decent woman": at [62]. A trial judge may comment on the evidence provided s/he makes clear the determination of the facts is entirely within the jury's province. Unless there is a need for comment the wise course will often be not to do so. Where the judge chooses to comment, the comment must exhibit a judicial balance so that the jury is not deprived 'of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence': at [61]; *B v The Queen* (1992) 175 CLR 599 at 605.

The appeal was allowed on the basis that the CCA erred in its approach to the proviso: at [63], [68].

16. Kilic The Queen **[2016] HCA 48**. Appeal from Vic CA.
Sentence - expression of "worst category" of offence should be avoided – current sentencing practices – comparable cases – sentencing domestic violence. Held: Crown appeal allowed.

The respondent had been sentenced for intentionally causing serious injury to his female partner who was pregnant by dousing her with petrol and setting her alight. The High Court allowed the Crown appeal against the Victorian Court of Appeal's reduction of original sentence.

The High Court held the Court of Appeal erred in using the expression "worst category" of offence: at [42]. An offence falling within the "worst category is one so grave it warrants imposition of the maximum prescribed penalty: at [18]. Where, however, an offence is not so grave as to warrant imposition of the maximum penalty – such as in this case - a sentencing judge is bound to consider where the facts of the offence and offender lie on the "spectrum" from the least serious to the worst category. It is confusing and likely to lead to error to describe an offence which does not warrant the maximum penalty as being "within the worst category". It is a practice which should be avoided: at [19]. Instead, in cases where relevant to do so, judges should state in full whether the offence is or is not so grave as to warrant the maximum penalty: at [20].

In its consideration of "current sentencing practices", the Court of Appeal impermissibly treated sentences imposed in a few comparable cases as defining the sentencing range. Cases of intentionally causing serious injury by fire are not common. The few cases mentioned by the parties could not properly be regarded as providing a sentencing pattern: at [24]-[25].

The High Court observed that current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations: at [21].

***17. RP v The Queen* [2016] HCA 53**. Appeal from NSW CCA.
Doli incapax – appellant's intellectual limitations – clear evidence needed to demonstrate offender had requisite understanding. Held: Appeal allowed. Verdicts of acquittal entered.

The appellant (then aged 11-12) was convicted by a judge alone of two counts of 'sexual intercourse with a child under 10' (counts 2 and 3) and one count of 'aggravated indecent assault' (count 4) committed against his younger brother. The trial judge had accepted counsel's concession that if count 2 was proved beyond reasonable doubt then counts 3 and 4 were also made out. On appeal, the NSW CCA upheld the convictions on counts 2 and 3; and quashed the conviction on Count 4: *RP* [2015] NSWCCA 215.

The High Court allowed the appellant's appeal and quashed the convictions on counts 2 and 3.

The presumption of doli incapax (that a child under 14 lacks the capacity to be criminally responsible for his or her acts - discussed at [8]-[12]) may be rebutted by evidence the child knew it was morally wrong to engage in the conduct. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that s/he knew it was morally wrong. This directs attention to the child's education and the environment in which the child has been raised**:** at [9]; *C (A Minor) v DPP* [1996] AC 1; *BP* [2006] NSWCCA 172. Rebutting the presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children nearly 14 years old will not: at [12].

The presumption was not rebutted. The conclusion of the CCA that the appellant knew his conduct was seriously wrong was based on inferences he knew his brother was not consenting and he must have observed his brother's distress. It cannot be assumed a child of 11 understands the infliction of hurt and distress on a younger sibling involves serious wrongdoing. While the evidence of the appellant's intellectual limitations does not preclude a finding the presumption had been rebutted, it does point to the need for clear evidence that, despite those limitations, he possessed the requisite understanding: at [32]-[35]. There was no evidence about the environment in which the appellant had been raised or as to his moral development. It was not open to conclude the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood his conduct was seriously wrong in a moral sense: at [36].

High Court Reserved Cases

Aubrey (MA) v The Queen
[2017] HCATrans 13. Appeal from NSWCCA.
Crimes Act 1900 (NSW) s 35 – Appellant alleged to have transmitted HIV to complainant – appellant had tested positive for HIV but told complainant he did not have HIV – appellant convicted of maliciously inflicting grievous bodily harm s 35(1)(b) – Whether recklessness under s 5 requires foresight of probability of harm rather than mere advertence to a possibility – Whether offence under s 35(1)(b) requires direct force applied violently to body of victim.

Hughes v The Queen
[2017] HCATrans 16. Appeal from NSW CCA.
Tendency evidence *Evidence Act* 1995 (NSW) s 97 – Appellant convicted on 10 charges of having sexual intercourse with, and committing acts of indecency on, girls under 16 – tendency evidence admitted to prove appellant had tendency to have a sexual interest in, and engage in sexual conduct with, female children under 16 –– Whether "significant probative value" – Whether "underlying unity" or "pattern of conduct" required to establish significant probative value – Whether evidence of tendency sufficiently specific to reach threshold of significant probative value – Whether CCA erred in rejecting approach taken to tendency evidence in *Velkoski v R* [2014] VSCA 121.

Rizeq v The State of Western Australia
[2017] HCATrans 11; [2017] HCATrans12. Appeal from WACA.
Constitutional law – s 80 Constitution – Appellant resident of NSW – convicted of possess drugs with intent to sell or supply under *Misuse of Drugs Act* 1981 (WA) s 6(1)(a) – convicted by majority pursuant to *Criminal Procedure Act* 2004 (WA) s 114(2) – Whether s 6(1)(a) applied directly or was "picked up" by *Judiciary Act* 1903 (Cth) s 79(1) – Whether s 6(1)(a) was an offence against "law of the Commonwealth" where District Court exercising federal diversity jurisdiction – Whether *Criminal Procedure Act* 2004 (WA) s 114(2) did not apply to trial because s 80 Constitution required unanimous verdict.

Perara-Cathcart v The Queen
[2016] HCATrans 269. Appeal from SA CCA.
Application of proviso – Where CCA held evidence of the appellant's drug possession relevant and correctly admitted – Where majority held trial Judge failed to provide satisfactory directions regarding permissible use of evidence of appellant's drug possession – Whether proviso correctly applied.

Prior v Mole
[2016] HCATrans 294. Appeal from NTCA.
Appellant spat on police officer whilst in "protective custody" under *Police Administration Act* 1979 (NT) s 128 – appellant convicted of assault – Construction of s 128(1) *Police Administration Act* 1979 (NT) – Exercise of power under s 128(1) – Whether power conditioned on both formation of belief based on reasonable grounds that person likely to commit offence because of intoxication and existence of facts sufficient to induce that state of mind in reasonable police officer – Whether appellant's apprehension lawful.

High Court Special Leave Cases

IL v The Queen
[2016] HCATrans 279. Appeal from NSW CCA.
Constructive murder – Joint criminal enterprise – death caused by ignition of ring burner by deceased –evidence showed deceased and appellant involved in production of prohibited drugs – Whether ignition of ring burner within criminal enterprise – Whether subjective foresight of risk of death required for charge of constructive murder where act causing death must be malicious – Whether malice established by recklessness – Proper approach to requirement in *Crimes Act* 1900 that act or omission be malicious.

The Queen v Dickman
[2016] HCATrans 283. Appeal from VSCA.
s 137 *Evidence Act* 2008 (Vic) - Identification Evidence – Respondent identified using photoboard – Court of Appeal by majority quashed conviction and ordered new trial – Whether Court of Appeal erred in holding trial judge erred in failing to exercise discretion to exclude identification evidence – Whether reliability relevant factor in determining probative value of evidence under s 137.

The Queen v Dookheea
[2016] HCATrans 284. Appeal from VSCA.
Jury directions – Respondent convicted murder – trial judge explained to jury "beyond reasonable doubt" – Court of Appeal allowed appeal and ordered re-trial – Whether erred in finding trial judge impermissibly explained meaning of "beyond reasonable doubt" – Whether direction which includes instruction that prosecution does not have to prove case beyond doubt but beyond reasonable doubt constitutes misdirection – Whether substantial miscarriage of justice.

DPP v Dalgliesh (A Pseudonym)
[2016] HCATrans 312. Appeal from VSCA.
Whether s 5(2)(b) *Sentencing Act* 1991 (Vic) alters common law principle of "instinctive synthesis" in sentencing – respondent convicted of several counts of incest and sexual penetration of child under 16 – 13-year-old victim fell pregnant – pregnancy terminated - total effective sentence 5y 6m – sentence 3y 6m on charge involving pregnancy – Whether sentence manifestly inadequate .

Chiro v The Queen
[2017] HCATrans 20. Appeal from SA CCA.
Sentencing – appellant convicted by jury of "persistent sexual exploitation of a child" *Criminal Law Consolidation Act* 1935 (SA) s 50 – complainant gave evidence of sexual exploitation that ranged in seriousness – trial judge directed jury they may convict if unanimously satisfied appellant kissed complainant in circumstances amounting to indecent assault on two occasions – Whether CCA erred in failing to hold trial judge erred in failing to ask jury which sexual offences subject of unanimous guilty verdict for purposes of sentencing – Whether in absence of such answer it was open to sentencing jury to sentence on basis that appellant guilty of all alleged sexual offending.

Van Beelen v The Queen
[2017] HCATrans 19. Appeal from SA CCA.
Criminal Law Consolidation Act 1935 (SA) s 353A – Second or subsequent appeal where Court satisfied fresh and compelling evidence that should in interests of justice be considered – appellant seeks to appeal against conviction of murder on basis new evidence shows expert evidence as to time of victim's death flawed – Whether "fresh" and "compelling" evidence – Whether further attack on expert evidence precluded because expert evidence contested at trial – Whether evidence could have been adduced at original trial – Whether principle of finality relevant to s 353A appeal – Whether in "interests of justice" to allow appeal.

The Queen v Holliday
[2017] HCATrans 21. Appeal from ACT CA.
Respondent alleged to have incited procurement of another to commit offence of kidnapping – Whether offence of incitement under *Criminal Code* 2002 (ACT) s 47 can be committed by inciting another person to procure a third person to commit an offence – Whether offence of incitement complete at point of the urging – Whether offence of incitement not complete until kidnapping committed.

Smith v The Queen; The Queen v Afford
[2016] HCATrans 247, 248. Appeal from NSW; Appeal from VSCA.
Criminal Code (Cth) s 307.1 – Intention – Factual inferential reasoning – Application of *Kural v The Queen* (1987) 162 CLR 502 – Whether "awareness of the likelihood" can be used to establish intention under Ch 2 of *Criminal* Code (Cth).

GAX v The Queen
[2016] HCATrans 304. Appeal from Qld CA.
Unreasonable verdict – appellant convicted of one count of aggravated indecent dealing with child under 16 – inconsistencies between accounts of complainant, mother and sister – Whether majority failed to make independent assessment of the sufficiency and quality of the evidence in determining reasonableness of verdict.

Pickering v The Queen
[2016] HCATrans 280. Appeal from Qld CA.
Criminal Code (Qld) – jury found appellant guilty of manslaughter – appellant killed deceased whilst allegedly trying to avoid him – Whether application of s 31(1)(c) *Criminal Code* (Qld) excluded by s 31(2).

ANNEXURE B

LEGISLATION 2016

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

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

Criminal Procedure Act 1986

. New Part 29 (clauses 81-94) inserted into Schedule 2 to:
  (i) allow evidence of children in "prescribed sexual offences" cases in the District Court to be pre-recorded in the absence of a jury
  (ii) provide for such evidence to be given with the assistance of a "Children's Champion" (or "witness intermediary").

. *Application*: Part 29 applies to proceedings before the Court sitting at a "prescribed place" in relation to a "prescribed sexual offence" (whenever committed):
  (a) on or after the commencement of Part 29, or
  (b) before the commencement of Part 29 but only if the matter has not been listed for trial before that commencement (cl 83)

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

. ***"Prescribed places"*** means: (a) Newcastle, (b) Downing Centre, Sydney, (c) such other places as may be prescribed by the regulations (Cl 82).

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

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

. *Access:* The accused and legal practitioner are to be given reasonable access to the recording (cl 86)

. *Children's Champions (or "witness intermediary"):* A children's champion is to communicate and explain (a) to the witness, questions put to the witness, and (b) to any person asking such a question, the answers given by the witness; and to explain such questions or answers to enable them to be understood by the witness or person in question (cl 88-90).

  A panel of suitable persons to be appointed as children's champions is to be established by Victims Services, Department of Justice. A person is to have qualifications in psychology, social work, speech pathology or occupational therapy (cl 89).

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

2. Bail Amendment Act 2015
Commenced on 6.12.2016

The following amendments are made to the *Bail Act 2013* in response to the Hatzistergos Review and Sentencing Council reports; and the Martin Place Siege Review.

1. Amendments in response to Hatzistergos and Sentencing Council reports

New "show cause" offence - s 16B (1)(l) inserted in s 16B 'Offences to which the show cause requirement applies'
New s.16B (1)(l) is inserted. The "show cause" requirement applies where the accused commits a serious indictable offence while the subject of a warrant authorising his/her arrest under:

(i) the *Bail Act 2013*, or
(ii) Part 7 of the *Crimes (Administration of Sentences) Act 1999* (Revocation and reinstatments by Parole Authrity); or
(iii) the *Criminal Procedure Act 1986*, or
(iv) the *Crimes (Sentencing Procedure) Act 1999*.

(Note: (iii) and (iv) was inserted by the *Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016*).

New s 16B (3) - Definition of "serious personal violence offence"
The definition of *serious personal violence offence* is expanded to include (b) below. The definition thus includes:

> "(a) an offence under Part 3 *Crimes Act 1900* punishable by imprisonment for 14 years or more;
> (b) an offence under a law of the Commonwealth, another State or Territory or any other jurisdiction that is similar to an offence under that Part."

Section 18 Additional factors when assessing bail concerns
Section 18 'Matters to be considered as part of assessment' is amended by inserting the following additional matters to be considered in assessing bail concerns:

. New s 18(1)(f) - whether the accused person has a history of compliance or non-compliance with any of the following: (i) bail acknowledgments, (ii) bail conditions,(iii) apprehended violence orders, (iv) parole orders, (v) good behaviour bonds,(vi) intensive correction orders, (vii) home detention orders, (viii) community service orders, (ix) non-association and place restriction orders, (x) supervision orders.
. New s18 (1)(f1) - where the accused person has failed or was about to fail to comply with a bail acknowledgment or a bail condition, any warnings issued to the accused.
. New s18 (1)(i1) -if the accused person has been convicted of the offence, but not yet sentenced, the likelihood of a custodial sentence being imposed.

Police bail at hospital – s 43(1A)
New s 43(1A) states a police officer of or above the rank of sergeant at a hospital may make a bail decision for an offence if:

"(a) the person accused of the offence is present at the hospital to receive treatment, and
(b) in the opinion of the police officer, it is not reasonable to take the person to a police station due to the person's incapacity or illness."

Section 47 'Review of police decision by senior police officer' is amended to allow a senior police officer to review a bail decision made under s 43(1A).

Revocation of bail - Section 78 Powers of bail authorities
s 78(2) is repealed. This provision permitted a bail authority to revoke / refuse bail if satisfied the person failed / was about to fail to comply with a bail acknowledgment / condition.
The following note has been added to s 78(1) to clarify the matter is still covered under s 4(3)(a):

"*Note*. The power to vary a bail decision includes a power to revoke the bail decision and substitute a new bail decision—section 4 (3) (a)."

2. Amendments in response to Martin Place Siege Review

Section 4 Definitions
The definition in s 4 is amended to include these new definitions:

> *"Commonwealth Criminal Code* means the *Criminal Code* set out in the Schedule to the *Criminal Code Act 1995* of the Commonwealth."
>
> *"terrorist act* has the same meaning as it has in Part 5.3 of the Commonwealth Criminal Code."

Section 18 Matters to be considered as part of assessment – Links to terrorist organisations and extremism
When assessing bail concerns, additional factors a bail authority must take into account are whether the accused:

. has any associations with a terrorist organisation (within the meaning of Division 102 of Part 5.3 of the *Commonwealth Criminal Code*): s 18(1)(q)
. has made statements or carried out activities advocating support for terrorist acts or violent extremism: s 18(1)(r)
. has any associations or affiliation with any persons or groups advocating support for terrorist acts or violent extremism: s 18(1)(s).

New section 22A 'Limitation on power to release in relation to terrorism related offences'
New s 22A states that, unless it is established that exceptional circumstances exist, a bail authorty must refuse bail for:

. an offence under section 310J *Crimes Act 1900* (membership of a terrorist organisation); or
. any other offence for which a custodial sentence may be imposed, if the accused has previously been charged with or convicted of an offence under s 310J; or
. where the accused is the subject of a control order under Part 5.3 of the *Commonwealth Criminal Code*.

Section 22A(2) states that if the offence is a show cause offence, the requirement that the accused establish that exceptional circumstances exist that justify a decision to grant bail or dispense with bail applies, instead of the requirement that the accused show cause why detention is not justified.
Section 22A(3) states that subject to subsection (1), Division 2 (Unacceptable risk test—all offences) applies to a bail decision made by a bail authority under this section.

3. Limitation Amendment (Child Abuse) Act 2016
Commenced 17.3.2016

The *Limitation Act 1969* is amended to remove limitation periods applicable to civil damages actions for child abuse victims (in response to recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse)

Section 6A removes the previous limitation periods (of between 3 and 12 years) for commencing an action for damages relating to death or personal injury resulting from "child abuse".

Section 6A has retrospective operation. No limitation period applies such claims regardless of when the child abuse occurred: s 9, Pt 3, Sch 5 *Limitation Act*. Circumstances in which an action on a previously barred cause of action may be brought are outlined: s 10, Pt 3, Sch 5.

4. Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016
Commenced 16.5.2016.

New Pt 2AA Terrorism (Police Powers) Act 2002 (NSW)

. Authorises arrest, detention and questioning of person suspected of being involved in a recent or imminent terrorist act: s 25A.

. Person under 14 cannot be arrested or detained: s 25F.

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

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

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

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

. An 'eligible Judge' (Judge of Supreme Court authorised to issue a covert search warrant under Pt 3) may extend detention period beyond initial 4 day period in increments of up to 7 days, where satisfied of certain matters: ss 25D, 25I.

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

Section 310L Crimes Act 1900: Section 310J makes it an offence to be a member of a terrorist organisation. Section 310L is amended so that the sunset date until which membership of a terrorist organisation is an offence is extended from 13.9.2016 to 13.9.2019.

5. Crimes (High Risk Offenders) Amendment Act 2016
Commenced 7.6.2016

The *Crimes (High Risk Offenders) Act 2006* enables the State government to apply to the Supreme Court for continuing detention or extended supervision orders after the expiry of a sentence of imprisonment in respect of high risk sex offenders and high risk violent offenders.

New s5A(2A) expands the definition of "serious violence offence" (s 5A(1)(a)) to include:

(a) Murder by an act done (by a person or an accomplice) in an attempt to commit, or during or immediately after the commission of, another serious crime (i.e. constructive murder);
(b) Manslaughter by unlawful and dangerous act
(c) Wounding with intent to cause death of grievous bodily harm.

6. Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016
Commenced 8.9.2016

Crimes Act 1900

. s 193C 'Dealing with property suspected of being proceeds of crime' is amended to create a scale of offending. Property less than $100,000 attracts maximum penalty of 3 years imprisonment; property greater than $100,000 attracts maximum penalty 5 years imprisonment (ss 193C(1),(2)).

. A non-exhaustive list of conduct and circumstances that can amount to reasonable grounds to suspect that property is the proceeds of crime is provided (s 193C(3)).

. New s.193E(2A) – an offence under s.193C may be an alternative verdict to s.193B 'Money laundering.'

. New s.193FA - several contraventions of Part 4AC (money laundering offences) may be combined into a single charge and value of property combined.

. The amendments apply in relation to proceeds of crime arising from serious offences committed before or after the commencement of the Act: s 193G.

Criminal Procedure Act 1986

. s 193 is included in Schedule 1 - Indictable Offences Triable Summarily.

Confiscation of Proceeds of Crime Act 1989

. The Supreme Court may make a "substituted tainted property declaration" in respect of property of a person convicted of a serious criminal offence in cases where other property was used by the offender in the offence and that other property is not available for forfeiture: s 33.

. The amendments apply only in respect of serious offences or serious drug offences committed on or after commencement of the Act: Sch 1[13].

Criminal Assets Recovery Act 1990 - This amendment commenced on 29.7.2016

. Expands the circumstances in which the Supreme Court can make an "asset forfeiture order" following application by the NSW Crime Commission. An order is made in respect of "serious crime use property" used in serious crime related activity: s 22(1A).

. The Court can also make a "substituted serious crime use property declaration" in respect of other property of an offender where the "serious crime use property" is unavailable for forfeiture: s22(1A), s 22AA.

. The amendments apply only in respect of serious crime related activity that occurs on or after commencement of the Act: Sch 3[13].

(Uncommenced)
Law Enforcement (Powers and Responsibilities) Act 2002
A new police power to make "Public Safety Orders" is set out in ss 87Q-87R.

A public safety order is an order made by a senior police officer that prohibits a specified person (or persons belonging to a specified class of persons) from:
(a) attending a specified public event (including entering, or being present at, premises being used in connection with the public event), or
(b) entering, or being present at, specified premises or other specified area at any time during a specified period: s87Q.

An order may only be made if the officer is satisfied that:
(a) the presence of the person (or class of persons) concerned at the public event or premises or other area concerned poses a serious risk to public safety or security, and
(b) the making of the order is reasonably necessary in the circumstances: s 87R(1).

In determining whether an order is reasonably necessary, the officer must take into account matters listed in s 87R(2) which include whether the person/s:

. previously behaved in a way that posed a serious risk to public safety or security/ have a history of engaging in serious crime related activity within the meaning of the *Criminal Assets Recovery Act 1990*
. are, or have been, members of a declared organisation
. associate, or have associated, with members of a declared organisation

An officer must not make an order that if the primary purpose of the person/s is non-violent advocacy, protest, dissent or industrial action: s 87R(3).

The provisions set out further criteria upon which a public safety order is to be made, the content and duration of the order, service of the order, urgent orders, variation and revocation of orders, appeals against orders, contravention of orders and police powers to stop and search in relation to the orders.

***7. Courts Legislation Amendment (Disrespectful Behaviour) Act* 2016**
Commenced 1.9.2016

The Act creates a summary offence for a person to engage in behaviour that is disrespectful (according to practice and convention) in the Supreme Court, Land and Environment Court, District Court or Local Court or in coronial proceedings. Maximum penalty: 14 days imprisonment or 10 penalty units, or both.

The offence is contained in: *Supreme Court Act* 1970 s 131 'Disrespectful behaviour in Court'; *Land and Environment Court Act* 1979 s 67A; *District Court Act* 1973 s 200A; *Local Court Act* 2007 s 24A; *Coroners Act* 2009 s 103A.

The offence applies to children; Proceedings for an offence may be brought at any time within 12 months after the date of the alleged offence; A Judge may refer any disrespectful behaviour in proceedings over which the Judge is presiding to the Attorney General; Proceedings may be commenced only with the authorisation of the Attorney General; An official transcript or official audio or video recording of the proceedings in the Court is admissible; The Judge presiding over the proceedings in which the alleged disrespectful behaviour occurred cannot be required to give evidence.

This offence does not affect any power with respect to contempt. A person cannot be prosecuted for an offence and proceeded against for contempt in respect of essentially the same behaviour.

***8. Law Enforcement (Powers and Responsibilities) Amendment Act* 2014**
The uncommenced provisions (Schedules 1 and 3) commenced on 1.9.2016

Law Enforcement (Powers and Responsibilities) Act 2002

Part 9 - Investigation and questioning

. ss 109-111: To provide separate safeguards for *detained persons* and *protected suspects*, and to remove references to persons deemed to be under arrest.

. The safeguards under Division 2 of Part 9 (Investigation and questioning powers) apply only to detained persons (persons detained after arrest) (eg the time limits on the investigation period).

. The safeguards under Division 3 of Part 9 (Safeguards relating to persons in custody for questioning) apply to both detained persons and protected suspects (eg giving caution they do not have to say anything; right to contact a friend, relative, guardian; right to medical attention).

. s 110 *'protected suspect'* means a person who is in the company of a police officer for the purpose of participating in an investigative procedure in connection with an offence if:
(a) the person has been informed that he or she is entitled to leave at will, and
(b) the police officer believes that there is sufficient evidence that the person has committed the offence.

. New s 112A - Part 9 safeguards can be applied at the scene of a search warrant, so that police no longer have to take the person back to the station to have their Part 9 rights administered.

. Initial investigation period extended. Section 115 is amended to extend the initial investigation period for a detained person from 4 hours to 6 hours. But the overall maximum investigation

period of 12 hours is retained by limiting the additional period of investigation under a detention warrant issued by an authorised officer to 6 hours instead of 8 hours: s 118.

Further amendments include:

. s 108E is repealed to remove the prohibition on admitting as evidence in-car video recordings of conversations after a person's arrest. This amendment follows from criticism of s 108E by the NSWCCA in *Carlton* [2010] NSWCCA 81 at [15]-[17].

Searches:

. A consensual search may only be carried out if the police officer has sought the person's consent before carrying out the search and provides evidence s/he is a police officer and with the officer's name and place of duty: s 34A.
. Amalgamates existing provisions relating to ordinary searches and frisk searches; the definitions of "ordinary search" and "frisk search" are omitted from s 3: s 30.
. References in LEPRA to persons of the same sex or opposite sex will cover transgender persons: s 3(2A)

Strip searches:

. A police officer may conduct a strip search at a police station or other place of detention if reasonably suspects necessary. May be conducted elsewhere if officer reasonably suspects necessary and the seriousness and urgency of the circumstances make the strip search necessary: s 31
. A strip search of a child or person with impaired intellectual functioning may be conducted in the absence of a parent, guardian or support person but only if officer reasonably suspects delaying the search is likely to result in evidence being concealed or destroyed or an immediate search is necessary to protect the safety of a person. Officer must record reasons for conducting the search: ss 33(3), (3A)

Crime scene warrants / domestic violence offences:

. Enables occupier of private premises to apply to an authorised officer for a review of the grounds on which a crime scene warrant is issued: s 94A
. Where crime scene powers are exercised on premises with occupier's consent, the consent only given if occupier has been informed by police of powers to be exercised, reasons for exercise and occupier has right to refuse to give consent. Occupier's consent to be in writing if reasonably practicable: ss 95(3), (4).
. A police officer may remain in a dwelling on which a domestic violence offence is / may have been committed to exercise functions in relation to a crime scene (such as directing a person to leave / not to enter) so that evidence can be preserved: ss 82(3A)-(3C)
  It is an offence to obstruct or hinder a police officer who is exercising crime scene powers in relation to a domestic violence offence: s 84
. Powers that may be exercised at a crime scene without a crime scene warrant are expanded to include investigative powers (including the power to search the crime scene but not powers to seize or detain things): s 92
. Extends from 3 to 4 hours the period during which crime scene powers may be exercised before a crime scene warrant is obtained (in the case of a rural area the period is extended to 6 hours): s 92(3)

9. Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016

Crimes (Sentencing Procedure) Act 1999

. Fixed terms are now permitted for SNPP offences: s 45(1).

. New s 45(1A) provides a court may decline to set a NPP (i.e. impose a fixed term) for an offence to which a SNPP applies "*… only if the term of the sentence is at least as long as the*

term of the non-parole period that the court would have set for the sentence if a non-parole period had been set in accordance with that Division."

. Non-parole periods for terms of sentence 6 months or less: Presently under s 46 ('Court not to set non-parole period for sentence of 6 months or less') a court is prohibited from setting a non-parole period when the sentence is for six months or less, thus these sentences must be fixed terms. New sub-section 46(2) is inserted to provide that if a court imposes an aggregate sentence of more than six months for multiple offences, it would not need to be a fixed term, even if the individual sentences the court would have imposed would have been less than six months.

. New s 53B states that the Local Court may impose an aggregate sentence of imprisonment of up to five years. (This addresses the previous ambiguity as to whether the 5 year limitation on consecutive sentences in s 58 also applies to aggregate sentences).

. s 71 (Commencement of ICOs) is amended to state that ICO's may be ordered to commence on a date other than the day on which it is made if it is to be served consecutively or partly consecutively with another sentence the subject of an ICO.

Criminal Procedure Act 1986

. New s 164A 'Judge unable to continue in trial by jury': New s 164A(1) provides that if the presiding judge in a criminal jury trial in the District or Supreme Court dies, becomes ill, or is otherwise unable to continue the proceedings, then the senior judicial officer of the court after hearing submissions from the parties may (a) nominate another judge of the court to take over the proceedings, or (b) discharge the jury and order a new trial.

. Section 164(2): The senior judicial officer must consider whether it would be in the interests of justice to do so, taking into account matters including: whether new presiding judge available to take over proceedings within a reasonable time; submissions from the parties; history, estimated length and complexity of the trial; nature of the evidence; unfairness to any parties.

. New presiding judge is bound by any orders / rulings by the former presiding judge, unless new presiding judge is of opinion it would not be in interests of justice for order / ruling to be binding: s 164A(4).

. s 291: amended so that proceedings must be held in camera where a complainant in a sexual assault matter gives evidence via an audio visual or audio recording, unless otherwise ordered.

Bail Act 2013

. Section 50(1) ('Prosecutor may make detention application') – Amended to make clear prosecutor may also apply for grant of conditional bail.

. Section 68 ('Limited powers when proceedings pending in another court') - New s 68(2A) states Local Court or authorised justice may hear a variation application where proceedings for the offence are pending in a higher court and accused and prosecutor consent.

Children (Criminal Proceedings) Act 1987

. s 29 ('Jurisdiction in respect of 2 or more co-defendants who are not all children') is amended to allow for committal proceedings for a child co-accused in Children's Court and an adult co-accused in the Local Court to be joined in the Children's Court at discretion of the Children's Court - regardless of the age of the adult co-accused. Previously such a course was only available where the adult co-accused was less than 3 years older than the child.

10. Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016

Inclosed Lands Protection Act 1901 - This amendment commenced on 1.6.2016

. New s 4B: aggravated offence of unlawful entry on inclosed lands. It is an offence if that person commits an offence under s 4 in relation to inclosed lands on which any business or undertaking is conducted and: (a) Interferes, attempts or intends to interfere with the business or undertaking, or (b) Does anything that gives rise to a serious risk to the safety of a person on those lands. Maximum penalty: 50 penalty units.

Crimes Act 1900 - This amendment commenced on 1.6.2016

. Section 201 'Interfering with a mine': The meaning of "mine" is extended to equipment and other things associated with a mine and including - a gas or other petroleum extraction site; a mineral, gas or other petroleum, exploration site.

Law Enforcement (Powers and Responsibilities) Act 2002 Act 1900 - This amendment commenced on 1.11.2016

. New ss 45A-C give police additional search and seizure powers without warrant where a person has (or a vehicle, vessel or aircraft contains) anything intended to be used to lock-on or secure a person to any plant,equipment or structure for the purpose of interfering with a business or undertaking and that will give rise to a serious risk to the safety of any person.

. Section 200 is substituted to remove limitations on police powers in relation to protests.

***11. Criminal Procedure Amendment (Summary Proceedings for Indictable Offences) Act* 2016**
Commenced 11.11.2016

The Act inserts Clause 8A into Table 1, Schedule 1 of the *Criminal Procedure Act 1986* to allow four strictly indictable break and enter offences to be dealt with summarily in the Local Court unless prosecutor or person charged elects otherwise. The offences in the *Crimes Act 1900* are:

s 109(2): aggravated breaking out of dwelling-house after committing, or entering with intent to commit, indictable offence;
s 111(2): aggravated entering any dwelling house with intent to commit a serious indictable offence;
s 112(2): aggravated break, enter any dwelling house or other building and commit serious indictable offence, or be in dwelling house or other building, commit serious indictable offence and break out
s 113(2): aggravated break and enter with intent to commit any serious indictable offence

Clause 8A will apply only where:
(a) the serious indictable offence alleged is stealing or intentionally or recklessly destroying or damaging property, and
(b) the value of the property stolen or destroyed, or the value of damage to the property, does not exceed $60,000, and
(c) the only circumstance of aggravation is the alleged offender is in company of another person/s.

The Local Court jurisdictional maximum penalty of two years' imprisonment applies.

Clause 8A does not apply to proceedings where alleged offenders were charged before 11 November 2016: Sch 1[4].

***12. Statute Update Act* 2016 (Cth)**
Commenced on 21.10.2016

The Act makes the following amendments to Commonwealth Acts:

. References to penalties expressed as a "dollar amount ($)" are now expressed as "penalty units". A "penalty unit" is $180: 4AA(1) *Crimes Act* 1914 (Cth).

. References to "maximum penalty" are replaced by "penalty". ["a penalty … set out at the foot of any provision of an Act" indicates: "(a) if the provision expressly creates an offence—that the offence is punishable on conviction by a penalty not exceeding the penalty so set out": s 4D(1) *Crimes Act 1914*.

13. Crimes (Serious Crime Prevention Orders) Act 2016
Commenced on 25.11.2016

The new stand-alone Act provides for the making of Serious Crime Prevention Orders (SCPO) to restrict the activities of persons or businesses involved in serious crime.

. A SCPO can be issued by the District or Supreme Court on application by the NSW Crime Commission (NSWCC), Office of the Director of Public Prosecutions (ODPP) or Commissioner of Police; where the Court is satisfied on the balance of probabilities a person/business is involved in serious crime related activity, or following a conviction for a serious offence.
. 'Serious offence' and 'serious crime related activity' is defined in the *Criminal Assets Recovery Act 1990.*
. In considering an application for a SCPO, a Court may have regard to hearsay evidence; however, the respondent will be put on notice and served with the material.
. A SCPO will include prohibitions or requirements a Court considers appropriate to prevent, or disrupt involvement in serious crime.
. A SCPO can last for a maximum of five years. Punishment for breach of an SCPO is maximum penalty five years' imprisonment and/or a fine of 300 penalty units ($33,000) for an individual and 1,500 penalty units ($165,000) for a corporation.
. Where a company is convicted of breaching an SCPO, an application may be made to the Supreme Court to wind up the company.

14. Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016
Commenced on 3.12.2016.

These amendments follow recommendations by the 'Statutory Review of the *Crimes (Domestic and Personal Violence) Act 2007'* and the 'Statutory Review of Chapter 9A of the *Coroners Act 2009*: the Domestic Violence Death Review Team' by the Department of Justice.

Some of the main amendments are as follows.

Crimes (Domestic and Personal Violence) Act 2007

. Savings and transitional
The amendments do not affect an application for an Apprehended Violence Order (AVO) made but not finally dealt with before the amendment. They do not affect proceedings arising from such an application even if those proceedings take place after the amendment. In any such case, the provision as in force immediately before its amendment is taken to continue to apply: Sch 1, Pt 4, cl 1.

Amendments to ss 32, 39, 40(4), 40A, 41A apply retrospectively: Sch 1, Pt 4 cl 12-16.

The amendments to the Act extend to an application for an AVO made but not finally dealt with before those amendments, and any proceedings arising from any such application: cl 6.

. New object of the Act. A new stated object of the Act is: the particular impact of domestic violence on Aboriginal persons and Torres Strait Islanders, persons from culturally and linguistically diverse backgrounds, persons from gay, lesbian, bisexual, transgender and intersex communities, older persons and persons with disabilities: s 9(3)(f1).

. Definitions
'Domestic relationship" in s 5 is extended to include the relationship between a current partner and former partner of a person.

"Personal violence offence" in s 4 is amended to include female genital mutilation, failing to provide a child with the necessities of life, sexual intercourse with a person under special care aged between 16 and 18, incest and offences relating to abandoning a child.

"Domestic violence offence" in s 11 is extended to include offences other than personal violence offences if committed by a person against a person with whom the person has or has had a domestic relationship and the offence arises from substantially the same circumstances as a personal violence offence or the offence is committed against the person in order to coerce or control or cause the person to be intimidated or fearful. Thus the previous list of 55 offences is expanded to include any NSW criminal offence or offence under the Commonwealth Criminal Code if committed under such conditions.

. Apprehended Domestic Violence Order (ADVO)
A court can make an ADVO without being satisfied that the person in need of protection in fact fears intimidation, stalking or the commission of a personal violence offence, if it is satisfied on the balance of probabilities that the person has *reasonable grounds* to fear the commission of a domestic violence offence against them: s 16(2)(d).

The only prohibitions that are imposed on the defendant by such an order are those that are taken to be specified in every AVO by s 36 (which only prohibit what is already criminal conduct): s 16(2A).

Evidence of subjective fears (as opposed to reasonable grounds to fear) are still required if a court is requested to impose further conditions under s 3.

. Apprehended Violence Order (AVO)
Section 36 is substituted to simplify existing prohibitions included in an AVO. Section 36 further adds a new prohibition against the defendant destroying or damaging property that belongs to, or is in the possession of, the protected person or person with whom the protected person has a domestic relationship.

. Final AVOs and interim court orders
The Local Court, Children's Court or District Court is required to make a final AVO for the protection of a person against whom a serious offence is committed if a person pleads guilty to, or is found guilty of, the serious offence: substituted s 39. (Section 39 previously related to offences under s 13 or a domestic violence offence - other than murder, manslaughter or assault causing death.

An application for a final AVO or interim court order may only be made by a police officer where only children (and no adults) are to be protected by the order: substituted s 48(3).

Applications for the variation or revocation of a final AVO or interim court order may be made: new ss 72-72D . Interested parties may seek variation of a police-initiated ADVO protecting a child, with leave of the court: s 72B.

. New Forms. The form of an application for an AVO is updated; and the form of an application notice for an ADVO is prescribed. The forms are written in plain English and seek to simplify the list of discretionary conditions which are commonly put on AVOs and ADVOs: Schedule 1, *Crimes (Domestic and Personal Violence) Regulation* 2014 (as amended by the *Crimes (Domestic and Personal Violence) Amendment (Apprehended Violence Orders) Regulation 2016*.

. Procedural matters
The transcript of proceedings and any evidence admitted in the District or Supreme Court in respect of a serious offence is admissible in the Local or Children's Court for the purposes of determining related AVO proceedings. This extends to the Supreme Court in relation to the requirement that a court must make an interim AVO against a person if the person is charged with a serious offence: s 40(4).

Children's Court may make, vary or revoke an AVO during care proceedings, under certain circumstances: s 40A.

The court, in proceedings in relation to an application for an order, may proceed to hear and determine the matter in the absence of one or more of the parties if the court is satisfied the absent party had reasonable notice of the proceedings and it is otherwise in the interests of justice to do: s 57A.

A defendant cannot directly question a child in proceedings for the making, varying or revoking of an AVO. Where a defendant is self-represented, cross- examination of the child must take place via a lawyer or suitable person appointed by the court: new s 41A.

Coroners Act 2009, Chapter 9A, Schedule 2 - commenced 22.8.2016

Membership of the Domestic Violence Death Review Team is altered to ensure membership includes an Aboriginal person or Torres Strait Islander: ss 101E(3), (6).

"Domestic relationship" in the *Coroners Act* has the same meaning as in the *Crimes (Domestic and Personal Violence) Act* 2007: s 101B(1).

15. Drug Misuse and Trafficking Amendment (Drug Exhibits) Act 2016
Commenced on 1.1.2017

The amending Act amends Part 3A DMTA and DMTA Regulations to update and streamline the system for the retention, analysis and destruction of prohibited drugs.

A helpful Flow Chart has been prepared the by Judicial Commission of NSW and is available on their website.

Previously, it was required that the whole of a substance be given to an analyst by Police as soon as practicable, though not later than 14 days: previous cl 10 DMTA Regulation.

New procedures include:
. Police member to record quantity of substance or provide it to an analyst for that purpose: cl 11(1)
. Certificate recording initial quantity to be served on accused: cl 11(2)
. Certificate is prima facie evidence in legal proceedings of quantity: cl 11(3)
. Police must retain an amount of the substance sufficient to allow for 3 times the amount required for 2 samples for analysis: cl 13

Substances (not plants)
. Less than traffickable quantity: to be provided to an analyst of identity of substance will be in dispute in any proceedings: cl 15

. Not less than traffickable quantity: amount must be provided to analyst: cl 14(2). Accused may request analysis of further sample by nominated person or analyst: cl 16. Police may order bulk of substance be destroyed where evidence of the substance is recorded by photographing etc and after 28 days from accused being served with notice of destruction: s 39I DMTA.

. Greater than commercial quantity: purity of drug to be analysed where capable of being tested: cl 16A(1)(c).

Plants

. Analyst must be given access sufficient to allow identification: cl 12(1)

. Police may order plants be destroyed where evidence of the substance is recorded by photographing etc: s 39H DMTA

Presumptions

. All substances to be placed in sealed and labelled drug exhibit bags and entered into the NSW Police Force exhibits management system as soon as practicable: cl 16F, cl 16G

. There are two new evidentiary presumptions:

. A certified copy of a report from the NSW Police Force exhibits management system is prima facie evidence of dealings with that exhibit as listed: cl 16L

. Certificates issued by the police officer sealing the bag and the analyst opening the sealed bag for testing are prima facie evidence that the substance analysed was the same substance seized: cl 16M (applies to substances other than a prohibited drug of less than traffickable quantity).

. Certificates issued under the Regulations are prima facie evidence of the matters stated in them without proof of the signature, appointment or approval of the person purporting to sign the certificate: cl 16N (this presumption mirrors the previous ss 43(2), 43(4) DMTA).

. Where person who pleads guilty in Local Court appeals against the Local Court's determination, and substance has been destroyed, any particular in the Court Attendance Notice as to quantity or nature of substance is presumed to be true for appeal purposes: s 39N DMTA

Review by Local Court

. Accused may apply for review in Local Court (within 60 days of being served with certificate) of the initial quantity recorded on a certificate issued under cl 11. A review can only be ordered where Local Court satisfied there has been substantial failure to comply with Act or Regulation, or there is a real doubt as to accuracy of certificate: s 39M DMTA.

ANNEXURE C

SUPREME COURT CASES 2016

Wilson v DPP (NSW) [2016] NSWSC 1458 (Schmidt J)
Conceal serious indictable offence s 316 Crimes Act – applies to historical sexual offence that was repealed prior to introduction of s 316 – requisite belief

The appellant, an Archbishop, was charged under s 316 *Crimes Act* 'Conceal serious indictable offence'. The victim had told the appellant in 1976 that in 1971 when he was 10 he had been sexually assaulted by a fellow priest. The Crown case was the appellant formed the requisite belief under s 316 much later in 2004 when he became aware of other allegations against the priest. The priest, who was deceased, would have been charged under the historical s 81 'Indecent assault on male.'

Schmidt J found a charge under s 316 was valid despite s 81 having been repealed in 1984 prior to the enactment of s 316 in 1990: see at [17]-[37].

Schmidt J found s 81 is a 'serious indictable offence' within s 316. Section 4 *Crimes Act* defines 'serious indictable offence' to mean "an indictable offence that is punishable by imprisonment …" Section s 81 was punishable by "penal servitude", but relevant legislative provisions mean that if a person is now convicted under s 81, the sentence a court must impose is not one of penal servitude, but of imprisonment. A conviction of a historical s 81 offence "is, for all purposes, taken to be a conviction for a serious indictable offence": at [57]-[62].

Schmidt J also found that the inferences to be drawn from all of evidence was that the appellant had the requisite belief under s 316: at [88]. Under s 316, the prosecution must establish that the offender actually came to hold the alleged belief that an offence has been committed: at [36]. The capacity of the evidence to establish the existence of a memory in 2004 - 2006 of what the appellant was told by the alleged victim in 1976 about the 1971 offending and the appellant's formation then of a belief about that offending, has to be considered in the light of all the evidence: at [80]; [82]-[83].

DPP v Lazzam [2016] NSWSC 145 (Adamson J)
Brief of evidence served outside time set by direction made by Magistrate - Magistrate erred in not admitting evidence and dismissing charges - s 188(1) Criminal Procedure Act 1986

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

Adamson J set out how s 188 operates. In particular:

> s 188(1) requires the court to refuse to admit evidence if, in relation to the evidence, "this Division or any rules made under this Division have not been complied with by the prosecutor".
>
> s 188 is only concerned with non-compliance by a prosecutor with a provision of Division 2. There is a significant difference between a statutory provision, a rule, a Practice Note and a direction. No other non-compliance engages s 188.
>
> If any relevant non-compliance can be identified, the Magistrate is obliged under s 188(2), to ask whether the accused consents to dispensation with the requirements of s 188(1); and, if so, the Magistrate is obliged to do so "on such terms and conditions as appear just and reasonable". If the accused does not consent, the Magistrate is obliged to consider whether the requirements ought be dispensed with and grant such dispensation "on such terms and conditions as appear just and reasonable".

. The discretion conferred by s 188(2) is broad and must be exercised judicially. The requirement to serve the police brief is a fundamental aspect of the administration of criminal justice. It is important that a prosecution not be required to be conducted on incomplete evidence (as in the present case).

. Factors relevant to the exercise of the discretion in s 188(2) had there been any relevant non-compliance (to engage s 188(1)) include: whether there was any prejudice to the defendants; whether it could be cured or ameliorated; the reason for any non-compliance; probative value of the evidence; the public interest in determination of criminal proceedings.

Salisbury v Local Court of NSW [2016] NSWSC 1082 (Bellew J)
Magistrate acted beyond power in ordering defence expert report be served on prosecution before hearing – s 28 Local Court Act 2007

The Magistrate adjourned the hearing directing that both parties serve expert reports. Bellew J allowed the appeal. The Magistrate did not have power to make an order requiring the plaintiff to serve expert evidence in advance. Any implied power of the Local Court does not extend to the power to make an order that abrogates fundamental common law principles governing the rights of an accused. It is for the prosecution to put its case fully and fairly, before the accused is called upon to announce his/her course (*Soma* (2003) 212 CLR 299): at [30].

DPP (NSW) v Tilley [2016] NSWSC 984 (Bellew J)
Magistrate's duty to give reasons

Bellew J helpfully gathers the authorities discussing the obligation imposed upon a judicial officer to provide adequate reasons for his or her decision, citing from *DPP v Sadler* [2013] NSWSC 718, *DPP v Illawarra Cashmart Pty Limited* [2006] NSWSC 343; (2006) 67 NSWLR 402, *DPP (NSW) v Wililo* [2012] NSWSC 713.

Bellew J upheld the DPP's appeal. The Magistrate's reasons for dismissing the charges were inadequate. The Magistrate's conclusion he was not satisfied beyond reasonable doubt that "each and every element of the charges had been established" was reached in the absence of identifying those elements; making any findings of fact; applying relevant legal principles to the facts; specifying the particular element(s) about which he was not satisfied beyond reasonable doubt; and exposing his reasoning process, explaining why he was not so satisfied. He made no reference to submissions of either party. This reflected a failure to engage with, and properly determine, the issues: at [48]-[50].

Wran [2016] NSWSC 1015 (Harrison J)
Extra-curial punishment – damaging newspaper articles – short periods in protective custody taken into account on sentence

The offender (accessory after the fact to murder; robbery in company) had a high public profile. Harrison J found the offender was subjected to a "sustained and unpleasant campaign" by the media and accepted that the adverse media publicity amounted to extra curial punishment: at [72]-[79].

The offender was placed in a harsh custodial environment due to her public profile, spending almost twelve months in maximum security and confinement in solitary for up to 23 hours a day in lockdown. The principle that time in protective custody is the equivalent of a longer loss of liberty under ordinary conditions of imprisonment (*AB* (1999) 198 CLR 111) apply with particular relevance to cases where periods in custody have been, or might be, long. In this case, where those periods have been relatively short, Harrison J accepted the offender was entitled to have these matters taken into account: at [80]-[82].

Turnbull (No.25) [2016] NSWSC 831 (Johnson J)
Manslaughter by extreme provocation – evidentiary onus on Accused - s 23(2) Crimes Act 1900

Johnson J explained that in an application for a trial judge to leave extreme provocation to the jury, the accused bears an evidentiary onus to point to evidence from which it could be inferred that there is at least a reasonable possibility that the homicidal act of the accused was provoked in accordance with the four elements contained in s 23(2) *Crimes Act* (*Youssef* (1990) 50 A Crim R 1). Caution must be exercised before declining to leave extreme provocation to the jury at [58]; *Lindsay v The Queen* (2015) 255 CLR 272 at 284. Where the Accused has failed with respect to one of the four elements, that is fatal to the application to have extreme provocation left to the jury: at [81].

Johnson J held the accused failed to discharge the evidentiary onus in relation to s 23(2)(b); and went on to discuss in obiter remarks that the evidentiary onus was also not discharged in relation to the remaining elements in s 23(2)(a),(c),(d): at [84]-[91].

W4 v Detective Senior Constable Ayscough [2016] NSWSC 1106 (Harrison AJ)
Crimes (Forensic Procedures) Act 2000 – ss 75ZC – application to allow DNA profile on DNA database system – magistrate failed to determine whether procedure "justified in all the circumstances"

When aged 14 the plaintiff committed a sexual assault upon a 12 year old girl and was entered on the Child Protection Register. A first application to have his DNA placed on the system was refused when he was still under 18. A second application under s 75ZC(1) *Crimes (Forensic Procedures) Act 2000 was* made when the plaintiff was 19 was granted. The Magistrate found it was unnecessary for the defendant to prove anything other than the plaintiff was a registrable person and his DNA profile was not on the DNA database system.

Harrison J set aside the Magistrate's decision and remitted the matter to the Local Court. In exercising its discretion to order a forensic procedure under s 75ZC(1) the court must be "satisfied that the carrying out of the forensic procedure is justified in all the circumstances". The Magistrate was required to address the balance between the rights of the citizen and the interests of the community - delay between acquittal, or in this case conviction, would be a relevant factor in determining whether the making of an order was justified (*Daley* [2014] NSWSC 144). Failure to address that the carrying out of the forensic procedure was "justified in all the circumstances" was an error in law: at [44].

Quami (No 56) [2016] NSWSC 1130 (Hamill J)
Discharge of juror – apprehension of bias – juror's ability to perform functions affected – s 53B Jury Act 1977

A juror was discharged on the basis that evidence (persistent smiling at accused, not attentive at all times, inappropriate responses to evidence and directions) suggested her level of distraction may compromise her ability to perform the task of a juror: s 53B(d). A reasonable apprehension of bias arose where a co-accused ran a defence linked to threats made by the other accused and the juror's smiling and staring appeared to be solely directed at those other accused. This conclusion was reached by observations by the trial judge ("evidence before the Court" s 53B(b) who must be careful not to draw inferences unless they are clear and rational, as well as other material: at [27].

BNS [2016] NSWSC 350 - Multiple bail applications – s 74 Bail Act 2013

Section 74 *Bail Act 2013* states that a court that refuses bail is to refuse to hear subsequent applications in respect of the same offence unless there are grounds for a further release application. Grounds for a further release application include: relevant material information that was not presented in the previous application (s 74(3)(b)) or circumstances have changed since the previous application (s 74(3)(c)).

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

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

Making of submissions by a legal representative different in quality or quantity from an earlier application by another legal representative, does not fall within s 74. Submissions are not information, nor a change of circumstances. The purpose of s 74 is not to give an applicant the right to a second hearing simply because a lawyer thinks they have a more persuasive argument than on an earlier occasion: at [42]-[44]. Under s 74 a court is first required to refuse to hear a further release application unless particular grounds are established. Change in surety and the amount are not always regarded as a change of circumstances or as material information. A court needs to assess, in the context of the seriousness of the charge and all other circumstances relevant to a bail application, whether such matters are "material": at [45]-[46].

ANNEXURE D

STOP PRESS: CASES 2017

Jiminez [2017] NSWCCA 1
Plea entered based on incorrect advice as to child's age

The CCA allowed the appellant's appeal under s 79(1)(b) *Crimes (Appeal and Review) Act* 2001 and entered a verdict of acquittal. The appellant pleaded guilty to possess child abuse material under s 91H(2) *Crimes Act* NSW after being mistakenly advised the offence was committed if the images were of a child less than 18. An appeal against conviction to withdraw his appeal was dismissed in the District Court. The parties and the judicial officers in both Local and District Courts were under the mistaken belief that a "child" was a person under 18, when in fact for the purposes of s 91H(2) a "child" is a person under 16 (s 91FA). The *Criminal Code (Cth)* s 473.1 defines 'child' as a person under 18. The CCA held that the plea could be regarded an admission the child was under 16 (an essential ingredient of the offence) and cannot be attributable to a genuine consciousness of guilt: at [14].

Potts [2017] NSWCCA 10
Standard non-parole periods (SNPPs) do not apply to 'Attempts' – SNPP erroneously referred to

The CCA allowed the appellant's sentence appeal. The appellant was sentenced for attempting to commit an aggravated break, enter and steal. The CCA found the sentencing judge incorrectly held that a SNPP of 5 years applied when SNPPs do not apply to offences of attempt: at [36]. The Crown argued the error did not have any effect on the sentence ultimately imposed. In cases in which a sentencing judge has erroneously referred to a SNPP that did not apply, this Court has adopted a cautious approach by accepting that error has been established, and moving to re-sentence. Analysis of the judge's remarks and the stern sentence imposed suggests the SNPP may have played a role in the judge's instinctive synthesis leading to the ultimate sentence: at [38]-[41].