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1. Sentence Appeal Cases

2. Conviction Appeal and Other Cases

Annexures

1. NSW CCA SENTENCE APPEAL CASES 2017

1. GENERAL SENTENCING

Reference to standard non-parole period (SNPP) where one does not apply – mere reference does not always result in material error

In ***Nguyen*** [2017] NSWCCA 39 the CCA said that a mere reference by the sentencing judge to a SNPP, when no SNPP applied, does not always result in a finding of material error. The Court is to enquire into all facts and circumstances, the terms in which the SNPP has been mentioned, and whether the erroneous reference had any effect on sentence. That effect does not have to be, but may be, a direct effect: at [103]-[104]. In this case, the error did not have any effect on sentence: at [120]. The judge's reference was in passing, did not form part of the judge's reasoning when considering the facts and circumstances, and no regard was made to it when reciting the basis upon which he was sentencing the appellant: at [118].

Error was found in ***Potts*** [2017] NSWCCA 10. The fact the judge made an explicit finding as to where the offence fell within the range of objective seriousness, together with the fact the sentence imposed was a stern one, suggests the SNPP may have played a role in the instinctive synthesis leading to sentence: at [1], [6], [39].

Assessment of objective seriousness

No requirement to rank the objective seriousness of the offences on a scale

In ***Sharma*** [2017] NSWCCA 58 the applicant was sentenced for sexual assault offences (to which a SNPP applied). The judge found they were "*serious offences of their type*." The CCA found the judge properly assessed objective seriousness.

There is no requirement to rank the objective seriousness of the offences on a scale. The judge properly assessed objective seriousness in that he "identify fully the facts, matters and circumstances which … bear upon the judgment that is reached about the appropriate sentence to be imposed" (*Muldrock* (2011) 244 CLR 120 at [29]): at [63].

The judge's broad expression "*serious offences of their type*" is open to the criticism it is vague or imprecise. It is not inappropriate for judges to make an assessment of objective offending according to a scale of seriousness (*Aldous* (2012) 227 A Crim R 184 at [33]; *Koloamatangi* [2011] NSWCCA 288 at [18]-[19]). Whilst greater precision may be desirable, it is not essential: at [64].

No failure to properly assess objective seriousness – no error found

Note - In the following cases a SNPP did not apply.

In ***AP*** [2017] NSWCCA 270 the appellant was sentenced for sexual assault offences (to which a SNPP did not apply). The judge found one offence to be slightly below mid-range and two offences were "*objectively serious matters*." The CCA rejected the applicant's submission that the judge failed to make a proper assessment of objective seriousness. A more elaborate finding was not required by law: at [56]. The CCA said that the principle in ***Sharma*** (above) applied in a case such as this where a SNPP did not apply. It is not inappropriate for judges to make an assessment of objective offending according to a scale of seriousness. Whilst greater precision may be desirable, it is not essential: at [45]-[46] citing ***Sharma*** at [64].

In ***Hurst*** [2017] NSWCCA 114 the CCA also found no error of failing to make an assessment of the objective seriousness of an offence of aggravated detention for advantage (to which no SNPP applies)**.** Where a sentencing judge has made it clear from his or her findings that the judge regards the offence as serious, little more is required: at [105]. The judge's approach was similar to *Delaney* [2013] NSWCCA 150; 230 A Crim R 581 at [56]. While the judge did not expressly determine the objective criminality of the offence, he gave careful consideration to the nature of the offending

conduct and the circumstances. Moreover, the evidence of the conduct of the applicant made a conclusion of significant seriousness self-evident: at [106]-[109].

Failure to properly assess objective seriousness – error found

In ***Kearslay*** [2017] NSWCCA 28 the CCA allowed the applicant's appeal against sentence for two offences (SNPPs did not apply) on the ground the judge failed to properly assess objective seriousness.

The CCA at [62] cited from *Delaney* (2013) 230 A Crim R 581; [2013] NSWCCA 150 at [56]-[57]. While there is abundant authority that it is the substance and not the form of a sentencing judge's remarks that are important in this respect, it remains critical that upon a fair reading of the remarks the relevant assessment is clear. In *Delaney* the judge did not in terms assess the objective gravity of the offending, but did specifically refer to the factors which bore upon its objective seriousness - role of the appellant, the nature of the conduct and the period over which it took place. While it may have been preferable to have made a specific assessment of the objective seriousness of the offending, the judge did implicitly do so.

In ***Kearsley***, an assessment of the objective seriousness was not "implicit" nor was it possible to "glean" the judge's view of it. The applicant argued he could have been sentenced to other than full-time custody. The judge's sentence suggests she considered the applicant's strong subjective case to be overwhelmed by the seriousness of the offence. It is critical the judge should have dealt with the objective gravity of the offence and not leave this to inference. Failure to do so invalidated the sentencing exercise: at [63]-[64].

In ***Lyons*** [2017] NSWCCA 204 the CCA also held the judge did not adequately assess objective seriousness: at [56]. The applicant was sentenced for a number of child pornography offences. Apart from the judge's recounting of facts in relation to each charge when considering objective seriousness, a reading of the remarks as a whole did not enable a conclusion about how the judge assessed the objective seriousness of each offence: at [52]-[56]; *Delaney* [2013] NSWCCA 150.

Taking into account matters personal to offender when assessing objective seriousness: mental state, duress, provocation, mental illness

In ***Yun*** [2017] NSWCCA 317 the applicant was sentenced for murder (to which a SNPP applies). The CCA rejected a submission that the judge erred in taking into account the applicant's mental state (intention, level of premediation and motivation) in an assessment of objective seriousness: at [19], [47].

The CCA referred to the statement by the High Court in *Muldrock* (2011) 244 CLR 120 at [27] (regarding the SNPP sentencing provisions in s 54B *Crimes (SP) Act* 1999):

> "[27] Section 54B(2) and s 54B(3) oblige the court to take into account the full range of factors in determining the appropriate sentence for the offence. In so doing, the court is mindful of two legislative guideposts: the maximum sentence and the standard non-parole period. The latter requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account *characteristics of the offender*. The objective seriousness of an offence is to be assessed without reference to *matters personal to a particular offender* or class of offenders. It is to be determined *wholly by reference to the nature of the offending.* (italics not in original)"

The CCA said that the High Court drew a distinction between "characteristics of the offender" and "matters personal to a particular offender" on the one hand, and "the nature of the offending" on the other. The latter expression is sufficiently broad to include the mens rea that accompanied the commission of the offence. It is not apt to describe an offender's state of mind during the commission of an offence as a "characteristic" of the person or a "matter personal to" him or her. It is an integral part of the offender's conduct that constitutes the offence: at [39].

Duress or provocation is not a characteristic of the offender. They are within "the nature of the offending" as they operate to partially excuse or justify the commission of the offence: at [40]; *Williams* [2012] NSWCCA 172 at [42].

Mental illness, where causally connected to the commission of the offence, may properly be described as a characteristic of an offender or a matter personal to an offender. Though it is clear that this Court has followed the approach that an offender's mental condition, which must impact upon moral culpability, is a matter to be properly taken into account when assessing the objective seriousness of an offence: at [45]; ***Biddle*** [2017] NSWCCA 128 at [66]-[70].

In the absence of clear guidance from the High Court, any contention that an assessment of objective seriousness of a SNPP offence, post-*Muldrock,* precludes consideration of the offender's mental state, duress, provocation and mental illness (where causally related to the commission of the offence) must be rejected: at [47].

2. AGGRAVATING FACTORS

Abuse of position of trust - Indecent assault by registered health practitioner - s 21A(2)(k) Crimes (Sentencing Procedure) Act 1999

In ***Jung*** [2017] NSWCCA 24 the applicant, a physiotherapist, was convicted of indecent assault offences (s 61L *Crimes Act*) committed against six female patients. The abuse of the trust of his patients was a significant aggravating factor under s 21A(2)(k): at [52]. Offences committed by a masseur against clients are also aggravated by the breach of trust inherent in that relationship (see *Qin* [2008] NSWCCA 189 at [36]). However, additional considerations apply where the offender is a registered health practitioner authorised by the State to provide professional health services to the public. The clear distinction between a masseur and a registered physiotherapist must be kept in mind: at [60]-[62]. The gravity of offences is magnified by the breach of trust which the patient reposed in a medical practitioner. The extreme vulnerability of patients and taking advantage of that situation for self-gratification attracts general and personal deterrent elements: at [63]-[65]; *Arvind* (NSWCCA, 8 March 1996, unreported); *Reeves* [2013] NSWCCA 34 at [205].

Abuse of position of trust - "special or peculiar relationship" of trust - s 21A(2)(k) Crimes (Sentencing Procedure) Act 1999

In ***Mol*** [2017] NSWCCA 76 the applicant was convicted of sexual assault offences against three victims whom he recruited to work for him as artist's models. The judge properly found the offences aggravated under s 21A(2)(k). The relationship between the applicant, a professional artist, and the complainants, who agreed to pose nude as models, constituted a "special or peculiar relationship" of trust which the applicant breached: at [108]-[109]. Section 21A(2)(k) was not intended to extend the categories of what might constitute a breach of trust or authority in the commission of an offence at common law where the special relationship between an offender and a victim imposes mutual obligations not to act to the detriment of the other (see *Johnson* [2005] NSWCCA 186 at [21]). However, in a given case, the particular nature of the relationship may transcend the duty of care that arises between people engaged in business or social communion, thereby imposing on them a particular obligation not to act to the detriment of the other, the breach of which will operate as a statutory feature of aggravation (*Suleman* [2009] NSWCCA 70 at [22]): at [107].

s 21A(2)(l) – security guard a vulnerable victim

In ***Longworth*** [2017] NSWCCA 119 a security guard who was assaulted by the applicant after refusing the applicant entry to licensed premises, was "vulnerable" within s 21A(2)(l) based on occupation. The occupation examples in s 21A(2)(l) are not exhaustive and are workers often isolated from others and in possession of significant amounts of money: at [17]. The risk of a security guard being subjected to aggression is significant and renders security personnel "vulnerable" in the relevant sense: at [17]-[20].

s 21A(2)(o) financial gain; s 21A(2)(n) planning - supply large commercial quantity of a prohibited drug s.25(2) DMTA - error to take financial gain and planning into account unless gain and planning is "significant"

In ***Wat*** [2017] NSWCCA 62 the CCA stated:

> "[44] For an offence of supply large commercial quantity of a prohibited drug contrary to s 25(2) *DMTA*, it will almost inevitably be the case that inherent characteristics of that class of offence are a level of planning and financial gain. These inherent characteristics are not to be treated as aggravating factors, unless "the financial gain or the planning is significant, that is, more than might be expected in the lowest level of offending for this type of offence" : *Prculovski* [2010] NSWCCA 274 at [43]; *Farkas* (2014) 243 A Crim R 388; NSWCCA 141 at [62]…"

Dismissing the appeal, the CCA held the judge did not err by taking into account as aggravating factors that the offence was part of a planned or organised criminal activity or was committed for financial gain. In this case, the level of planning was elaborate and the applicant was offered AU$50,000. Both the level of planning and financial gain went well beyond that which might be expected in the lowest level of an offence of this type: at [47]-[48].

In ***Huang*** [2017] NSWCCA 312 the CCA allowed the appeal's against sentence for supply large commercial quantity of a prohibited drug, holding the judge erred in finding the offence aggravated under s 21A(2)(o). The applicant was part of joint criminal enterprise to supply drugs for $1.2 million. There was no evidence as to the profit each co-offender would receive. The CCA considered whether any financial gain was significant (applying ***Wat*** [2017] NSWCCA 62; *Prculovski* [2010] NSWCCA 274). The CCA found evidence of any financial gain was slight. The applicant became addicted to ice, had a drug habit which he needed to support, and owed money arising from his drug habit. On the paucity of evidence available, it cannot be concluded that any financial reward to be received by the applicant was 'significant' nor that it was more than was likely to be inherent in the offence which involved the supply of a large commercial quantity: at [60].

In ***Kassoua*** [2017] NSWCCA 307, Basten JA (Price J agreeing) referring to the principle in ***Wat*** at [44] (above) stated that it is important the passage should not be read out of context.

> [12] ……. Indeed, the context is critical in understanding the principle. First, both *Wat* and *Farkas* expressly sourced the principle to the observations of Howie AJ in *Prculovski*. The particular offence in *Prculovski*, to which Howie AJ directed his comments, was s 25A(1) of the *Drug Misuse and Trafficking Act 1985* (NSW). That section made it an offence for a person on three or more occasions over 30 days to supply "a prohibited drug (other than cannabis) for financial or material reward". In other words, "financial or material reward" was an element of the offence. It is not in doubt that, as s 21A(2) expressly notes, "[t]he court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence." What Howie AJ stated, in that statutory context, was as follows: [7]
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> > "It is not necessarily an error to take into account, when sentencing for a s 25A offence, either that the offence was committed for financial gain or that it involved planning. Where the financial gain or the planning is significant, that is more than might be expected in the lowest level of offending for this type of offence, the court is entitled to take that fact into account as a matter of aggravation."
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> [13] In short, Howie AJ was making the unremarkable point that although financial gain or reward was an element of the offence, it was still possible to take it into account as an aggravating factor so long as it was a "significant" level of gain or reward. The purpose for which it was taken into account was to assess the objective seriousness of the offending. The point is unremarkable because, in almost every case, the court will have regard to the quantity of drug involved even though the minimum quantity is an element of the offence. However, there is a risk in generalising the observation and applying it in cases where financial reward is *not* an element of the offence. In particular, it would be wrong to rewrite s 21A(2)(o) so that the phrase "for financial gain" was read as if it said "for a financial gain which exceeded that which might be expected in the lowest level of offending for this type of offence". To impose such a constraint would be wrong and would tend to overcomplicate the sentencing process."

Recently in ***Lin*** [2018] NSWCCA 13 (supply large commercial quantity of a prohibited drug) the CCA allowed the applicant's appeal on the basis the judge erred by "double counting" the applicant's financial gain by taking it into account when determining objective seriousness and then again separately as an aggravating circumstance under s 21A(2)(o): at [10]; [33], [45]–[46]. The judge erred

in acting on the only evidence available that the applicant was promised $2000. In the context of a transaction involving a payment of $1.2 million it is difficult to accept $2000 constituted the kind of financial gain that would further aggravate the offence: at [33], [45]-[46].

Note that in ***Lin*** Hamill J (Basten JA agreeing in a separate judgment; Bellew J agreeing) stated at [37] that he did not accept that financial gain is an "element of the offence" as a result of the quantity of drugs constituting a large commercial quantity; however acknowledged a number of authorities support the approach that where drugs are supplied in commercial quantities, financial gain will only be an aggravating feature under s 21A(2)(o) where the gain is "significant" and exceeds that which is inherent in an offence of supplying commercial quantities of drugs (citing ***Wat***, above).

Hamill J noted the observations of Basten JA above in ***Kassoua*** [2017] NSWCCA 307 in regard to ***Wat*** at [44]. Basten JA's observations as to "a more general risk" involved in the counting of aggravating factors by reference to s 21A(2) such that "any attempt to give particular weight to a particular factor will result in double counting" identified the heart of the applicant's complaint in ***Lin***: at [41]-[42].

Procedural fairness denied - dealing with applicant's knowledge of complainant being underage as aggravating factor - failure to give notice to applicant – s 61J Aggravated sexual intercourse without consent

In ***Aloniu*** [2017] NSWCCA 74 the applicant was sentenced for Aggravated sexual intercourse without consent [victim under authority] (61J(1) *Crimes Act*). The circumstance of aggravation averred (and admitted) as an element of the s 61J(1) offence as pleaded in the indictment was that the complainant was "under the authority" of the applicant (s 61J(2)(e)).

The complainant was the applicant's niece aged 15. The applicant took issue with the judge's remark: "*I do find beyond reasonable doubt he knew she was under age as well. How could he not know?"*

The CCA held the applicant was denied procedural fairness. The language used in the impugned remark suggests the judge was dealing with the applicant's knowledge of the complainant being underage as an aggravating factor. The age of the complainant, if under 16, was a circumstance of aggravation for the purposes of s 61J(2)(d), requiring proof by the Crown beyond reasonable doubt. Given the Crown made no submission seeking such a finding, it was necessary, as a matter of procedural fairness, for the sentencing judge to give notice to the applicant to be heard on that issue before ruling upon it: at [60]-[61].

Motive – no evidence of motive – no error in considering applicant's dangerousness increased by inability to identify motive - whether inability to identify motive aggravated sentence imposed

In ***Cramp*** [2017] NSWCCA 305 (murder) the applicant submitted the judge erred in considering dangerousness to be increased because motive could not be determined. The judge stated in remarks: the "*very inability to identify a motive … increases rather than reduces ... dangerousness*." The CCA held there was no error.

The applicant relied on *Louizos* (2009) 194 A Crim R 223 at [102] where the Court there said that, "If the Crown wishes to rely upon motive as an aggravating feature, the Crown must prove it beyond reasonable doubt. If the accused contends that the motive is a mitigating factor, the accused is required to prove it on the balance of probabilities. *If the court cannot determine what motivated the offender, it follows that it is not a factor that can be taken into account in determining the objective seriousness of the offence or in any other way relevant to sentencing."* The CCA said that the final sentence of the passage from *Louizos* was not intended to be a general statement, for all cases, where no specific motive can be proved: at [25]-[27]. In *Louizos* the judge erred in converting the absence of "an aggravating factor into a mitigating factor": at [32].

Here, the judge was not able to determine whether objective gravity was aggravated or mitigated by motive. Where no motive could be positively established this void in the evidence nevertheless had an indirect relevance to sentencing. The judge's remark is no more than that the need to sentence on the

basis of danger posed to the community was confirmed and the degree of risk against which the community was to be protected was heightened by the circumstance of no apparent motive: at [32].

3. MITIGATING FACTORS

Bugmy v The Queen (2013) 249 CLR 571 - dysfunctional background — judge finding applicant's dysfunctional background of less weight due to "ample opportunity to address difficulties" contrary to Bugmy — effects of childhood deprivation do not diminish with time

In ***Ohanian*** [2017] NSWCCA 268 the CCA found the sentencing judge erred by concluding the mitigating effects of the applicant's dysfunctional upbringing were diminished because he was a mature man with "ample opportunity to address his difficulties". The statement is contrary to the law as explained in *Bugmy* (2013) 249 CLR 571 (at [22]) where the High Court stated:

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

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

Bugmy v The Queen (2013) 249 CLR 571 - dysfunctional background and youth

In ***IS*** [2017] NSWCCA 116 the applicant was aged 16 years 8 months at the time he committed an aggravated robbery using corporal violence with the infliction of GBH (s 96 *Crimes Act*). The applicant grew up in a background of "parental criminal activity, substance abuse, severe and chronic neglect and familial violence". He was placed under Ministerial care aged 7 and thereafter moved through multiple placements.

The CCA found that although the judge accepted the applicant's upbringing engaged the principle in *Bugmy*, he failed to give any weight to the reduction in moral culpability and placed strong emphasis on general deterrence: at [58]. The combined effect of the applicant's background of profound childhood deprivation and youth called for the weight that would ordinarily be given to personal and general deterrence and the protection of society "to be moderated in favour of other purposes of punishment" and, in particular, his "rehabilitation": at [65]; *Bugmy* at [46].

With regard to young offenders, the emphasis given to rehabilitation rather than general deterrence and retribution may be moderated when the young person has acted in the way an adult might and has committed a crime of violence. The court will look to matters including weapons, premeditation, criminal history and the nature and circumstances of the offence: at [60]; *KT* (2008) 182 A Crim R 571.

The CCA held that *a*pplying these principles to the present case, the judge erred. The applicant was aged 16 years 8 months with no extensive criminal history; the offence involved no weapon or premeditation, although the nature and circumstances of the offending made it objectively serious: at [61]. The applicant's resort to violence was wholly a product of profound childhood deprivation. The offending occurred when he had not yet gained maturity and the effect of that deprivation must have been at its fullest: at [62]. The particular circumstances of the applicant's upbringing remained a central consideration: at [63].

Duress

In ***Giang*** [2017] NSWCCA 25 the CCA held that duress is not a purely subjective factor. There was no error in the judge factoring duress into the sentencing exercise at both the objective and subjective stages. The distinction between factors that are relevant to "the nature of the offending" (*Muldrock* (2011) 244 CLR 120) (objective factors) and those that are purely subjective to the offender is not always easy to draw. However, nothing in *Muldrock* confines duress as a purely subjective factor (*Tiknius* [2011] NSWCCA 215; (2011) 221 A Crim R 365 relating to the application of non-exculpatory duress to sentence continues to apply): at [33]-[34].

Gambling addiction – fraud offences

In ***Johnston*** [2017] NSWCCA 53 the CCA said that the principles set out in *Henry* (1999) 46 NSWLR 346 at [273] – that an addiction to drugs or gambling is not of itself a mitigating circumstance - apply equally to cases of fraud to feed a gambling addiction: at [40]-[41]. The Court has consistently held that the fact offences were committed to feed a gambling addiction will not generally be a mitigating factor. Although the gambling habit may explain serious criminal conduct, it is a rare case where the offender can seek mitigation of penalty based on an addiction to gambling even when pathological: at [36]. Gambling addiction will generally not reduce moral culpability where the offence is committed over an extended period, as the offender had a degree of choice as to how they would finance their addiction. Where general deterrence is an important factor, it would be inappropriate to treat an underlying explanation that the motive was gambling as a mitigating circumstance or reducing moral culpability particularly where the frauds were perpetrated and skilfully executed over an extended period: at [37]-[38]; *Grossi* (2008) 183 A Crim R 15; [2008] VSCA 51.

s 21A(3)(a) - injury, emotional harm, loss or damage caused by the offence was not substantial - drug supply - controlled operation where drugs not disseminated into community - judge did not err in giving no weight to mitigating factor

In ***Taysavang; Lee*** [2017] NSWCCA 146 the CCA held the judge did not err in giving no weight to the degree of injury to the community under s 21A(3)(a) where the drug supply was part of a controlled operation in which the applicants supplied to an undercover operative: at [52]- [53].

In cases where a charge of supply drugs involves drugs acquired by a person cooperating with police, it is open to a sentencing judge to give no weight or very slight weight to the consideration that the supplied drugs have not been disseminated into the community (*Chan* [1999] NSWCCA 103; *Hristovski* [2010] NSWCCA 129): at [50]. A primary consideration remains that an offender intended to supply the prohibited drug to members of the community, and that it was no act of an offender that resulted in this not happening: at [51]; *Achurch* [2013] NSWCCA 186 at [97].

Unlikely to reoffend – s 21A(3)(g) – difference between 'prospects of rehabilitation' and 'unlikelihood of re-offending' considered

Section 21A(3) lists as amongst the factors that a sentencing court is obliged to take into account in mitigation -

> *"(g) the offender is unlikely to re-offend,*
>
> *(h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise"*

In ***Zuffo*** [2017] NSWCCA 187 the CCA allowed the applicant's appeal on the ground the sentencing judge failed to assess the applicant's likelihood of reoffending under s 21A(3)(g).

The applicant, sentenced for drug supply offences, presented a strong subjective case: renunciation of drug-use, understanding of great harm to the community caused by drug-dealing, successful attempts to build a business and restore a close relationship with family, and no further drug offences.

The judge did make a specific finding the applicant was "substantially rehabilitated" (s.21A(3)(h)). However, the judge neither referred to s 21A(3)(g) nor made an assessment of the unlikelihood of re-offending: at [52].

The CCA said although the prospects of rehabilitation and the unlikelihood of re-offending are commonly linked, the concepts are not the same. Rehabilitation is a concept which is broader than merely avoiding reoffending (*Pogson* (2012) 82 NSWLR 60). Nonetheless both mitigating factors share much in common. An assessment that an offender is unlikely to re-offend is commonly linked to a favourable finding of good prospects of rehabilitation. The need for specific deterrence may be reduced when the sentencer determines a person is unlikely to re-offend and has good prospects of rehabilitation: at [47]-[48].

The judge was obliged to make his own assessment as to whether the applicant was unlikely to re-offend within s 21A(3)(g): at [51]. A favourable assessment by the judge of the applicant's future offending could not be inferred from the judge's remarks: at [55]-[56].

Remorse – s 21A(3)(i) – absence of remorse may not be taken into account to impose a more severe sentence

In ***Roff*** [2017] NSWCCA 208 the sentencing judge erred in using the absence of remorse to impose a more severe sentence. Remorse under s 21A(3)(i) may mitigate a sentence so that an offender found to be remorseful may anticipate a lesser sentence than a co-offender found to be unremorseful: at [25]-[26].

Ice Psychosis and Drug Addiction

In ***Fang (No.4)*** [2017] NSWSC 323 Johnson J sentenced the offender for a murder committed during an ice-induced psychosis. Johnson J applied s.21A(5AA) *Crimes (Sentencing Procedure) Act*, ignoring the self-induced intoxication as a mitigating factor, but accepting that the fact the addiction was caused by family tragedy assisted the offender's subjective case. Further, the fact the accused did not have prior knowledge the ice would lead to an act of violence on his part was not a mitigating factor but the absence of a seriously aggravating factor.

4. FACT FINDING

Principles that apply to untested statements

In ***Lewin*** [2017] NSWCCA 65 at [26] and ***PH*** [2017] NSWCCA 79 at [53]- [56] the CCA stated that a sentencer ought to exercise caution when accepting exculpatory or mitigatory statements from offenders recorded in documents that are not supported by sworn evidence.

In ***Imbornone*** [2017] NSWCCA 144 the judge did not err in declining to accept remorse as a mitigating factor: at [60]. The evidence of an untested hearsay claim to the psychiatrist was insufficient to find the applicant was remorseful for the purposes of s 21A(3)(i). Untested out of court statements made to third parties should be treated with caution and, in many cases, given little or no weight: at [57] (*Qutami* [2001] NSWCCA 353; *Palu* (2002) 134 A Crim R 174). In the absence of evidence from the applicant, there was no opportunity to assess the genuineness of the remorse (*Harrison* (2002) 121 A Crim R 380): at [58]-[59].

The CCA re-stated the principles to be applied where a sentencing judge is faced with an untested statement made to a third party: at [57] -

1. Although statements made to third parties are generally admissible in sentence proceedings (subject to objection and the application of the rules of evidence) courts should exercise very considerable caution in relying upon them where there is no evidence given by the offender. In many cases such statements can be given little or no weight: *R v Qutami* [2001] NSWCCA 353 at [58] – [59].

2. Statements to doctors, psychologists, psychiatrists, the authors of pre-sentence reports and others, or assertions contained in letters written by an offender and tendered to the court, should all be treated with considerable circumspection. Such evidence is untested, and may be deserving of little or no

weight: *R v Palu* [2002] NSWCCA 381; (2002) 134 A Crim R 174 at 185, [40]-[41]; *R v Elfar* [2003] NSWCCA 358 at [25]; *R v McGourty* [2002] NSWCCA 335 at [24] – [25].

3. It is open to a court in assessing the weight to be given to such statements to have regard to the fact that an offender did not give evidence and was not subject to cross-examination: *Butters v R* [2010] NSWCCA 1 at [18]. It is one matter for an offender to express remorse to a psychologist or other third party and quite another to give sworn evidence and be cross-examined on the issue: *Pfitzner v R* [2010] NSWCCA 314 at [33].

4. If an offender appearing for sentence wishes to place evidence before the court which is designed to minimise his or her criminality, or otherwise mitigate penalty, then it should be done directly and in a form which can be tested: *Munro v R* [2006] NSWCCA 350 at [17]–[19].

5. Whilst evidence in an affidavit from an offender which is admitted into evidence without objection may be accepted by a sentencing judge (see ***Van Zwam v R*** [2017] NSWCCA 127) – *[Author's Note: this case outlined below]* - generally the circumstances in which regard should be had to such untested evidence is limited. Affidavits relied upon in the absence of oral evidence on oath frequently contain self-interested assertions of a character which makes them almost impossible to verify or test (particularly when served on the Crown in close proximity to, or on, the date of hearing). In the absence of any independent verification of the asserted behaviour, or state of mind, or of a tangible expression of contrition, "to treat this evidence with anything but scepticism represents a triumph of hope over experience": *R v Harrison* [2001] NSWCCA 79; (2002) 121 A Crim R 380 at [44].

Untested evidence by sworn affidavit – error in finding no genuine evidence of remorse where applicant not subject to cross-examination - difference between sworn affidavits and out-of-court statements recorded in a third party report

In ***Van Zwam*** [2017] NSWCCA 127 the sentencing judge erred in finding there was no genuine evidence of remorse where the applicant gave evidence by reading a sworn affidavit in which he expressed remorse but was not subject to cross-examination.

There is a very significant difference between a sworn affidavit and out of court statements provided by an expert's report, which may be disputed: at [107]. The affidavit was sworn testimony upon which the Crown was entitled to cross-examine: at [108]-[110]. The judge was not bound to accept the affidavit evidence any more than oral testimony from the appellant. But failure to appreciate the affidavit was *evidence* led to the error of acting on a wrong principle: at [111]. It is a rule of procedural fairness that a party who does not accept the evidence of a witness should put the alternative view in cross-examination: at [111] (citing *O'Neil-Shaw* [2010] NSWCCA 42 at [26] – [27]). In the absence of challenge by cross-examination the judge, not having said he found it inherently implausible, was not entitled to reject the evidence of the appellant: at [112].

5. SENTENCING OPTIONS

Sentencing adult offender for offences committed as a juvenile – children's sentencing options under Children (Criminal Proceedings) Act can be taken into account

In ***AA*** [2017] NSWCCA 84 (Crown appeal) the respondent was aged 23 when he was sentenced for child sexual assault offences (s 61M(2), s 66A(1)) he had committed when he was aged 15 to 19 years old.

The CCA held the judge did not err err in having regard to the sentencing options that were open under the *Children (Criminal Proceedings) Act* had AA been prosecuted as a juvenile.

A sentencing court, in dealing with an adult offender for an offence committed while they were a juvenile, can have regard to the sentencing regime available for juveniles had they been prosecuted earlier. In *TC* [2016] NSWCCA 3 the judge erred in failing to specifically address the statutory regime for the sentencing of children prevailing at the time the offence was committed. See also *SHR* [2014] NSWCCA 94: at [65].

The CCA found the judge had regard to the provisions of the *Children (Criminal Proceedings) Act* as a matter in mitigation of sentence. The approach is arguably analogous to sentencing for historical

sexual abuse offences whereby a sentencing court can take into account the sentencing practice at the date of the offence when sentencing practice has since moved adversely (*MJR* (2002) 54 NSWLR 368): at [64].

The CCA thus held that in regard to the offences under s 61M(2) (Aggravated indecent assault on young person), the judge was entitled to adopt the approach he did: at [66].

However, in regard to the offence under s 66A(1) (Sexual intercourse with person under 10) it was an error to sentence on the basis that had the respondent been prosecuted as a juvenile, the Court "would have imposed a control order": at [27], [67]. This was because s 66A(1) was a "serious children's indictable offence" which had to be dealt with according to law and could not have included a control order: at [67].

Stated case – Good behaviour bonds - District Court does not have jurisdiction to impose a condition on a bond that any beach is to be reported to particular judge of District Court - Local Court has jurisdiction under s 98 Crimes (Sentencing Procedure) Act to revoke bonds imposed on appeal in District Court and to re-sentence — District Court (in appellate jurisdiction) had power under s 17 Crimes (Appeal and Review) Act to determine if sentence imposed in Local Court valid

In ***DPP (NSW) v Jones*** [2017] NSWCCA 164 the respondent appealed to the District Court against sentences imposed in the Local Court. The District Court judge allowed his sentence appeal and imposed good behaviour bonds (s 9 *Crimes (Sentencing Procedure) Act* 1999 (CSPA). The District Court judge imposed a bond condition stating: "... any breach of bond be reported to [named Judge] for further action". The respondent failed to comply with his bond. He was called upon by the Local Court where his bond was revoked and he was re-sentenced to imprisonment.

The District Court judge stated a case to the CCA. The CCA held, inter alia, that the Local Court has jurisdiction to call-up and revoke a s 9 good behaviour bond imposed by the District Court in an appeal against sentence. Further, the Local Court can take any of the steps under ss 98(2) and 99(1) *Crimes (Sentencing Procedure) Act* 1999 including re-sentencing.

The CCA answered, inter alia:

. The District Court has jurisdiction to determine that a sentence imposed in the Local Court was invalid and, if so held, to set it aside: s 17 *Crimes (Appeal and Review) Act* (*CARA*)

. The direction given by the District Court judge - that any breach of bond be reported to him for further action - was not a condition of the bond. It did not deprive any other court or judicial officer of its statutory power to deal with the offender for failure to comply with bond conditions: at [9]-[10], [28].

. The District Court does not have jurisdiction to impose a condition on a bond that any breach of the bond be reported to a particular judge: at [10], [28].

. Where a bond is imposed by the District Court (sitting in appellate capacity on appeal from the Local Court), a Local Court has jurisdiction to call on an offender to appear before it. The Local Court may determine whether there has been a failure to comply with any condition of the bond: s 71 *CARA*; s 98(1)(b) *CSPA*. If so satisfied, the Local Court may revoke the bond (s 98(2)(c) *CSPA*) and resentence (s 99(1)(a)) or take such other steps as may be appropriate under s 98(2): at [28].

. Where there is failure to comply with a bond condition due to committing further offences, the Local Court in sentencing for those further offences can deal with the failure to comply with the bond, despite the bond having been imposed in the District Court on a sentence severity appeal: at [26].

Principles in considering Life Sentence

In considering a life sentence for murder, manslaughter and other related offences in ***Qaumi*** [2017] NSWSC 774 at [181]-[198] Hamill J rejected the established two-stage approach to the application of s.61(1) *Crimes (Sentencing Procedure) Act* of firstly assessing the objective culpability of the offence, then considering the relevance and impact of subjective features applicable to the offender.

> "The correct approach to s 61 is for the sentencing judge to consider all of the evidence relevant to the sentencing discretion, apply the relevant sentencing principles (common law and statute) and make an assessment of the extremity of the offender's culpability and the 'community interest in retribution, punishment, community protection and deterrence.' The sentencing Judge must consider whether the only way that the community interest so identified can be met is by the imposition of a life sentence. This is not a multi-stage process. Rather, it is an intuitive evaluation of the all of the material and principles and an application of the legislation providing for mandatory life sentences": at [194]

Hamill J also accepted that the criminal record of the offender and earlier offences cannot be used to determine the objective gravity of the offence but are relevant to assessing the '"community interest" for the purpose of s 61 … in particular (but not only) in terms of the community interest in "community protection": at [197]. (In this case the offenders were given a head sentence for murder of 45 and 38 years with total head sentences of 60 and 50 years).

SNPP provisions – correctly applied to juvenile at original sentence – SNPP no longer applies to juveniles – SNPP does not apply on re-sentencing on appeal

DL (No 2) [2017] NSWCCA 58: In 2008 the applicant, aged 16, was sentenced for murder. The sentencing judge correctly took into account the SNPP of 25 years that then applied. Legislative amendments subsequently removed the SNPP from applying to juveniles: s 54D(3) *Crimes (Sentencing Procedure) Act* 1999. The CCA said that on re-sentencing the SNPP has no application in determining the sentence to be imposed, because of the operation of s 54D(3), and the SNPP is to be disregarded completely (*MB* [2013] NSWCCA 254): at [5], [136].

6. PLEA OF GUILTY

Application for hearing before a court constituted by five judges refused - application based on recent divided decision of PG [2017] NSWCCA 179:– a discount for a plea of guilty must be applied to the starting point of each indicative sentence not to aggregate sentence.

In ***Berryman*** [2017] NSWCCA 297 the CCA refused an application for a hearing before a court constituted by a five-judge bench to consider the recent divided decision of ***PG [2017] NSWCCA 179***.

In ***PG*** Basten JA (dissenting) stated the utilitarian discount for a plea of guilty is to be applied to the sentence in fact imposed – the aggregate sentence – rather than to the indicative sentences. The majority (Button J and N Adams J) held, following authority of the Court, that a discount must be applied to the starting point of each indicative sentence and no explicit discount is to be applied to the aggregate sentence.

In refusing the application, the Court in ***Berryman*** (Leeming JA, Bellew and Lonergan JJ) held jointly at [29]-[33]:

- There is a preponderance of authority the discount is to be applied to the indicative sentences: ***PG*** *[2017] NSWCCA 179;* ***Elsaj*** [2017] NSWCCA 124 at [56]; *Nykolyn* [2012] NSWCCA 219, *Subramaniam* [2013] NSWCCA 159, *JM* [2014] NSWCCA 297; *Cahill* [2015] NSWCCA 53. Per the majority in ***PG*** (Button J and N Adams J) at [76]:

  > "We accept that no previous decision of this Court has expressly considered how it is that ss 22 and 53A(2)(b) of the Act are to be read together. Despite this, all of the decisions of this Court since *JM v R* are to the effect that a discount must be applied

to the starting point of each indicative sentence and that there should be no explicit discount applied to the aggregate sentence. …. We feel bound by that line of authority unless we consider those decisions to be 'plainly wrong' (adopting the test posited by Heydon J in *Green v The Queen* (2011) 244 CLR 462; [2011] HCA 49 at 490-491 [84]-[85] and applied by this Court in *Hampton v R* [2014] NSWCCA 131 at [32])."

- Button and N Adams JJ held that the construction which has been applied on countless occasions is not "plainly wrong".

Other circumstances why the matter should not be adjourned to a five-judge bench include that this point was not taken at first instance (in light of the authorities binding the sentencing judge, the submission could only have been formal); it is not a point that arises on the notice of appeal, where the sole ground is the sentence is manifestly excessive.

This appeal is therefore inappropriate as the vehicle for consideration by five judges. The Court is not implying that arguing such a course might in some other case be either desirable or appropriate.

s 16A(2)(g)* Crimes Act 1914 *(Cth) requires a court to take into account the utilitarian value of a guilty plea

In ***Xiao*** [2018] NSWCCA 4 a five-judge bench held that s 16A(2)(g) *Crimes Act 1914* (Cth) requires a court to take into account the utilitarian value of a guilty plea when considering the fact that a person has pleaded guilty to an offence: at [269]–[278] following Victorian CCA in *DPP (Cth*) *v Thomas* [2016] VSCA 237. It is desirable that the discount to be given for a guilty plea is specified by the court. However, there is no obligation on the sentencing judge to do so, and failure to do so does not of itself amount to error: [280].

The decision resolves the divergence of authorities on the question of whether the utilitarian value of a guilty plea is a relevant consideration for federal offences: see *Cameron* (2002) 209 CLR 339; *DPP (Cth) v Gow* (2015) 298 FLR 397; *Harrington* (2016) 11 ACTLR 215.

Plea of guilty - caution against using a range of percentages for discount

In ***Linggo*** [2017] NSWCCA 67 the applicant pleaded guilty to Commonwealth offences. The sentencing judge allowed a discount of "between 4 per cent and 10 per cent". The CCA strongly cautioned against using a range of percentages. It is difficult to know how the discount of between 4 per cent and 10 per cent was actually applied and introduced an unsatisfactory degree of uncertainty into the sentencing process: at [51]. Further, the very small discount failed to pay appropriate, if any, regard to the extent to which the early plea facilitated the course of justice and is such as to be indicative of error. The CCA came to this conclusion notwithstanding that in the ordinary course, the question of the weight to be given to a plea of guilty is a matter for the discretion of the sentencing judge. [48].

Manslaughter plea offer rejected by prosecutor - offer made subject to facts to be agreed and not particularised - applicant's case at trial and on appeal inconsistent with plea - utilitarian discount not available

In ***Merrick*** [2017] NSWCCA 264 a jury found the applicant not guilty of murder but guilty of manslaughter. Four weeks before trial the applicant offered to plead guilty to manslaughter but that offer was rejected by the Crown. No statement of facts was ever submitted on behalf of the applicant for the agreement of the Crown as the basis of the proposed plea. The applicant submitted the judge erred in failing to allow a discount for the applicant's offer to plead guilty: at [99]-[100]. The CCA rejected the applicant's submission.

The CCA reviewed a number of cases: *Oinonen* [1999] NSWCCA 310; *Pennisi* [2001] NSWCCA 326; *Cardoso* [2003] NSWCCA 15; 137 A Crim R 535; *Johnson* [2003] NSWCCA 129.

The CCA observed that:

- Culpability for manslaughter may vary considerably (for example, intention to kill or to cause grievous bodily harm; provocation or excessive self-defence as the basis of acquittal of murder; abnormality of mind etc.). The bare offer to plead guilty may not indicate the particulars of criminal responsibility. The sentencing judge will be entitled to place weight upon that fact in determining whether to allow any discount: at [117].
- If particulars are ascertainable then the pre-trial offer can be compared with the verdict following trial. The potential utilitarian benefit lost by rejection of the plea may be identified and attributed to the decision of the Crown to reject the plea, making it unfair to deny the offender a discount: at [117].

In the present case it was open to the judge to conclude the offer was not "fairly open to acceptance by the Crown" - because it was conditional upon any proposed version which the applicant never particularised. The only version ever propounded, and on appeal, is one upon which a plea of guilty to manslaughter would have been traversed and would therefore have been rejected by the judge, if not by the Crown: at [120].

The CCA noted that an offer of a plea of guilty of manslaughter on arraignment in the presence of the jury, may justify some discount even though no detail of the basis of the offered plea is specified by the accused. In that situation the offer is concrete and capable of immediate acceptance so that some utilitarian value could be derived, although sentence proceedings to determine the facts might be necessary and protracted: at [122].

Failure to indicate whether guilty plea taken into account - Degree of latitude afforded to remarks delivered ex tempore not available where judgment reserved - starting points of sentences provide no indication of whether discount applied

In ***Murray*** [2017] NSWCCA 262 the CCA allowed the applicant's appeal finding the sentencing judge failed to indicate the guilty plea had been taken into account. The judge acknowledged in the sentencing proceedings the applicant would receive the "full discount" for his pleas of guilty. After an adjournment of two days, the judge delivered sentence but made no reference to the guilty plea (only that the applicant had confirmed his pleas of guilty).

The record should reflect clearly and transparently the plea of guilty has been taken into account and the extent to which it has ameliorated sentence (T*homson; Houlton* (2000) 49 NSWLR 383; *Woodward* [2014] NSWCCA 205). Because the plea is a mandatory consideration (s 22 *Crimes (SP) Act*), it must form part of the reasoning process and be addressed in the judgment. 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 treated as an immaterial error. Where there is a real possibility it was not properly considered, failure to refer to the issue in the judgment should be treated as a material error (*Lee; Matthew* [2016] NSWCCA 146): at [33]-[37].

There have been cases where this Court has been satisfied the plea was taken into account and an appropriate discount allowed, although cursory reference was made to the plea and the discount was not quantified – for example *Reilly*; *Smith* [2012] NSWCCA 166 where the sentencing judge delivered remarks *ex tempore*: at [39].

In the present case however, judgment was reserved. The degree of latitude afforded to sentencing judgments delivered *ex tempore* is not available. Further the ungainly starting points of the sentences provide no indication as to whether the utilitarian discount was applied: at [40]-[42].

Guilty plea - No error in discounting sentence by only 17.5% where delay caused by applicant's flight — history of matter relevant to determining extent of discount

In ***Samuel*** [2017] NSWCCA 239 the applicant was charged in 2007 with various offences. He subsequently left NSW for 8 years. In 2015 he returned to NSW, handed himself in to police and pleaded guilty in the Local Court. The appellant submitted a discount for a guilty plea recognises the conservation of the court's resources, and there is no difference between a Local Court plea in 2007 or 2015.

Dismissing the appeal, the CCA held the sentencing judge did not err in giving a discount of 17.5% for the utilitarian value of the guilty plea.

A sentencing court must take into account a plea, its timing, and the circumstances in which it was entered (s 22 *Crimes (SP) Act*). Whether or not to allow a reduction is a matter within the discretion of the sentencer. The effect of the plea can encompass a number of matters such as witness vulnerability and utilitarian value. Utilitarian value should generally be assessed in the range of 10–25% with timing the primary consideration determining where in the range a case should fall. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencer (*Thomson & Houlton* (2000) 49 NSWLR 383): at [53]-[55].

Having been charged with offences in 2007 and entering pleas of guilty in 2015, the applicant's pleas could only be characterised as "an early plea" if the events of 2007 were entirely ignored. There is no reason why, in assessing the relevance of the pleas to the efficiency of the criminal justice system, such an approach should be endorsed: at [57].

Plea entered based on incorrect advice as to child's age

Jiminez [2017] NSWCCA 1: 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 aged less than 18. (For the purposes of s 91H(2) a "child" is a person under 16: s 91FA). An appeal against conviction to withdraw his appeal was dismissed in the District Court. 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 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].

7. DISCOUNTS

Aggregate sentences - discount for assistance under s 23 Crimes (Sentencing Procedure) Act 1999 to be applied to each indicative sentence consistent with discount for guilty plea under s 22

TL [2017] NSWCCA 308 held that a discount for assistance to authorities under s 23 *Crimes (SP) Act* 1999 is to be applied to each indicative sentence of an aggregate sentence, consistent with the approach regarding a discount for a guilty plea: s 53A(2)(b); ***PG*** [2017] NSWCCA 179***; Elsaj*** [2017] NSWCCA 124.

Assistance to authorities - a discount can be granted for assistance for "…. the offence concerned or any other offence" – connection with subject offence required - s 23 confers discretion, not obligation, to grant discount

Section 23(1) *Crimes (Sentencing Procedure) Act* 1999 states a discount can be granted for assistance for "…. *the offence concerned or any other offence*." [Emphasis added].

In ***XX*** [2017] NSWCCA 90 the CCA held it was an error to allow the respondent the discount under s 23(1) where the "*other offence*" lacked connection to the subject offences: at [63]. The respondent was sentenced for sexual assault offences committed in 2013-2014. The judge allowed a 15% discount for the applicant's assistance to authorities in 2006 in relation to a charge of conspiracy to murder, where the respondent gave evidence at the trial of the conspirators and received payment of $17k. The lack of any connection between the conspiracy to murder and the subject offences was significant to any consideration of whether to exercise the discretion in s 23(1): at [36]. The sentencing judge failed to consider that the subject offences and the offence for which the respondent provided assistance were unrelated: at [48]-[49], [61]; s 23(2)(i); *Kelly* (1993) 30 NSWLR 64.

Voluntary disclosure of guilt - ss 23(2), (4) Crimes (Sentencing Procedure) Act 1999

R v Ellis (1986) 6 NSWLR 603 at [38] held that "the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency."

In ***AA*** [2017] NSWCCA 84 (a Crown appeal) the CCA held the judge erroneously allowed an *Ellis* discount without considering the factors under s 23(2) *Crimes (Sentencing Procedure) Act* 1999. The respondent was sentenced for child sexual assault offences. The complainant did not make a complaint until three years later. The respondent thereupon attended a police station where he made some admissions.

The CCA noted at [41]-[41] that the *Ellis* discount is accommodated by two provisions in the *Crimes (Sentencing Procedure) Act*:

> (1) s 21A(3)(i) which provides that remorse shown by an offender is a mitigating factor. Voluntary disclosure to police can be powerful evidence of remorse. No separate discount should be given on account of remorse (*Borkowski* (2009) 195 A Crim R 1 at [32]).
>
> (2) s 23 Power to reduce penalties for assistance provided to law enforcement authorities.

The CCA noted at [43] that disclosure by an offender to law enforcement authorities involves the provision of assistance to law enforcement authorities within the meaning of s 23(1) and is thereby subject to the stricture of s 23(3) (*CMB* (2015) 256 CLR 346). In such cases, sentencing judges are required to comply with s 23(4) and specify the level of the discount proffered (*Panetta* [2016] NSWCCA 85). Failure to comply with s 23(4) is not a jurisdictional error but complaints about such failures fall to be considered as part of the appellate process: at [44]; s 23(6), s 101.

The CCA stated at [45] that the end result is that if sentencing judges are considering imposing a lesser sentence on account of voluntary disclosure, then they must:

- consider the factors in s 23(2) in determining whether to proffer the discount (*Williamson* [2015] NSWCCA 250 at [68]) and, if so, its level.
- ensure the penalty imposed is not disproportionate (s 23(3)); and
- specify the level of discount in accordance with s 23(4).
- Irrespective of whether s 23 is engaged, sentencing judges may also consider whether the offender's actions demonstrate remorse.

In this case, the CCA found the judge did allow an *Ellis* discount on account of AA's assistance but failed to address the factors in s 23(2). In view of that conclusion it is not necessary to address whether error was established by the further failure to specify the level of discount in accordance with s 23(4): at [49].

The CCA determined afresh whether, having regard to s 23(2), any discount was warranted. It was not established that the information was ultimately of significance or especially timely (ss 23(2)(b), (d)) or complete (s 23(2)(c)). The respondent only attended the police station after he was notified of the complaints, when they were about to be reported anyway, and his admissions were incomplete. The CCA concluded that the imposition of a lesser penalty on account of his assistance was not warranted: at [50].

8. MENTAL ILLNESS

Taking into account an offender's mental illness when assessing objective seriousness of an offence

In ***Biddle*** [2017] NSWCCA 128 the CCA said that it is clear this Court has followed the approach that an offender's mental condition, which must impact upon moral culpability, is a matter to be properly taken into account when assessing the objective seriousness of an offence: at [66]-[70]; *McLaren*

[2012] NSWCCA 284; *Martin* [2015] NSWCCA 6. (This is despite the difficulties presented by the tension in the statements in *Muldrock* (2011) 244 CLR 120 at [27] (*objective seriousness to be assessed without reference to matters personal to an offender, but wholly by reference to the nature of offending*) and [54] (*mental illness will, in most cases, substantially lessen the offender's moral culpability for the offence*): at [54], [66].

In this case, the CCA dismissed the applicant's appeal. The CCA found the judge expressly allowed for the possibility that the applicant's mental state might be relevant to an assessment of objective seriousness and explained why, if that were the case, it would not alter his assessment of objective seriousness. This was because the judge found that the applicant's mental condition was not causally connected to the offending – a finding which was properly open on the facts: at [71], [87].

In ***Yun*** [2017] NSWCCA 317 the CCA again affirmed an offender's mental condition at the time of the commission of the offence is a critical component of "moral culpability" which in turn affects the assessment of "objective seriousness": at [47]; ***Biddle*****.**

Error in taking a too restrictive approach to mental condition — judge's approach called upon applicant to demonstrate more than the law of sentencing required

In ***Luque*** [2017] NSWCCA 226 the CCA allowed the applicant's appeal holding that the sentencing judge adopted a too restrictive approach to the applicant's mental condition and set the bar too high before her mental conditions were judged to be able to be taken into account: at [80].

The judge approached the psychiatric report with caution, bearing in mind that much of what the applicant had told the psychiatrist was uncorroborated, and that she had not given evidence on sentence. The CCA cited a portion of the judge's remarks (at [62]-[63]):

> "There is no suggestion in anything that [the Dr] says that the actions taken by the offender were something that she could not see [sic] control, over which she had no independent capability of exercising discretion, or had no understanding of what she was doing. In my opinion, the reports do not establish a basis to find that her actions were a direct result of any mental illness or incapacity. She certainly had some depression around that time, but this went far beyond something which could be excused on the basis she had no idea what she was doing."

The applicant had pleaded guilty to making a false accusation (s.314 *Crimes Act* 1900). The admitted offence and its context inevitably give rise to a need for great caution in accepting anything that the applicant had to say. Nevertheless, the evidence about the mental state of the applicant did not merely derive from what she had to say but came from a number of sources including the psychiatrist, her father and a psychotherapist: at [73]-[74].

The opinion ultimately expressed by the psychiatrist was that the applicant's psychiatric conditions contributed to poor judgment which underpinned commission of the offence. In this portion of the remarks, some of the negative propositions called upon the applicant to demonstrate more than the law of sentencing required. The applicant did not need to demonstrate her actions were beyond her control; that she had no independent capability of controlling them; that she had no understanding of what she was doing; nor that her actions were "excused" on the basis she had "no idea what she was doing". The question was whether the applicant had established on the balance of probabilities her actions were mitigated, on the basis that a mental illness or condition played a role of some significance in her offending (*Scognamiglio* (1991) 56 A Crim R 81). Although the judge referred correctly, to the applicable principle, this portion of the remarks suggests that, in applying that principle, too restrictive an approach was taken in practice: at [79]-[85].

9. DE SIMONI PRINCIPLE

The *De Simoni* principle (*The Queen v De Simoni* (1981) 147 CLR 383) is that a sentencing judge must not take into account as a circumstance of aggravation a factor that would constitute an element of a more serious offence than the one for which the offender is to be sentenced. This principle qualifies the statutory obligation in s 21A(2) to take into account aggravating factors which do not

constitute elements of the offence: ss 21A(2), (4) *Crimes (Sentencing Procedure) Act; Cassidy* [2012] NSWCCA 68 at [1]; ***Issa*** [2017] NSWCCA 188 at [62].

De Simoni principle not infringed - Intentionally damage property by fire s.195(1)(b) Crimes Act – foreseeability of risk of harm to the victims - judge properly took into account as circumstance of aggravation

In ***Issa*** [2017] NSWCCA 188 the applicant was sentenced for offences of Intentionally damage property by fire (s.195(1)(b) *Crimes Act*). The judge took into account that the offences were aggravated by the offender's disregard for public safety (s 21A(2)(i)) *Crimes (Sentencing Procedure) Act* 1999), and the foreseeability of risk of harm to the victims (an aggravating factor at common law).

The applicant submitted that finding the applicant's advertence to the possibility of harm to potential occupants trespassed into the elements of more serious arson offences in ss 196 (Maliciously destroying or damaging property with intent to injure a person) and 198 (Maliciously destroying or damaging property with the intention of endangering life). The applicant submitted that recklessness as to the consequences provided for in s 196 covered the same ground as the aggravating factors which were taken into account by the judge at common law and under s 21A(2)(i); and thereby infringed the principle in *The Queen v De Simoni* (1981) 147 CLR 383.

The CCA dismissed the appeal. The CCA examined closely the elements of ss 196 and 198. The elements of an offence against s 196(1)(a) are: (1) the accused damaged property; (2) the accused did so intentionally or recklessly; and (3) when the accused damaged property he intended to cause bodily injury to another person. The mental element that must be proved with respect to the act of damaging property (element (1)) is satisfied either by intention or recklessness (element (2)). However, in respect of the consequences, bodily injury to another person, the Crown must prove intention (element (3)). Recklessness (proof of foresight of particular consequences and the decision to go ahead anyway) is not sufficient. Similarly, the offence of damaging property with the intention of endangering life under s 198 requires the Crown to prove that an accused did a certain act (damaging property), intentionally or recklessly, with the intention of endangering the life of another: at [78]-[79].

Thus, if the applicant, as the judge found, foresaw the possibility of injury to others (whether persons inside the house or members of the public) when he intentionally or recklessly damaged property, this mental element would not be sufficient for an offence under ss 196 or 198, since an intention to bring about the consequences is required: at [81].

It was therefore open to the sentencing judge to find that the applicant realised his conduct was likely to cause a risk of physical danger to the occupants and to regard this matter as increasing the seriousness of those offences: at [90].

Importation border controlled drug s 307.3 Criminal Code 1995 (Cth) - gross weight of package 3.2 kg but actual quantity unknown - sentencing judge made finding that the "offender was aware it was a substantial quantity" - breach of De Simoni principle

In ***Lee*** [2017] NSWCCA 156 CCA the applicant was convicted of Import border controlled drug (methamphetamine) under s 307.3 *Criminal Code* (Cth). The drug package had a gross weight of 3.2kg but the drugs were destroyed before purity testing could be carried out. It was due to the failure to determine purity that the charge was brought under s 307.3, as Commonwealth drug offences generally rely on purity to determine the quantity and hence the applicable offence (s 312).

Quantity is not a physical element of an offence under s 307.3 (which has a maximum penalty of 10 years). In contrast, the quantity of drug is a physical element for the more serious offences under ss 307.1 and 307.2 (importation of commercial and marketable quantities – maximum penalties of life imprisonment and 25 years, respectively).

The CCA found that the judge referred to the gross weight of 3.2 kg, the fact that purity testing was not carried out and then expressed her finding "*the offender was aware that the item contained a substantial quantity of a border controlled drug*". The CCA held the judge thus took into account a matter that would have rendered the applicant liable for a more serious offence, thereby breaching

the principle in *The Queen v De Simoni* (1981)147 CLR 383: at [26]-[27], [36]. Further, the marketable quantity threshold is only 2 grams. If the judge was mindful she could not take into account that a quantity of 2 or more grams was imported it would be expected that she would say so. The only conclusion is that she took into account the importation was of an actual quantity that was "substantial" and had in mind 2 grams or likely considerably more: at [37].

10. STATISTICS AND COMPARATIVE CASES

Statistics – no guidance regarding aggregate sentences – counsel to ensure limits of utility of statistics is understood - statistics can be very valuable tool -* "*Explaining the Statistics" document by the Judicial Commission

Why [2017] NSWCCA 101: A number of cases have found Judicial Commission statistics offer no guidance about the propriety of an aggregate sentence. The statistics only record the sentence imposed for one offence in a multi-offence sentencing exercise; that is, the "principal offence" – and no statistics are maintained of the overall or aggregate sentence imposed in such cases: at [33]-[34]; *Tweedie* [2015] NSWCCA 71 at [47]; *AG* [2016] NSWCCA 102. RA Hulme J made the following observations at [59]-[64]:

. The statistics can be a very valuable tool if properly understood and used appropriately. If they are to be relied upon, counsel should ensure the limits of their utility are properly understood (*Knight* [2015] NSWCCA 222).

. Practitioners should read the "Explaining the Statistics" document available on the Judicial Commission website before relying upon statistics in court.

. The statistics provide an enhancement of published judgments available via hyperlink which give further information about individual cases making up the database. Another enhancement is the provision of statistics for "Aggregate/Effective" terms of sentence and non-parole periods, though there are limitations on the utility of these.

NOTE: Following R A Hulme J's comments, the Judicial Commission's *Sentencing Bench Book* now states:

> *"[10-025] Necessity to refer to "Explaining the statistics" document* - Where JIRS statistics are used by either party it is essential that reference is also made to the "Explaining the statistics" document (found at the top of the Statistics page on JIRS). This document explains how JIRS statistics are compiled. RA Hulme J in *Why* [2017] NSWCCA 101 at [60]–[61], [64] emphasised the need for the parties to refer to the "Explaining the statistics" document on JIRS."

Statistics - "multiple offences" variable – mid-range point variable – both variables now removed from Judicial Commission statistics

NOTE: Following these two cases, the Judicial Commission has now removed the variables "Multiple offences", the median and 80% range from the statistics viewer for the Higher Courts.

In ***Wright*** [2017] NSWCCA 102 the sentencing judge was left under the misapprehension that the "multiple offences" variable within the Judicial Commission statistics encompassed multiple offences of the *same* offence. In fact the "multiple offences" variable referred to "*any* additional offence" committed by the offender. This resulted in sentence that was manifestly inadequate, however, as his Honour's misapprehension was not corrected by the Crown, the CCA dismissed the Crown appeal: at [50]-[55].

In ***Harper*** [2017] NSWCCA 159 the applicant's counsel relied on the statistics to show the sentence imposed reflected a "middle of the road" result inconsistent with the sentencing judge's finding that the objective seriousness of the offence was just below the middle of the range. Dismissing the appeal, the CCA said the problem with the applicant's submission is the premise the median in the statistics

represents sentences imposed for middle of the range offences, or offences less serious where the subjective case is not as positive as the applicant's. Without knowing anything about the facts of the cases falling at or close to the median, the premise is not established: at [34]. Further, little can be discerned from statistics as to subjective cases: at [35].

Comparative cases

In ***Upadhyaya*** [2017] NSWCCA 162 the CCA found that the sentencing judge did not give undue weight to another case and that error could not be inferred by the fact the sentence imposed was similar to that case.

The CCA referred to the guidance provided by the High Court in *R* v *Kilic (*2016) 91 ALJR 131 about the use of comparable cases at [75]:

- It is for the parties to provide the Court with cases which are said to provide comparable sentences.
- Whether a case is appropriately comparable requires "consideration to be given to the circumstances of the offending" in the proffered comparator.
- Only when the circumstances of the offending are found to be appropriately comparable that a proposed comparator may provide a yardstick.
- A single prior instance even of appropriately comparable offending is unlikely to provide much by way of useful guidance. Normally, it takes a number of appropriately comparable cases to provide a useful yardstick.
- A yardstick is no more than that. It does not constitute a range within which the sentence under consideration must fall. A sentence *markedly* out of kilter with a useful yardstick may provide reason to consider whether there is good reason for a marked difference in outcome.
- It is an inevitable part of this process that previous decisions proffered as comparable frequently will be considered only to be discarded for failing to provide an appropriate comparator.

In ***To*** [2017] NSWCCA 12 the CCA said that the Court has a specific duty to examine sentences in like cases in determining whether a lesser sentence is warranted in law. While caution is to be exercised, the Court is bound to have regard to the sentences passed in like cases, provided that true comparability can be shown, in order to achieve consistency (*Wong* at [6]), "equal justice" (*Green & Quinn* (2011) 244 CLR 462), and 'systematic fairness' and 'reasonable consistency' in sentencing (*Hili)*: at [256]-[258].

That kind of general consistency is maintained by the decisions of intermediate courts of appeal: at [257]. There is also the positive purpose of the sentencing judge or intermediate Court of Appeal drawing upon the collective wisdom of other judges (*Hili a*t [54]): at [260]. The purpose of comparison is to consider whether the sentence reflects "consistency in the application of the relevant legal principles". This does not merely involve checking the principles have been articulated. The level of penalty imposed must be explicable by reference to the principles applied to the specific facts of the case and must bear a reasonable proportion to levels of penalty in like cases where the same principles have been applied to materially comparable facts: at [259]. A conclusion as to whether the sentence is appropriate is not arrived at merely on the simplistic basis that other sentences passed under the same section have been lower: at [261].

Comparative cases – necessary with respect to child pornography offences

In ***Lyons*** [2017] NSWCCA 204 the applicant was sentenced for a number of offences of possess child abuse material (s 91H(2) *Crimes Act* NSW) and use carriage service to transmit child pornography material (s 474.19(1) *Criminal Code* Cth).

The CCA said that it is necessary, particularly in cases involving child pornography offences, to have regard to comparative cases. This is because objective seriousness is an assessment of where the case lies on the 'spectrum' that extends from the least serious instances of the offence to the worst category of offending (*Kilic* (2016) 91 ALJR 131 at [19]). The need arises because a number of the

relevant considerations concern the numbers of images, the length of time material was possessed, accessed or transmitted, and the nature and content of the material assessed on the CETS or Oliver scales: at [82]; *Minehan* (2010) 201 A Crim R 243; *De Leeuw* [2015] NSWCCA 183.

11. PARTICULAR OFFENCES

DRUGS

Drug supply - Clark "principle" inconsistent with sentencing discretion and should no longer be applied

In ***Parente*** [2017] NSWCCA 284 the five-judge Bench held that the *Clark* "principle" (*Clark* NSWCCA, unreported, 15 March 1990) that drug trafficking in any substantial degree should lead to a custodial sentence unless there are exceptional circumstances is incompatible with the judicial sentencing discretion. It should no longer be applied: at [101], [108]-[110].

The *Clark* principle saw an approach of first determining whether there has been trafficking to a substantial degree giving rise to an assumption that there must be a full-time custodial sentence, and then to inquire whether there are exceptional circumstances that would justify an alternative imposition. This "two-staged" approach is contrary to the "instinctive synthesis" approach of taking into account *all* relevant factors in order to arrive at a single result: at [93]-[97] (*Markarian* (2005) 228 CLR 357 at 371; *Wong* (2001) 207 CLR 584). The "principle" is one that "crosses the boundary between identifying the 'unifying principles' to be applied in any sentencing decision and imposing an unlegislated judicially created constraint on the sentencing discretion": at [105]; ***Robertson*** [2017] NSWCCA 205.

The CCA said that sentencing in drug supply cases should be approached in a manner consistent with the general sentencing principles above, with emphasis on some matters:

> (i) It is necessary a sentencing court be mindful of the purposes of sentencing which include deterrence and protection of the community (s 3A *Crimes (Sentencing Procedure) Act*).
>
> (ii) It is necessary to remain mindful of the maximum penalty and any SNPP. They are legislative guideposts and for drug supply are set at a high level.
>
> (iii) It may be accepted that sentencing practices establish that, where an offence demonstrates drug dealing "to a substantial degree", a sentence of imprisonment will ordinarily be imposed. The serious social implications of drug dealing (reflected in maximum prescribed sentences) suggests that, in the ordinary case, a sentence other than imprisonment will fail to meet sentencing objectives (Simpson JA in ***Robertson*** at [50]).
>
> (iv) A court must not sentence an offender to imprisonment unless satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate: s 5(1) *Crimes (Sentencing Procedure) Act*. This is a consideration of the possibility of options such as a fine, bond, or community service order rather than of the possible alternative ways in which a sentence of imprisonment might be served (presently, by way of full-time imprisonment, home detention or an intensive correction order). Nothing in s.5 directs a judge, having decided that no alternative to imprisonment is a viable option, to then exclude from consideration any non-custodial means by which the sentence may be served (Simpson JA in ***Robertson*** at [97]).

The correct approach is to determine:

> (1) whether no sentence other than imprisonment is appropriate (regardless of how it might be served);
> (2) if so, the length of such a sentence (regardless of how it might be served); and
> (3) whether any alternatives to full-time incarceration are available and appropriate.

"Drug rip-offs"

Kijurina [2017] NSWCCA 117: The CCA noted that although the criminality in a "drug rip-off" may be less than a genuine plan to supply drugs, drug "rip-offs" are objectively serious and subject to the

penalties that apply to a supply offence under s 25 *DMTA*. The victim of a drug rip-off is unlikely to report the matter to police. The offender is likely to escape scot-free. There is significant community interest in not allowing the drug trade to be used for such fraudulent activities and in deterring violence such conduct can provoke: at [99]-[100]; *Yaghi* (2002) 133 A Crim R 490.

Ice – supply large commercial quantity – where penalty increased 3 months prior to commission of offence

In ***Chong*** [2017] NSWCCA 185 the CCA (by majority) allowed the applicant's sentence appeal in respect of supply large commercial quantity methylamphetamine (923g) taking into account that the penalty for the offence was increased three months prior to the applicant's offence. The threshold for the large commercial quantity was halved from 1kg to 500g (*DMTA (Methyl amphetamine) Regulation 2015*, commenced 1 September 2015). The offence now carried a maximum sentence of Life imprisonment, SNPP 15 years. Pre-amendment the maximum penalty for supplying an amount less than 1kg was 20 years imprisonment, SNPP 10 years.

Parliament intended that sentences imposed upon persons supplying quantities between 500g and 1kg should be increased (*Muldrock* (2011) 244 CLR 120 at [8]). It does not follow that all sentences must immediately increase beyond the sentences for offending immediately pre-amendment. Questions of general and specific deterrence will still need to be assessed in the individual case, albeit against new guideposts: at [18]-[20].

"Lack of previous convictions has less significance in drug trafficking cases" – caution required in applying this statement as a general statement of principle

In ***Chong*** [2017] NSWCCA 185 the judge gave little weight to applicant's lack of previous convictions, stating the fact the offender has a clear record will have less significance in drug trafficking than other crimes as people are selected for trafficking because their records and lifestyles are not such as to attract suspicion (*Leroy* [1984] 2 NSWLR 441): at [27].

The CCA stated some caution is required before applying this as a general statement of principle. Here, there was no suggestion the applicant was "selected" by the organisers of the criminal activity because of his lack of a prior record: at [28].

Drugs not disseminated in the community

In ***Giang*** [2017] NSWCCA 25 the CCA observed that the fact drugs are not actually disseminated into the community as a result of a police operation is not a factor that reduces the moral culpability of an offender. The dissemination of drugs into the community constitutes a significant aggravating factor. However, the absence of an aggravating factor does not thereby constitute a mitigating factor: at [24]; *AB* [2013] NSWCCA 273

SEXUAL ASSAULT

Use of "judicial memory" doubted in historical child sexual abuse sentence cases

In ***MC*** [2017] NSWCCA 316 the CCA questioned the use of "judicial memory" in historical sexual assault matters, adopting the doubts expressed by other judges as to the equity and utility of judges (and appellate courts) relying on their memories of the sentencing patterns in cases that were decided two and three decades earlier: at [52], [68]. The use of judicial recollection is apt to be unreliable and inequitable in its application. It arises out of the experience of a particular judge which may not reflect a sufficiently broad-based sentencing practice, and the greater the passage of time, the less reliable a recollection becomes: at [50]-[52] citing *MBP* (2013) 234 A Crim R 576 (cf *Magnuson* [2013] NSWCCA 50).

Sentencing judges and this Court should rely on the cases decided by this Court, reliable statistics and case summaries for the relevant period rather than their own recollection of events decades before: at [68].

A body of appellate authority now establishes a number of propositions with respect to sentencing practices for historical child sex assault (some also apply to other offences). These include that sentence lengths have increased due to increased maximum penalties, the introduction of standard non-parole periods, the courts understanding of the impact of such offending and in response to community expectations; the increase of the proportion of the non-parole period to total sentence; and greater degree of accumulation of individual sentences: at [40]–[44], [68].

Sexual assault – consent - failure to make findings and give reasons in relation to consent

In ***Alcazar*** [2017] NSWCCA 51 the CCA allowed the Crown appeal against the sentence imposed for three offences of aggravated sexual intercourse without consent (s 61J(1) *Crimes Act*).

Evidence showed the respondent and two co-offenders assaulted the victim who was incapable of consent due to her intoxicated state. The evidence established she did not "freely and voluntarily" agree to the assaults, then obviously not having the capacity to give such consent: at [42], [55]; *Crimes Act,* ss 61HA(2), (4)(a).

The CCA found that the question of consent was in issue having been raised on sentence by the respondent. However, the judge erred in failing to explain how he resolved the question of consent and for not giving reasons for his conclusions: at [45]-[46]. The respondent's evidence on sentence was consistent with knowledge of the absence of consent. The judge should have found as such and would inevitably have concluded the offences were more serious and the respondent's moral culpability was greater: at [58]-[70].

Sexual assault – young age of offender – relevance in assessing objective seriousness

In ***AA*** [2017] NSWCCA 84 the respondent (aged 23 at sentence) was 15-19 years old when he committed child sexual assault offences.

On the Crown appeal, the Crown submitted the judge incorrectly took into account the respondent's youth in assessing objective seriousness, when it was relevant to the assessment of the offender's "moral culpability": at [53]; *Muldrock* (2011) 244 CLR 120; *KT* [2008] NSWCCA 51 at [22]-[25].

The CCA rejected the Crown's submission. In the context of a sexual offence some aspects of an offender's personal circumstances may bear upon the "nature of the offending" (*Muldrock* at [27]). For example, the age difference between a victim and perpetrator can affect assessment of objective seriousness. Additionally, the perpetrator's age can be relevant to an explanation of the context of the offending. In this case, the respondent was in his late teens and had not assumed responsibility for the care of the two child victims. It is likely the victims could distinguish between him and an adult. This does not deny or mitigate the seriousness of the offence. However, at least in the present case, the judge did not err by referring to the age of the respondent and his victims in assessing objective seriousness: at [55].

Sexual assault – short duration of offence

In ***AA*** [2017] NSWCCA 84 the offender (aged 15 – 19) committed sexual offences against the child victims when other people, including the respondent's mother, were in the home. On the Crown appeal, the Crown submitted the judge erred in referring to the "relatively short duration" of the offending as the agreed facts did not "suggest any particular time period".

The CCA rejected the Crown's submission. While the short duration of a sexual assault "would not ordinarily be considered as a factor which reduces the objective seriousness" of such an offence (*Daley* [2010] NSWCCA 223 at [48]; *Cowling* [2015] NSWCCA 213) it was open to the judge to have some regard to it (see *Russell* [2010] NSWCCA 248 at [61]): at [56]. The description of the events and the context in which they occurred, namely while the children were in the care of the respondent's mother, enabled the judge to make the finding he did: at [56].

Sexual assault – absence of physical violence, threats, memory of complainant – judge erred by taking into account the absence of factors in aggravation as matters in mitigation when assessing objective seriousness

In **CTG** [2017] NSWCCA 163 the respondent was sentenced for sexual intercourse with a child under 10 under s 66A *Crimes Act*. The sentencing judge took into account the absence of "*any degree of force, coercion, threats or pressure, the absence of physical injury, the lack of memory by the victim which suggests that she does not remember the incidents and that does not lead me to do anything by way of speculation as to whether there is likely to be any lasting effect upon her*."

Allowing the Crown appeal, the CCA held it was not appropriate for the judge to take into account the absence of actual bodily harm and the absence of force and coercion as matters in mitigation of the offending so as to impact directly upon an assessment of objective seriousness. Because a matter of aggravation is not established beyond reasonable doubt it does not follow a matter of mitigation is established (*Filippou* (2015) 256 CLR 47 at [66]-[69]). That it is possible to identify factors which are absent which if present would have made the offence more objectively serious does not make the offence less serious than it is (***Mills*** [2017] NSWCCA 87; *Bravo* [2015] NSWCCA 302): at [60]-[63].

The judge further erred in taking into account the apparent absence of the victim's memory of the offences and that there was no evidence at the time of sentencing of psychological harm as mitigating matters: at [73]; *JP* [2015] NSWCCA 267. In relation to future psychological harm in the area of sex offences against young children, s 66A(2) provides a very substantial penalty (as well as a standard non-parole period) given the expectation that substantial harm will result to a young child victim of sex offences (*Gavel* [2014] NSWCCA 56): at [74]-[76].

In ***Faehringer*** [2017] NSWCCA 248 the CCA noted the principle that in sexual assault matters, that no violence or threat of violence was alleged against the offender cannot operate to make the charged offences less serious: at [49]; ***CTG*** [2017] NSWCCA 163.

Sexual assault - historic child sexual assault - sentencing practice and patterns of late 1980s

In ***CT*** [2017] NSWCCA 15 the CCA dismissed the applicant's appeal against sentence for historic child sexual assault offences committed in the late 1980s (ss 61E(1), 67 /s 66A, 66C(2) – indecent assault; carnal knowledge; sexual intercourse child under 10).

The statistics and comparable cases for this period of time were sparse. The sentencing judge properly had regard to decisions of this Court regarding sentencing practices at the time those offences were committed; as well as cases by the defence: at [49], [79].

The judge did not have the same advantage as this Court had in *Magnuson* [2013] NSWCCA 50 as there were no comprehensive statistics setting out sentencing patterns for the period under consideration, i.e. the late 1980s. *Magnuson* and the statistics available in that case related to sentencing in the early to mid-1970s: at [50].

The judge clearly looked at the cases to which she was referred by both sides. When one looks at the cases and the judgments to which the judge was specifically referred, almost all the non-parole periods are somewhere between 50% and 60% of the head sentences. None of the cases had a complainant as young as the complainant in this matter (aged 6 – 13). The youngest complainant in those cases was 8 – 9 years of age: at [51].

The judge was entitled to have regard to those cases and also to the principles in *Magnuson* that in the absence of a clear sentencing pattern, a court can take into account that sentences passed at the relevant time tended to be more lenient, and there has been a steady increase since then: at [52].

The indicative sentences are clearly less than those which would be imposed at the present time, especially considering they are undiscounted head sentences and there was also a significant degree of concurrency in the aggregate sentence: [53].

DOMESTIC VIOLENCE

Repeated domestic violence offences - need for denunciation, general deterrence and specific deterrence

In ***DPP v Darcy-Shillingsworth*** [2017] NSWCCA 224 the CCA allowed the Crown sentence appeal against sentences imposed upon the respondent for the assault of his partner and his partner's father. The respondent had received 150 hours community service for reckless wounding; and an aggregate sentence of 21 months suspended upon entering into an 18 month good behaviour bond for assault occasioning actual bodily harm and recklessly causing grievous bodily harm. The CCA re-sentenced the respondent to an aggregate sentence of 2 years 6 months, NPP 1 year 3 months.

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 (*The Queen v Kilic* [2016] HCA 48; 91 ALJR 131). This statement has been understood in this Court as reflecting the current response of the criminal law in relation to domestic violence as requiring "rigorous and demanding consequences for perpetrators for the purpose of protecting partners, family members and the wider community" (***Cherry*** [2017] NSWCCA 150 at [78]): at [83]-[84].

Specific and general deterrence were not adequately reflected in the sentences. In the absence of any finding of remorse or significant insight into the behaviour which led to the offending, the issue of specific deterrence should have been a significant consideration. General deterrence is a matter of importance in cases of domestic violence: at [82]-[85].

In ***Cherry*** [2017] NSWCCA 150 noted in the context of domestic violence offences, the High Court has observed it is a longstanding obligation of the State to vindicate the dignity of each victim of violence, to express the community's disapproval and to afford protection as can be afforded by the State to the vulnerable against repetition of violence: at [79]; *Munda v State of WA* (2013) 249 CLR 600. The repeated commission of domestic violence offences in breach of an ADVO attracted a need for specific deterrence, general deterrence and denunciation in this case: at [80]; *Browning* [2015] NSWCCA 147.

2. NSW CCA CONVICTION APPEAL AND OTHER CASES 2017

1. EVIDENCE ACT CASES

Section 13 Evidence Act - children's evidence – complainant allowed to give sworn evidence - examination-in-chief given by complainant in recorded interview with police - whether witness required to be competent at time of interview

In ***Tikomaimaleya*** [2017] NSWCCA 214 the CCA dismissed the appellant's appeal against conviction for sexual intercourse with a child under 10. The complainant was 4 or 5 years old at the time of the offence and 6 years 5 months old at trial.

Competent to give sworn evidence: The appellant accepted the complainant was competent to give evidence, however, submitted the judge erred in finding the complainant was competent to give *sworn* evidence i.e. under oath or affirmation. The CCA rejected this submission.

Simpson J helpfully summarised the position under ss 12-13 Evidence Act:

> "[15] The position may be summarised as follows:
>
> (i) a proposed witness is presumed to be competent to give evidence (s 12(a));
>
> (ii) a person who lacks capacity to understand a question about a fact, or to give an intelligible answer to a question about a fact, where that incapacity cannot be overcome, is not competent to give evidence about that fact (s 13(1));
>
> (iii) a person who is not competent to give evidence about a fact may nevertheless be competent to give evidence about other facts (s 13(2));
>
> (iv) before giving evidence, a witness must take an oath or affirmation to tell the truth (s 21);

(v) a person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if he or she lacks capacity to understand the obligation to give truthful evidence (s 13(3));

(vi) a person who lacks capacity to understand the obligation to give truthful evidence may give unsworn evidence if advised by the court of:

1. the importance of telling the truth;
2. that questions to which he or she does not know or remember the answers may be answered accordingly; and
3. that he or she should feel under no pressure to agree with propositions that he or she believes to be untrue."

Simpson J stated:

. The test to be applied in determining whether the complainant was competent to give sworn evidence was whether she had the capacity to understand that, in giving evidence, she was under an obligation to give truthful evidence (s 13(3)). The judge stated this question correctly: at [40]-[41]. In determining that question, the judge, under s 13(8), informed himself as he thought fit, by questioning the complainant and drawing conclusions about her capacity to understand the obligation to tell the truth: at [46].

. The *Evidence Act* draws a distinction between "sworn" (which includes given on affirmation) and unsworn evidence: at [16]. However, the appellant's submission that a trial judge is obliged to direct a jury there is a distinction between sworn and unsworn evidence is contrary to the High Court in *GW v The Queen* (2016) 258 CLR 108 at [46]. The Act is "neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn": at [47]–[48]; *GW* at [46].

. There is no requirement under s 165(2) *Evidence Act* to warn a jury a complainant's evidence may be unreliable because it was unsworn. Nor any common law requirement to warn a jury of the need for caution in accepting unsworn evidence: at [48]; *GW* at [56].

Complainant's pre-recorded interview with police admissible as evidence-in-chief: The complainant's pre-recorded interview with police was properly as evidence-in-chief under s 306U(1) *Criminal Procedure Act* 1986 (which allows evidence of vulnerable persons to be given in this way).

It was never part of the appellant's case at trial that at the time of the interview the complainant was not competent to give evidence. However, note the CCA remarked that had that question been raised, the trial judge would have been obliged to make a finding about the complainant's capacity at the time of the interview, by observing the recording of the interview and, in accordance with s 13(8), by obtaining information from other sources: at [55]-[56].

s. 18 Evidence Act 1995 – compellability of parent to give evidence – compliance with s 18(4)

Section 18(4) states: "If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person."

In ***Decision Restricted*** [2017] NSWCCA 93 witness T was subpoenaed by the Crown to give evidence against his daughter, the applicant, being tried for drug offences. T objected to giving evidence under s 18(2) *Evidence Act*. Both the applicant and T appealed against the trial judge's ruling that T was required to give evidence. The CCA allowed (by majority) the appeals and remitted the matter to the District Court. The judge failed to comply with the requirements under s 18(4). The trial judge had to be satisfied T was "aware of the effect of [the] section" as it applied to T. To be "aware of the effect" of the section the prospective witness needs to be aware not only of his/her right to object but also that:

(1) the court will decide whether or not the objection should be overruled and the person required to give evidence;

(2) the decision will be based upon the court's findings as to matters under s 18(6), of which the judge should apprise the witness;
(3) in making its decision the court will take into account the five matters referred to in s 18(7), of which the judge should apprise the witness: at [26]-[27].

The witness will thus know to what issues his/her evidence and submissions should be directed in persuading the court of the force of the objection to giving evidence: at [28].

In this case, s 18(4) was not complied with. The judge simply asked T (not counsel) whether T had spoken to the lawyers (the representatives of the Crown and the accused). The judge did not ask T what explanation, if any, T had been given about the effect of the section. This course was not capable of satisfying the judge that T was "aware of the effect" of the section: at [29]-[30].

A s 18 determination is "interlocutory" in nature and thus can be appealed from pursuant to s 5F *Criminal Appeal Act*: ss 5F(2), (3): at [12]-[14]. T also had standing to appeal. A person who participates in a hearing, in a manner analogous to that of a formally recorded party (for example, by leading evidence or making submissions) is a "party" for the purposes of an appeal provision such as s 5F(3) if the person is directly affected by orders made. This conclusion is appropriate even if the person is not formally recorded as a party: at [20].

s 55, 137 Evidence Act 1995 – error in excluding child witness' corroborating evidence – relvance: IMM (2016) 257 CLR 300 – probative value: Dickman [2017] NSWCCA 24

In ***SG*** [2017] NSWCCA 202 (sexual assault) the trial judge ruled that the corroborating evidence of a child prosecution witness SG was inadmissible under s 55 and s 137 Evidence Act. The CCA allowed the interlocutory Crown appeal against the judge's ruling (s 5F(3A) *Criminal Appeal Act 1912*).

Section 55 Relevance:

Section 55 is to be given a wide interpretation - "could" in s. 55 means "it is possible that it may": at [29]; *Nye v State of NSW* [2002] NSWSC 1270 at [13]. The effect of the evidence on the assessment of the relevant probability (namely the probability of the existence of a fact in issue) may be direct or indirect. The effect the evidence "could" have on proof of a fact is a reference to the capability of the evidence to do so, to be determined on the assumption the jury will accept the evidence. Evidence which is relevant according to s 55 and admissible under s 56 is, by definition, "probative" – if it is of only some, even slight, probative value it will be prima facie admissible: at [29] citing *IMM v The Queen* (2016) 257 CLR 300 at [38]-[40].

The CCA found the evidence was relevant under s. 55. In her police interview SG referred to a specific incident which occurred shortly before Christmas 2015 and that the respondent got on top of SG's mother (the victim FG). The Crown alleges counts 1-3 occurred on 23 December 2015 and a fact in issue is whether the offender climbed on top of the victim. However, the judge did not consider the nature of the Crown case on counts 1-3 and did not identify the facts in issue. Both of those steps were essential to a determination of relevance of SG's evidence: [32]. The judge erred in concluding it was "difficult if not impossible to extract any relevant evidence as to any particular event": at [18], [36]. Further, contrary to *IMM*, the judge erred by having regard to the reliability of the evidence in determining relevance (in finding there was "evidence that the mother told SG things about events occurring at uncertain times"). In determining relevance, the judge does not consider whether or not there may be a basis for the rejection of the evidence by the jury. The judge was required to take the evidence at its highest and assume it would be accepted: at [33].

Section 137 Probative value:

Whether evidence should be excluded under s. 137 requires two separate assessments, followed by a final determination. The first assessment is the probative value of the evidence. The second is of the danger of unfair prejudice to the accused. Once those assessments have been made, a trial judge must determine whether the identified danger of unfair prejudice outweighs probative value of the evidence. If so, the judge is obliged to exclude it. Competing inferences, or alternative interpretations,

are irrelevant to the assessment of probative value: at [44]; *Burton* [2013] NSWCCA 335 at [134],[160].

"Unfair prejudice" may be constituted by danger a jury may make improper use of the evidence, eg. by giving it more weight than it properly deserves, considering it in a manner logically unconnected with issues in the case, or by allowing it to provoke an irrational, emotional or illogical response. Unfair prejudice may also be occasioned because the evidence invites the jury to draw an inference about some matter which would ordinarily be excluded from evidence: at [45], *Dickman* [2017] HCA 24 at [48].

The judge did not make an assessment of probative value. He found its probative value was low due to erroneous conclusions about SG's evidence. At its highest, SG's evidence was an eyewitness account and capable of corroborating specific aspects of FG's allegations. The unfair prejudice identified by the judge was that it was "difficult if not impossible" for the respondent to adequately test the contents of any assertions by SG. But it will be open to cross-examine SG about her assertions and thus there is no danger of unfair prejudice to the respondent. The probative value is high and danger of unfair prejudice is low. Therefore s. 137 is not engaged and the judge erred in excluding the evidence on that basis: at [46]-[48].

s 79 Evidence Act 1995 – Voice identification by police officer of telephone intercepts

In ***Nguyen*** [2017] NSWCCA 4 (drug supply) a police officer gave evidence at trial that the female voice on police telephone intercepts was the applicant. The officer had listened repeatedly to a large number of intercepts as well as the applicant's record of interview. The applicant submitted the officer's evidence was not admissible under s 79 *Evidence Act* 1995.

Refusing leave to appeal, the CCA (by majority) held the evidence was admissible under s 79: at [105]-[106]. There was a total of 44,523 "mobile products" (voice calls, text messages and mobile internet data). The officer estimated he monitored 70 per cent of all intercepted products, listening to calls a number of times; stopping, starting and restarting to listen again: at [85]-[86]. The officer identified the applicant's voice by reference to three matters: the way in which the person spoke; voice characteristics; and common references (or phrases): at [90]. Two of the three bases upon which the officer made his identification of the applicant's voice were readily capable of being drawn to the jury's attention and for them to make their own assessment. But the officer relied upon the overall sound of the voice as well as the attributes he was able to articulate. The amount of time he invested in repeatedly listening to the calls and the applicant's police interview is something that would have been impractical for the jury to replicate. The evidence was relevant for this reason: at [91].

The concept of an ad hoc expert, who can be called to give opinion evidence such as that sought to be called from the officer, has long been recognised: at [103]; *Butera* (1987) 164 CLR 180; *Leung & Wong* (1999) 47 NSWLR 405 at [40].

s.110, s.97 Evidence Act – Evidence excluded as tendency evidence may still be admissible to rebut evidence of good character

In ***Clegg*** [2017] NSWCCA 125 the appellant was charged with child sexual assault offences against two complainants. The trial judge had earlier ruled under tendency provisions that the trial for a third complainant (DJ) should be held separately due to allegations of violence not present in allegations of the other two complainants. The appellant sought to lead evidence of good character from five witnesses. The trial judge ruled if such good character evidence was led, then the Crown would be permitted to call evidence in rebuttal from DJ. The appellant submitted the ruling was erroneous.

The CCA dismissed the appeal.

Sections 110(2) and 110(3) *Evidence Act* state that if good character evidence has been admitted, then the hearsay rule, opinion rule, tendency rule and credibility rule do not apply to such evidence. (The ability of the Crown to adduce such rebuttal evidence is subject to limitations or exclusions in ss 112, 135 and 137).

Evidence excluded as tendency evidence is capable of being adduced to rebut evidence of good character, unless a relevant rule of exclusion or a discretion under the *Evidence Act* applies. There is nothing to the effect that once evidence is excluded as tendency evidence, that the evidence is necessarily inadmissible to rebut evidence of good character: [96]. There is no warrant for imposing a statutory gloss on the *Evidence Act*. When evidence meeting the description in s 110 is engaged, the tendency rule does not apply to such evidence. That implies, at the very least, that some evidence, inadmissible as tendency evidence, may be admissible as rebuttal evidence in the event that an accused chooses to raise his or her good character generally or in a particular respect: at [92].

s 165B Evidence Act 1995 - delay - forensic disadvantage direction - trial judge may give forensic disadvantage direction on own volition

Section 165B *Evidence Act 1995* states, inter alia:

> "**Delay in prosecution**
>
> …….
>
> (2) If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence. …"

In ***TO*** [2017] NSWCCA 12 at [167] the CCA summarised the effect of s 165B *Evidence Act* as follows:

1. The duty on the judge to give a direction in accordance with subsection (2) arises only on application by a party and what is said to be the particular significant forensic disadvantage must form part of the application: *Groundstroem v R* [2013] NSWCCA 237 at [56].
2. Subsection (5) prohibits the judge from directing the jury "about any forensic disadvantage the defendant may have suffered because of delay" otherwise than in accordance with the section: *Jarrett v R* (2014) 86 NSWLR 623; [2014] NSWCCA 140 at [53] ("*Jarrett*").
3. There is a duty to inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence, only when the judge is satisfied that the defendant has "suffered a significant forensic disadvantage because of the consequences of delay": *Jarrett* at [53].
4. Subsection (3) provides a rider to the obligation to inform where the judge is satisfied there are "good reasons" for not taking that step: *Jarrett* at [53].
5. Subsection (4) prohibits the judge from suggesting that it would be dangerous or unsafe to convict the defendant "solely because of" the delay or the disadvantage. Otherwise, no particular form of words need be used: *Jarrett* at [53].
6. Whether there has been a significant forensic disadvantage depends on the nature of the complaint and the extent of the delay in the circumstances of the case. The extent of delay is not the test. It is the consequence of delay which is decisive: *Groundstroem* at [61]. The proper focus of s 165B is on the disadvantage to the accused: *Jarrett* at [60].
7. The concept of delay is relative and judgmental. Although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the exception in s 165B(3): *Jarrett* at [61]–[62].
8. If the accused is put on notice of the complaint, any failure to make inquiry thereafter will not normally constitute a consequence of the delay, but a consequence of the accused's own inaction: *Jarrett* at [63].

A trial judge may, even absent an application from the defendant, give a forensic disadvantage direction, although, if given, the direction must comply with s 165B(4). The duty of a trial judge to give any warning to avoid a perceptible risk of a miscarriage of justice is unfettered: at [176]-[178]; *Greensill* (2012) 37 VR 257; [2012] VSCA 306.

In this case, the CCA dismissed the applicant's appeal. The trial judge was not prevented from giving a forensic disadvantage direction even though defence counsel did not ask the judge for such a

direction. However, in the circumstances of the case such a direction was not necessary to avoid a perceptible risk of a miscarriage of justice: at [183].

The appellant, convicted of child sexual assault, had submitted forensic disadvantage arose from there being no statement being taken for one and half years from his son OJ who was present when the offences were committed. However, defence counsel had relied on OJ's evidence and the complainant had not complained due to being scared by threats made by the appellant. Any forensic disadvantage was thus not due to delay in complaint: at [183].

Directions - child sexual assault – warnings – s 165 Evidence Act – Murray direction – discretion to decline to give warning

In ***AL*** [2017] NSWCCA 34 the applicant was convicted of child sexual assault offences. The applicant submitted the judge failed to give a "*Murray* direction" (where there is only one witness asserting the commission of a crime, the evidence of that witness must be "scrutinised with great care" before it is accepted a verdict of guilty could be returned: *Murray* (1987) 11 NSWLR 12). Further, the judge failed to give a direction pursuant to s 165 *Evidence Act 1995* (NSW): at [48]-[49].

The CCA dismissed the appeal. The judge did not err in not giving a *Murray* direction or s 165 warning: at [90]. The CCA noted the various provisions that operate to restrict the scope of the common law warnings formerly given with respect to the evidence of a complainant in a sexual assault case:-

> s 164 *Evidence Act 1995 (*removed the requirement for a trial judge to warn a jury that it was "dangerous to act on uncorroborated evidence");
> s 165 (a power to warn a jury about "evidence of a kind that may be unreliable");
> s 165(6) (prohibits a warning being given to a jury as to the unreliability of a child's evidence based upon the age of the child);
> s 165A (Warnings in relation to children's evidence);
> s 294AA *Criminal Procedure Act 1986* (judge must not warn or make suggestion that complainants as a class are unreliable witnesses; prohibits a warning of danger of convicting on uncorroborated evidence of complainant): at [67]-[75].

The CCA stated that a direction, cautioning the jury about the possible unreliability of the evidence of a child complainant, can only focus on matters relevant to the particular child in the particular circumstances of the case – and not upon the mere fact the witness is a child, or an inherent feature of children. This approach contravenes s 165A *Evidence Act* and s 294AA *Criminal Procedure Act*: at [77]-[78]; *Ewen* [2015] NSWCCA 117; (2015) 250 A Crim R 544.

Section 165 refers to "evidence of a kind that may be unreliable". Arguably, much of the evidence given by lay witnesses could be challenged as unreliable. However, where statutory amendment suggests a desire to limit rather than enlarge jury warnings, it cannot have been the intent of the legislature to engage s 165 in every case where an assertion of unreliability is made: at [79]. Section 165(3) *Evidence Act* and s 294AA *Criminal Procedure Act* provide statutory limits upon s 165 warnings: at [80].

It is within the judge's discretion to decline to give a warning for matters evident to jury which the jury can assess without assistance: at [81]. There is also the principle that warnings are required where there is some danger which would not be appreciable to a jury, but which would be perceived by the court of which the trial judge was conscious: at [80]-[82]; *GW* [2016] HCA 6; *Tully* (2006) 230 CLR 234 at [178]. The judge's decision to decline to give a s 165 warning or *Murray* direction were made in the exercise of his discretion. Section 165(3) retains a discretion as to whether or not to give the statutory warning; whether a *Murray* direction is given is a matter for the discretion of the trial judge: at [85]-[86]; *SKA* [2012] NSWCCA 205 at [254].

ss 116, 165 Evidence Act 1995 - "in-court identification" by witness familiar with appellant (by appearance, not name) – evidence not subject to evidentiary weaknesses where witness unacquainted or unfamiliar with offender: Alexander v The Queen (1981) 145 CLR 395, Festa v The Queen (2001) 208 CLR 593 distinguished

In ***Fadel*** [2017] NSWCCA 134 (intentionally causing GBH) the appellant kicked the victim in the jaw. At trial, witness S (the victim's father) stated in evidence he was familiar with the appellant but did not know his name, stating "I know he is one of the boys of the next-door family. I can recognise him. I am positive it is that man there": at [34].

Dismissing the appeal, the CCA rejected the appellant's submission the judge erred in failing to discharge the jury following "in-court" identification of the appellant. The warnings and directions regarding identification evidence are stated in ss 116 and 165. However, the common law that predates the Act is not redundant, and is of utility in explaining the rationale of the caution with respect to identification evidence. Particular caution is required in respect of "in-court" identification - its especially dangerous quality is that "… all the circumstances conspire to compel the witness to identify the accused in the dock": at [75]-[76]; *Alexander* (1981) 145 CLR 395; *Festa* (2001) 208 CLR 593.

This was a case far removed from *Festa*. This was not a case in which the identification was given by a witness previously unacquainted or unfamiliar with the person identified. S had frequented the premises next door to those of the appellant, knew and recognised (although not by name) the appellant and his family and the appellant), and observed closely the commission of the offence. If it is "in-court identification", it is of an unusual and special kind, not subject to all of the same weaknesses as the evidence in *Festa:* at [85]. Further, the Crown case was always that S recognised the appellant as the perpetrator of the attack and that he knew the brothers by sight and not by name. S' identification did not change the Crown case: at [87]; *Aslett* [2009] NSWCCA 188 distinguished.

2. JURY

Jury - jury permitted by judge to formulate questions for witnesses – miscarriage of justice

In ***Tootle*** [2017] NSWCCA 103 the CCA held there was a miscarriage of justice resulting from the trial judge advising the jury they were entitled to formulate questions to be asked of witnesses.

The process involved the jury submitting questions in writing to the judge who discussed the questions with counsel; evidence of the witness taken on the voir dire; trial judge ruling as to admissibility; and permitted questions then asked of the witness by the Crown prosecutor.

Any practice of a trial judge allowing a juror directly to question witnesses has long been frowned upon by this Court (*Pathare* [1981] 1 NSWLR 124). The question is whether the indirect process by the judge avoided that which renders direct questioning of witnesses impermissible: at [47]-[52].

The role of the jury is that of impartial arbiter as to the facts and final determination of guilt; the jury does not have any investigative or inquisitorial role: at [42]. Only the parties and their legal representatives have a complete overview of the evidence to be called. Neither judge nor jury is privy to the case as a whole. The structure of the trial is undermined if the jury is permitted to take on an inquisitorial role, and steer the trial in a direction different from that laid out by the prosecution, and known to the defence: at [44].

The process crossed the boundary to the point that the very nature of the trial was altered in a fundamental respect (*Lee* (2014) 253 CLR 455). It was not a trial according to law, constituting a miscarriage of justice: at [62].

The CCA noted that at the commencement of a trial, and usually after the jury is empanelled, it is customary for the trial judge to give general directions concerning procedure, evidence, and role of the various participants. Some judges include a caution to the effect that the jury can expect evidence to unfold gradually and to withhold judgment until the evidence is complete. Such a direction is a wise and fair precaution. It is often reinforced at the close of the Crown case, especially if known the accused will go into evidence. It may be given again at the end of the Crown's address, if there is to be a break before defence address commences: at [58]. The CCA quashed the appellant's convictions and ordered a new trial.

Juror alleged bullying and did not return to court – remaining jurors asked to self-assess whether they could properly perform duty – whether judge should have made full investigation of juror allegation - no miscarriage

In ***Bahrami*** [2017] NSWCCA 8, a juror, towards the end of the trial. sent a note to the judge stating: "*Am unwell/stressed extreme –… Being mistreated by another juror (bullying)*". The juror did not return for service the following day. The judge discharged the juror, asked the other jurors whether they could continue to discharge their duties and continued the trial. The CCA dismissed the appellant's appeal.

The judge had asked each juror if they could continue to discharge their duty: at [41]. This Court has implicitly endorsed the approach taken by the trial judge of seeking a self-assessment by jurors of their ability to discharge their duty in accordance with their oath or affirmation: at [77]-[78]; *Elomar* [2014] NSWCCA 303; *Spilios* [2016] SASCFC 6 referred to.

The appellant submitted the juror's note created reasonable grounds for suspecting a juror had exercised unlawful intimidation - "a serious breach of the presuppositions of the trial" (*Smith v State of Western Australia* at [54]). The CCA said the note did not positively assert bullying in the sense of an attempt to intimidate or coerce the juror in relation to an issue concerning the trial: at [59]-[62].

The appellant submitted the judge should have sought an investigation by the Sheriff as to whether improper pressure had been applied to the juror. The CCA said a request to the Sheriff pursuant to s 73A *Jury Act* 1977 to carry out an investigation could have been made if there was "reason … to suspect that the verdict of … may be … affected because of improper conduct by a member or members of the jury". However, trial counsel retreated from such a suggestion. The judge took the more expeditious action available. Efforts were made to contact the juror and the option of further delaying the trial while such attempts continued had to be balanced against other considerations (*Wu* (1999) 199 CLR 99 at [18]): at [67]-[71].

3. APPEALS

Scope and operation of Rule 4, Criminal Appeal Rules

In ***Greenhalgh*** [2017] NSWCCA 94 the CCA made some observations in respect of Rule 4 *Criminal Appeal Rules* (no ground of appeal shall be allowed on any matter where no point or objection was raised at trial).

The authorities emphasise that the leave required by r 4 is not to be lightly granted. Generally speaking such leave will only be granted where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings: *Tripadona* (1988) 35 A Crim R 183; *Abusafiah* (1991) 24 NSWLR 531.

Basten JA (Button J agreeing; N Adams J agreeing with additional observations) stated there are serious difficulties in adopting that language as a criterion for the exercise of r 4: at [10].

Certain points may be made in relation to the purpose and effect of r 4:

- It is a constraint upon the pursuit of a ground of appeal which would otherwise be available. It does not assume the ground will be upheld; rather, it precludes reliance upon the ground. If the ground can be seen to lack merit, leave will be refused. The converse is not necessarily correct. A claim that something should have happened which did not is hard to evaluate. If, in a clear case, a necessary element of a fair trial according to law was overlooked, leave should usually be granted. It must, in some sense, be in the interests of justice that leave be granted; otherwise leave should be refused: at [14].
- The importance of not limiting the scope and operation of a discretionary power, particularly in relation to the fairness of a criminal trial, was exemplified in *Kentwell* (2014) 252 CLR 601. Parties are bound by the conduct of their counsel. It is the fairness of the process that is in question. Inherent in that proposition is the need to assess unfairness "by reference to an

objective standard, and without an investigation of the subjective reasons for that conduct" : at [17]-[18]; (*Nudd* (2006) 80 ALJR 614).

- In most cases it will be difficult to know from the trial transcript whether some tactical advantage may have been perceived, a step not taken based on instructions, or whether omitted through inadvertence. The mere fact a step was omitted through inadvertence will often not be decisive - it may merely demonstrate that a point now seen to be important was not, in the immediacy of the trial, seen to have such significance: at [19].
- In cases where no direction was sought, it will usually be a precondition to a grant of leave under r 4 that the omitted direction should be expressly formulated. It will be difficult for the appeal court to assess the significance of the omission, being far removed from the context provided by the trial: at [21].

Judge did not err by making direction for acquittal before conclusion of Crown case - The question is whether at the time a no case to answer submission is made the accused could lawfully be convicted on the evidence as it stood at that time

In ***TS*** [2017] NSWCCA 247 the CCA held the judge did not err in directing a verdict of acquittal before the end of the Crown case: at [28]. The CCA dismissed the Crown appeal against the directed verdict pursuant to s 107 *Crimes (Appeal and Review) Act* 2001.

The authorities do not support the contention that a no case submission can *never* be made until the close of the Crown case: at [15], [19]; *RMC* [2013] NSWCCA 285 at [44].

The appropriate time to consider a no case submission is when the evidence in support of the charge has been fully presented. (In a sexual assault trial wholly dependent on the evidence of the complainant, this is at the close of the complainant's evidence in chief). It is not incumbent on defence counsel to commence cross-examination or await the end of the Crown case, with the attendant risk that the gap will be filled: at [19].

A judge may direct a verdict of acquittal "only if there is a defect in the evidence in the Crown case such that, taken at its highest, it will not sustain a verdict of guilty": (*RMC* at [41]). This principle links the power to direct a verdict with two factors, namely, the high point of the Crown case and the incapacity of the evidence to prove the ingredients of the offence: at [16]-[17]. If there is evidence *yet to come* towards proof of the offence then it is not possible to take the Crown case at its highest: at [20].

The question is whether at the time a no case to answer submission is made the accused could lawfully be convicted on the evidence as it stood at that time: at [22]; *PL* [2012] NSWCCA 31; *May v O'Sullivan* (1955) 92 CLR 654 at 658; *Serratore* (1999) 48 NSWLR 101.

Discharge of jury by trial judge - Crown proposed to change case during the course of trial - trial judge found that it would not be fair to confine Crown to case initially presented - trial judge erred in exercising discretion to discharge jury

In ***Curran*** [2017] NSWCCA 123 the CCA allowed the applicant's appeal against the trial judge's order discharging the jury (s 5G *Criminal Appeal Act*). The judge discharged the jury when the Crown proposed to change its case during the course of the trial. The judge found "it would not be fair to confine to the Crown to the case it initially decided to present": at [25].

The CCA remitted the matter to the District Court for continuation of the trial. (The Crown on the hearing of this application conceded it was unfair for the Crown to change its case in the circumstances: at [34]).

The accused faced trial for sexual intercourse without consent and other sexual assault offences. The Crown opened its case by stating the complainant did not consent at any stage to sexual intercourse. The complainant gave evidence accordingly. Later in the Crown case, a covertly recorded conversation was tendered in which the accused made statements that could be taken as admissions he continued to engage in intercourse after the complainant had communicated a withdrawal of consent.

The criterion for the exercise of the discretion to discharge the jury is the maintenance of the fairness of the trial and that the test for the discharge of the jury was one of necessity: at [28]-[31]; *Bartle* [2003] NSWCCA 329; *Crofts v The Queen* (1996) 186 CLR 427; *Qing An* [2007] NSWCCA 53.

The judge erred in the exercise of his discretion. The judge reasoned it would be unfair to the Crown to deny it the opportunity to change its case so as to rely upon something said by the accused as capable of amounting to an admission. The reasoning was flawed. It was not unfair to the Crown to refuse to allow it the opportunity to change its case. The Crown always had available to it the covert conversation. This was not a case where something unexpected or an irregularity had occurred in the trial: at [32]-[34].

Re-trial - Factors to be taken into account in determining whether interests of justice require an order that there be a further trial

In ***Lazarus*** [2017] NSWCCA 279 the CCA held it would be oppressive to order a third trial. The respondent was convicted by a jury of sexual intercourse without consent. A conviction appeal was allowed and a re-trial ordered (*Lazarus* [2016] NSWCCA 52). At his second trial, the respondent was found not guilty by a trial judge sitting alone. On this appeal by the Crown against the judge's finding, the CCA found error in the judge's reasons. The Crown submitted the respondent be re-tried for a third time.

The CCA at [155]-[157] set out the principles for determining whether to order a further trial:

- The power to order a new trial is discretionary to be exercised having regard to the ultimate question of whether the interests of justice require a new trial: *DPP (Nauru) v Fowler* (1984) 154 CLR 627
- In considering where the interests of justice lie, the Court must take into account those factors in ss. 104(2) and (3)(a) of the *Crimes Appeal and Review Act* (s 104(3)(b) having no application).
- Those factors are not absolute. The term "interests of justice" encompasses a variety of considerations. In *Gilham v R* [2012] NSWCCA 131 McClellan CJ at CL said (at [649], citations omitted):

> "The court determines where the interests of justice lie by considering various factors, including:
>
> the public interest in the due prosecution and conviction of offenders;
>
> the seriousness of the alleged crimes;
>
> the desirability, if possible, of having the guilt or innocence of the accused finally determined by a jury, which, according to the constitutional arrangements applicable in New South Wales, is the appropriate body to make such a decision;
>
> the length of time between the alleged offence and the new trial, and in particular whether the delay will occasion prejudice to the accused;
>
> whether the grant of a new trial would impermissibly give the prosecution an opportunity to supplement or "patch up" a defective case or to present a case significantly different to that presented to the jury in the previous trial;
>
> the interests of the individual accused, and in particular whether it would be unduly oppressive to put the accused to the expense and worry of a further trial;
>
> whether a significant part of the sentence imposed upon conviction has already been served;
>
> the expense and length of a further trial;
>
> whether a successful appellant to the Court of Criminal Appeal has been released from custody; and

whether an acquittal would usurp the functions of the properly constituted prosecutorial authorities, which are entrusted with responsibilities and discretions to act in the public interest in the initiation and conduct of criminal prosecutions."

- Determining where the interests of justice lie is a balancing exercise which involves assessing each individual factor and ascribing the appropriate weight to it. Importantly, such weight may vary according the particular case.

In this case, in terms of s. 104(2), there has been considerable publicity although such publicity would not impact adversely upon the respondent's right to a fair trial as the jury would be properly directed to ignore any publicity: at [158]. In terms of s. 104(3)(a), the re-trial would take place more than 5 years after event. A delay of that magnitude in bringing an accused person to trial is undesirable: at [159].

The CCA noted the public interest in the prosecution and conviction of offenders charged with serious criminal conduct and that it is desirable the guilt or otherwise of any offender be determined by the appropriate tribunal of fact. Those factors weigh in favour that the respondent be re-tried: at [160].

Equally however, factors point in the opposite direction (at [161]-[163]):

- any re-trial would take place more than five years after the event;
- whilst any criminal trial is an ordeal for a complainant, it is also an ordeal for an accused;
- the circumstances which bring about the possibility of a re-trial are not the fault of the respondent or those acting for him;
- the respondent finds himself in this position for a second occasion; an order for a re-trial would see him being tried for a third time. As is the case in the present instance, the circumstances which resulted in the previous order for a re-trial were not the fault of the respondent.
- the respondent was sentenced to a term of imprisonment of which he served 10 months before being released following the previous judgment of this Court.

The CCA concluded having regard to all of these circumstances it would be oppressive to put the respondent to the expense and worry of a third trial (*Spies* (2000) 201 CLR 603 at [103]): at [163]. The CCA further concluded that an order for a re-trial would bring would give rise to oppression and unfairness of the kind indicated in *R v Thomas (No.3)* (2006) 14 VR 512 at [27]: at [168].

Direction that evidence be given from overseas by audio visual link* (*AVL)* - *s 5B Evidence (Audio and Audio Visual Links) Act 1998* - *direction pursuant to s 5B not an "order" for purposes of s 5F Criminal Appeal Act 1912

Section 5B(1) *Evidence (Audio and Audio Visual Links) Act* 1998 states a court may '*direct'* a person give evidence by:

> *" … audio visual link from any place within or outside New South Wales, including a place outside Australia, other than the courtroom or other place at which the court is sitting".*

In ***KN*** [2017] NSWCCA 249 the applicant faced trial for sexual assault. Upon an application by the Crown, the trial judge made an 'order' that the complainant and a witness give evidence from overseas via AVL using the "*Jabber*" program.

The CCA refused the applicant's application seeking a stay of the trial pending determination of an application for leave to appeal the judge's 'order' pursuant to s 5F (*Criminal Appeal Act*). Section 5F which provides for an appeal against "*an interlocutory judgment or order*".

The CCA found the judge did not make any "order" regarding use of the Jabber technology. The acceptance that particular technology would be a permissible means by which evidence may be given is not "*a command that something be done or not done*" nor enforceable should there be non-compliance: at [56]-[57]. The language of s 5B ("the court may *direct*") is to be contrasted with other provisions that provide a "court may order" and for enforcement: at [58]-[59]. For the same reasons,

even if the application could be treated as relating to the "orders" that the witnesses' evidence be given by AVL, such orders do not fall within s 5F(3) *Criminal Appeal Act*: at [60].

Subject to the legislation, the decision to permit evidence to be given by AVL is a matter for the primary judge's discretion in the circumstances of a particular case: at [66]; *Kirby v Centro Properties Limited* (2012) 288 ALR 601; *ASIC v Rich* [2004] NSWSC 467. The judge did not err in the exercise of her discretion. The judge was satisfied the jury could adequately assess the witnesses' evidence given by AVL. There was nothing in the judge's rulings or reasons to indicate the judge would not manage the trial in such a way so as to ensure the applicant would have a fair trial: at [66]-[68], [75].

Trial by Judge Alone – principles – that evidence might reveal accused is bail refused not proper basis for allowing application

In ***Decision Restricted*** [2017] NSWCCA 197 the CCA allowed the Crown interlocutory appeal against an order granting a trial by judge alone under s 132 *Criminal Procedure Act* 1986. The basis of the judge alone application had been that irreparable prejudice would arise because cross-examination of the "complainant" would reveal the applicant was in gaol, bail refused. The CCA found there was no proper basis on which the application could properly have been allowed: at [23].

Although an order under s 132 is characterised as a procedural step, there is a large public interest in the form of a criminal trial and it is wrong to treat the presence or absence of a jury as procedural: at [7]. Applications under s 132 do not require a generic assessment of the perceived benefits and disadvantages of trial by jury as against trial by judge alone. Section 132 gives weight to the importance of the application of objective community standards in the resolution of a range of factual issues, some only of which are expressly identified. That is a consideration which favours trial by jury, in accordance with underlying principle. What is required is an assessment of the particular circumstances of the case: at [10].

The cases reveal judge alone trials may be preferable in lengthy complex trials, or where the judge is not satisfied a fair trial can be achieved with a jury perhaps because a particularly horrendous crime has inflamed a small community: at [11].

An order is not to be made because a reasoned judgment is more transparent than a jury verdict, the trial is likely to be shorter and less expensive, or a "correct" result is more likely: at [11].

This case did not fit within any category in which orders for judge alone trials are warranted: at [14]. The applicant was seeking to equate knowledge of the fact he had been refused bail with the prejudice that may arise from the jury learning he has been charged with, or convicted of, other offences. Facts of arrest and pre-trial detention are inherent elements of the criminal process and cannot, of themselves, give rise to the prejudice which may give rise to an unfair trial: at [15]. The applicant did not identify any reason why he had been refused bail, nor was any reason relied on by the judge: at [19]. It is difficult to understand why an appropriate direction would not be effective: at [22].

4. PARTICULAR OFFENCES

Manslaughter - s 18(1)(b) Crimes Act does not encompass self-killing - application of IL v The Queen [2017] HCA 27

In ***Moussa*** [2017] NSWCCA 237 the Crown case, based on joint criminal enterprise, was that the appellant drove the deceased to a house where the deceased's act of lighting a fire caused his own death. Applying the High Court judgment in ***IL v The Queen***, the CCA held the appellant was not liable for manslaughter as s 18(1)(b) *Crimes Act* does not encompass self-killing. ***IL v The Queen*** is discussed below under High Court cases.

Sexual intercourse without consent – judge alone trial – judge / jury must have regard to any "steps" taken by the accused to ascertain whether complainant was consenting – "steps" – s 61HA(3)(d) Crimes Act

In ***Lazarus*** [2017] NSWCCA 279 (Crown appeal) the CCA found the trial judge sitting alone erred in failing to direct herself that in relation to making a finding about the respondent's knowledge of consent (s. 61HA(3)) she failed to have regard to any steps taken by the respondent to ascertain whether the complainant was consenting, as required by s 61HA(3)(d).

The respondent was found not guilty by a judge sitting alone of guilty of sexual intercourse by consent (s 61I *Crimes Act*). In a prosecution for an offence contrary to s. 61I, s 61HA(3)(d) mandates a trial judge must instruct the jury that they are to consider the reasonable steps taken by an accused person to ascertain whether the complainant was consenting: at [142]; *XHR* [2012] NSWCCA 247.

It follows that s 61HA(3)(d) embodies a principle of law the trial judge was bound to apply. It is sufficient if the reasons of a trial judge sitting alone demonstrate, expressly or by implication, that such a principle has been applied: *Filippou* (2015) 256 CLR 47. If that is not demonstrated, an appellate court should conclude that the principle was not applied, as opposed to concluding that it was applied but not recorded: at [142]; *Fleming* at [30]; *Adams* [2017] NSWCCA 215 at [286]; [289]-[292].

The CCA found that nowhere in the judge's passages of reasons (set out in the judgment at [134]) is there any reference, express or implied, to s 61HA(3)(d), and thus no express or implied statement of the relevant principle. Those factors alone support a conclusion the principle was not applied, and that error is established: at [144]. Further, whilst specific use of the word "steps" is not necessarily required to demonstrate compliance with s 61HA(3)(d), the judge's reasons amount to nothing more than a summary of factual findings, where the word "step" was not used, and there was no express or implied reference to the statutory provision: at [145].

The word "steps" is not defined in the Act and should be given its natural and ordinary meaning. The Collins English Dictionary defines the term "take steps" as meaning: "*to undertake measures to do something with a view to the attainment of some end*." A "step" for the purposes of s. 61HA(3)(d) must involve the taking of some positive act. A positive act does not necessarily have to be a physical one. A positive act, and thus a "step", extends to include a person's consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives. Even allowing for that interpretation, the judge's reasons do not comply with s 61HA(3)(d): at [146]-[147].

Break and enter dwelling house and commit serious indictable offence - s 112 Crimes Act 1900 - meaning of "break" – no "constructive break" when person enters dwelling house with permission gained without trick, threat or artifice but with intent to commit serious indictable offence

In ***Ghamrawi & Ors*** [2017] NSWCCA 195 the CCA allowed the appellants' conviction appeal under s 112(2) *Crimes Act* (Aggravated BE commit serious indictable offence (AOABH)). The trial judge erred in directing the jury that if a person intends to commit an unlawful act at the time that s/he is given permission to enter the house then there is a "breaking".

The Crown case was the appellants opened an unlocked door without knocking, entered the home and assaulted the victim. The Defence case was that one of the appellants (M) knocked and that someone inside the house said "come in". Further, in cross-examination, Crown witness P agreed that at the moment M walked in the door, P had had no objection to him walking into P's house.

The CCA held, inter alia:

(1) In order to commit a break within the meaning of s 112 *Crimes Act*, the accused must commit an "actual" break or a "constructive" break (that is, obtain entry by artifice, trick or threat): at [84]-[85], [104]-[105].

(2) If a person intends to commit an unlawful act on premises which s/he is permitted to enter, and that permission has been obtained without any trick, threat or artifice, and entry is made without using any force, then there is neither a constructive breaking nor an actual breaking, and therefore no commission of an offence under s 112 *Crimes Act*: at [79]-[99], [104]-[105].

Manslaughter – Crown relied on two separate acts as constituting voluntary act causing death - jury must be unanimous as to the voluntary act or acts

In ***Lane*** [2017] NSWCCA 46 the appellant was found not guilty of murder but guilty of manslaughter. Evidence showed the deceased fell striking his head on the ground on two occasions, and that the head injuries in each fall were separately sufficient to cause death which occurred nine days later. The Crown alleged the first fall was caused by contact between the appellant and the deceased, and the second fall was the result of the appellant punching the deceased. The appellant's case was that the jury could not be satisfied that either fall was caused by a voluntary act on his part.

The CCA held that the judge erred in failing to direct the jury that they could not convict unless unanimous as to the voluntary act or acts. The Crown relied on two discrete acts said to have been deliberate and to have caused death. Each may have been sufficient to establish murder or manslaughter and thus was an alternative factual basis of liability. In such circumstances the jury could not convict of murder or manslaughter unless they were agreed as to whether one or both of those acts was a criminal act of the appellant. In the absence of any direction to that effect it remained possible some jurors might reason to a verdict of guilty of murder or manslaughter by being satisfied the appellant's voluntary act caused the first fall, while others might reason to the same conclusion by reference to his voluntary act having caused the second fall. That possibility was not excluded by the trial judge's general direction as to unanimity which accommodates only the circumstance that the *same* facts may support alternative legal bases of guilt: at [42]-[44]. However, the CCA applied the proviso and dismissed the appeal: at [61].

Production of child pornography and child abuse material s 91H(2), s 91G(1) Crimes Act - "private parts" does not extend to depictions of clothed areas - "breasts" does not extend to bare chest of pre-pubescent girl – convictions quashed

In ***Turner*** [2017] NSWCCA 304 the applicant pleaded guilty to various offences relating to covert filming and indecent assaults of three victims aged between 8-10 years. The CCA quashed convictions for two offences:

(i) For film taken by the applicant of a girl's crotch clothed in underwear - s 91H(2) ('producing child pornography' – charged under the offence as it then was, prior to amendments made on 17 September 2010) .

(ii) For photographs of a girl's bare chest - s 91G(1) ('child not to be used for production of child abuse material).

The CCA quashed these two convictions as neither offence involved "child abuse material" as defined in s 91FB:

> **s 91FB Child abuse material—meaning**
> (1) In this Division:
> ***child abuse material*** means material that depicts or describes, in a way that reasonable persons would regard as being, in all the circumstances, offensive:
> ……
> (d) the private parts of a person who is, appears to be or is implied to be, a child.
> ……..
> (4) The ***private parts*** of a person are:
> (a) a person's genital area or anal area, or
> (b) the breasts of a female person.

With respect to the images of a girl's crotch clothed in underwear (s 91H(2)), the definition of "private parts" in s 91FB should be given its ordinary meaning, namely a depiction or description of a body part which is unclothed and not one which is clothed. Otherwise, it would be necessary to consider how much clothing would be sufficient to take the depiction or description outside the relevant definition: at [50]. There are newer legislative provisions defining "private parts" as "a person's genital area…whether bare or covered by underwear" (in s 91I and s 91N, relating to offences of Voyeurism and Recording and Distributing Intimate Images). They do not extend to s 91FB, and it is not appropriate to imply an extended operation to s 91H which is an offence carrying a maximum penalty of 10 years: at [50].

With respect to the photographs of a girl's bare chest (s 91G(1), the use of the term "breasts" connotes a visible degree of sexual development. There was no finding (or agreed fact) that the pictures taken by the applicant depicted a girl at pubescence. Further, the ages of the victims rendered that unlikely. The ordinary meaning of the second part of the definition of "private parts" would not engage the depiction or description of the chest of a prepubescent female child: at [59].

Destroy or damage property s 195 Crimes Act - physical damage not an essential element - physical interference with coal loader rendering it temporarily inoperable sufficient

In ***Grajewski v DPP (NSW)*** [2017] NSWCCA 251 the applicant, a protester activist, suspended himself from a coal loader rendering the loader inoperable for two hours until he was removed. The coal loader itself was not damaged. By way of stated case the CCA held the applicant was properly convicted of recklessly or intentionally destroying or damaging property under s 195 *Crimes Act*. Physical damage is not an essential element to offence of damaging property. It was sufficient there was physical interference with the property and coal loader was rendered temporarily inoperable: at [54]-[65]. The Court considered NSW, other Australian jurisdiction and English authorities at [31]-[53].

Drugs – "prohibited drug" – "substance"

In ***Woods*** [2017] NSWCCA 5 the CCA quashed the applicant's conviction for supply prohibited drug, namely, dextromethorphan. The CCA held that dextromethorphan was not a "prohibited drug".

Section 3 of the *Drug Misuse and Trafficking Act* 1985 defines "prohibited drug" as "any substance… specified in Schedule 1". "Substance" is defined as including "preparation and admixture and all salts, isomers, esters or ethers of any substance and all salts of those isomers, esters and ethers". Dextromethorphan is an isomer of two other drugs but not a structural isomer of either: at [18]-[20], [25]. The CCA found that dextromethorphan is not a prohibited drug for the purposes of the *DMT Act* for the following reasons (at [21]):

. A prohibited drug is defined in s 3 as any *substance* specified in Schedule 1.
. Schedule 1 is augmented by the so-called 'analogue provisions' at the end of the schedule which deem analogues, structural isomers (as opposed to isomers- simpliciter) and structurally modified substances to be included in the schedule and hence to fit the description of 'prohibited drug' in s 3.
. The s 3 definition of 'prohibited drug' commences with the words "prohibited drug *means*…"
. The s 3 definition of 'substance' commences with the words "substance *includes*…" The matters included in a "substance" are 'preparation and 'admixture' AND all salts, isomers, esters or ethers of any substance AND all salts of those isomers, esters and ethers.
. The definition of 'prohibited drug' refers to 'any substance.' Accordingly, the definition of 'prohibited drug' should be read together with the definition of 'substance.'
. On this construction, the definition of 'substance' does no more than expand upon and explain the use of the word 'substance' in the definition of 'prohibited drug'.

The s 3 definition of "substance" is not intended as a "catch all" for those substances which do not appear in either the Schedule or in the analogue provisions, given the words "specified in Schedule 1" appearing in the definition of "prohibited drug": at 22].

Intimidation – offence of specific intent

McIlwraith [2017] NSWCCA 17 held the offence of intimidation is one of "specific intent" under s 428B *Crimes Act 1900*. Thus an offender's intoxication is relevant to criminal liability for the offence of intimidation. The applicant had been convicted under s 112(2) *Crimes Act* 1900 of an offence of aggravated break, enter and commit serious indictable offence (s 112(2) *Crimes Act*). The serious indictable offence was intimidation under s 13(1) C*rimes (Domestic and Personal Violence) Act*. The judge erred in finding the s 112(2) offence was not an offence of specific intent: at [28].

5. OTHER CASES

Plea of guilty to deemed supply prohibited drug - imprudent legal advice given to applicant - real question concerning Applicant's guilt – retrial ordered

In ***Ritchie*** [2017] NSWCCA 21 the applicant, on the advice of his solicitor, pleaded guilty to deemed supply of prohibited drug (s 29 *Drug Misuse and Trafficking Act* 1985). The applicant had informed his solicitor he possessed the drugs for his own use, not for the purpose of supply. There was evidence of drug addiction: at [18]; [30]-[31]. The CCA (with concurrence by the Crown) found a miscarriage of justice will occur if the applicant is not permitted to withdraw his plea: at [30]-[32]. There is ample evidence to support the applicant: (1) the advice given to the applicant was imprudent and inappropriate; (2) the applicant's plea was not attributable to a consciousness of guilt; and (3) the material shows there is a real question concerning the applicant's guilt: at [33]; applying *Wilkes* [2001] NSWCCA 97; 122 A Crim R 310.

Costs in Criminal trials – child sexual offences

Cox (No.2) [2017] NSWCCA 129 where costs sought in child sexual assault offence - decision that it would have been unreasonable to prosecute if in possession of all the facts based on weaknesses in complainant's evidence – do not have to conclude complainant being deliberately untruthful – sufficient to be 'very substantially lacking in credit'.

STATISTICS. The Judicial Commission Statistics for the Court of Criminal Appeal sentencing and Crown appeals to date 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			

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**

ANNEXURE A - HIGH COURT CASES 2017

1. Perara-Cathcart v The Queen [2017] HCA 9; (2017) 341 ALR 535. Appeal from SA.

Proviso – conviction appeal. Held: Appeal dismissed.

The High Court held that the proviso to dismiss a conviction appeal is not to be applied unless a *majority* of the appellate court concludes that no substantial miscarriage of justice has occurred. The Court considered the SA provisions which are in similar terms to the NSW provisions in ss 6(1) and 21A(1) *Criminal Appeal Act 1912*.

Section 353(1) *Criminal Law Consolidation Act (SA)* states:

> "*…the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred*."

Section 349 states:

> "*The determination of any question before the Full Court...shall be according to the opinion of the majority of the members of the Court hearing the case.*"

The language of s 353(1), understood in the light of s 349, authorises the application of the proviso if "it", meaning the Full Court, "considers that no substantial miscarriage of justice has actually occurred": at [38]-[39], [48]. Under s 353(1), two questions arise for determination: (1) whether the Full Court "thinks that the verdict of the jury should be set aside" on any one or more of the three grounds there stated; and (2) whether the Full Court "considers that no substantial miscarriage of justice has actually occurred." By virtue of s 349, each of these questions is determined according to the opinion(s) of the majority of the Court: at [38].

2. Prior v Mole [2017] HCA 10; (2017) 343 ALR 1. Appeal from NT

Arrest – intoxication in public place and likely to commit offence - "reasonable grounds" for belief – police officer's experience relevant to forming belief. Held: Appeal dismissed.

The appellant was apprehended under s 128(1) *Police Administration Act* (NT). Section 128 provides, inter alia, that a police officer may apprehend without warrant a person who the member has reasonable grounds for believing is intoxicated in a public place and is likely to commit an offence.

The appellant submitted the NT Court of Appeal erred in holding that the police officer had reasonable grounds for his belief that, because of his intoxication, the applicant was likely to commit an offence in circumstances in which the officer knew nothing of the applicant's background and based his belief at least in part on his policing experience.

The High Court dismissed the applicant's appeal. When a statute prescribes that there must be "reasonable grounds" for a state of mind, it requires the existence of facts sufficient to induce that state of mind in a reasonable person. It is an objective test. The question is not whether the relevant person thinks they have reasonable grounds: at [73], [98]-[100]; *George v Rockett* (1990) 170 CLR 104; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423. The officer was entitled to rely upon experience of more than 12 years and dealings with people displaying similar behaviour. It was fair for the court to infer the experience of which the officer spoke was of dealing with intoxicated people behaving in the aggressive, abusive way as the appellant: per Kiefel and Bell JJ at [14]-[19]. A police officer is ordinarily expected to bring previous experience as an aid. Where past experience has taught that identified circumstances coincide with particular kinds of offending, it is reasonable to infer similar circumstances entails a possibility of similar offending. It was sufficient for the officer to outline past experience and observations of the appellant and surrounding circumstances: per Nettle J at [69]-[72]. The officer's policing experience was *a*, not *the*, basis for his belief. His experience was not relied upon in a vacuum, but in the context of the appellant's demeanour, behaviour and the circumstances: per Gordon J at [108]-[110].

3. Aubrey v The Queen [2017] HCA 18; (2017) 343 ALR 538. Appeal from NSW

Infliction of grievous bodily harm – Meaning of "inflicts" – Appellant caused complainant to contract human immunodeficiency virus (HIV) – R v Clarence (1888) 22 QBD 23 not followed. Held: Appeal dismissed.

The applicant was convicted of one count of maliciously inflicting grievous bodily harm upon the complainant, contrary to s 35(1)(b) *Crimes Act* (as it stood in 2004). The Crown case was that the appellant had unprotected sexual intercourse with the complainant where the appellant knew he was HIV positive. The High Court answered in the affirmative on two questions of principle:

(1) Is an act of having sexual intercourse and thereby causing the other person to contract a grievous bodily disease capable of amounting to the "infliction" within s 35(1)(b)?

(2) Is it sufficient to establish that an accused acted *recklessly* within the meaning of s 5 (repealed), and thus maliciously within the meaning of that section and s 35, for the Crown to establish that the accused foresaw the *possibility* (as opposed to the *probability*) that the act of sexual intercourse with the other person would result in the other person contracting the grievous bodily disease?

The High Court held that *R v Clarence* (1888) 22 QBD 23 should no longer be followed: see at [11], [16]-[18], [35]-[36]. *Clarence* held that the transmission of a disease by sexual intercourse was not "infliction" of harm: at [10]. In light of contemporary conceptions of bodily injury and disease, it is no longer possible to discern the critical difference identified in *Clarence* between an immediate and necessary connection between a blow and physical harm, and the delayed effect of an act of sexual intercourse leading to the development of infection: at [16]; *Dica* [2004] QB 1257. The NSW common law - that the degree of recklessness required to establish malice for the purpose of statutory offences other than murder was foresight of possibility (not probability) of harm (Coleman (1990) 19 NSWLR 467) - was correctly applied to s 35: at [46]-[47].

4. Smith v The Queen; The Queen v Afford [2017] HCA 19; (2017) 343 ALR 561 Appeal from NSW and Vic

Import border controlled drug – ss 5.2, 307.1 Criminal Code (Cth). Held: Crown appeal from VSCA allowed - Appeal from NSW CCA dismissed.

The appellants, A and S were convicted (in Victoria and NSW respectively) of import commercial quantity of border controlled drug (s. 307.1(1)(a) *Criminal Code* (Cth). The drugs were hidden in the appellants' luggage brought into Australia. The case of both appellants was that they had no intention to import the drugs. For the offence of import commercial quantity of border controlled drug, the fault element is intention (a person has intention with respect to conduct if s/he means to engage in that conduct: s 5.2(1)).

In *Kural v The Queen* (1987) 162 CLR 502 the High Court had held that under the earlier *Customs Act* provision (s 233B(1)(b) - repealed) it was open to infer intent to import a narcotic drug where it was established the accused knew or believed or was aware of the likelihood, in the sense of there being a significant or real chance, that what was being imported was a narcotic drug.

The High Court held that the process of inferential reasoning in *Kural* does apply to proof of an intention to import a commercial quantity of border controlled drug under s. 307.1(1): at [64]. The High Court allowed the Crown appeal from the VSCA, and dismissed the appeal from the NSW CCA.

In cases like this, it is entirely appropriate for a trial judge to tell the jury that, if they consider it to be established beyond reasonable doubt the accused perceived there to be a real or significant chance of the presence of a substance in an object which the accused brought into Australia, it is open to infer the accused intended to import the substance: at [60]-[61]: *Saengsai-Or* (2004) 61 NSWLR 135; *Cao* (2006) 65 NSWLR 552.

It does not follow the accused must be shown to have known or believed what the substance was or what it looked like, or how it was wrapped or otherwise contained, or where it was located or concealed in the suitcase: at [63].

The High Court at [69] set out directions, where it is not disputed the accused brought a substance into Australia and not disputed that it was a border controlled drug.

5. Hughes v The Queen [2017] HCA 20; (2017) 344 ALR 187. Appeal from NSW

Tendency evidence – s 97(1)(b) Evidence Act 1995 (NSW). Held: Appeal dismissed.

The appellant was convicted of child sexual offences against four complainants. Evidence by the complainants and other witnesses was admitted at trial to prove the appellant's tendencies for sexual interest in female children under 16 and to act on that interest through opportunistic sexual activity with underage girls. The NSW CCA declined to follow *Velkoski* (2014) 45 VR 680, thus rejecting the appellant's submission the evidence was inadmissible because it lacked an 'underlying unity' or 'pattern of conduct' inherent in the expression 'significant probative value'.

Dismissing the appeal, the High Court held the NSW CCA did not err in declining to follow *Velkoski* nor in determining the tendency evidence had significant probative value: at [12]. The test posed by s 97(1)(b) *Evidence Act* 1995 is that "the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged" (*Ford* [2009] NSWCCA 306; (2009) 201 A Crim R 451 at 485). It is not necessary the disputed evidence has this effect *by itself*. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged. Where there are multiple counts, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible: at [40].

The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters: (1) The first matter is the extent to which the evidence supports the tendency; (2) The second matter is the extent to which the tendency makes more likely the facts making up the charged offence: at [41].

Where the question is not one of the identity of a known offender but a question concerning whether the offence was committed, it is important to consider both matters. In summary, there is likely to be a high degree of probative value where: (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency; and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged: at [41]. Unlike the common law which preceded s 97(1)(b), the statutory words do not permit a restrictive approach to whether probative value is significant. However, the open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means that it is inevitable that reasonable minds might reach different conclusions: at [42].

6. Rizeq v The Queen [2017] HCA 23; (2017) 344 ALR 421. Appeal from WA

Majority verdict – state offences – appellant from different state – federal jurisdiction. Held: Appeal dismissed.

The appellant was convicted of state drug offences under (WA) *Misuse of Drugs Act* s.6(1)(a) by majority verdict. The appellant was a resident of NSW which meant the case involved federal jurisdiction under the Cth *Constitution* s.75(iv) (matters between a State and the resident of another State). Section 80 of the *Constitution* requires a unanimous verdict for trials involving a law against the Commonwealth (*Cheatle* (1993) 177 CLR 541). The issue in this case was whether the offences under the (WA) *Misuse of Drugs Act* s.6(1)(a) had become Commonwealth offences and therefore required unanimous verdicts.

In dismissing the appeal, and after considering the application of (CTH) *Judiciary Act* s.79, the Court concluded the appellant's trial had been for offences against the law of a State and a majority verdict was available under the (WA) *Criminal Procedure Act* s.114.

7. R v Dickman [2017] HCA 24; (2017) 344 ALR 474. Appeal from Victoria.

Evidence – s 116, s 137 – no error in finding unfair prejudice minimal – Court of Appeal erred in concluding there was a miscarriage of justice without reference to the evidence or conduct of trial. Held: Crown appeal allowed. Conviction restored.

The respondent was convicted of intentionally cause serious injury and making threat to kill. In 2009 the victim identified an "old man" from a police photoboard, however, that man had an alibi. In 2011 the victim identified the respondent from another photoboard. The VCA held the trial judge erred in failing to exclude the 2011 identification evidence and set aside the convictions. The prosecution appealed. The High Court allowed the appeal and restored the convictions.

The admission of the August 2011 identification was not in error. The trial judge was justified in finding exclusion under s 137 was not required because the danger of unfair prejudice was minimal and could be adequately addressed by directions: at [57].

There was no dispute regarding the trial judge's assessment of the probative value of the evidence as low: at [43]. Standing alone, the low probative value of the evidence did not require its exclusion unless that value was outweighed by the danger of unfair prejudice: at [44]; *Festa* (2001) 208 CLR 593. Yet the reasons by the VCA as to why exclusion was required were concerned with the evidence's low probative value: at [44].

The unfair prejudice was the risk the jury would infer that the police officer's suspicion of the respondent as the suspect was based on matters known to the officer but not in evidence. However that risk does not appear to have been a real one as the reasons why the investigation came to focus on the respondent were explained in evidence: at [56].

The VCA erred by proceeding to the conclusion there had been a substantial miscarriage of justice without reference to the evidence or the conduct of trial: at [58]. The possibility that a person other than the respondent was the "old man" was excluded beyond reasonable doubt and other evidence meant the respondent's conviction was inevitable: at [63].

8. Gax v The Queen [2017] HCA 25; (2017) 344 ALR 489. Appeal from Qld

Unreasonable verdict – sufficiency of reasons. Held: Appeal allowed. Verdict of acquittal entered.

The appellant was charged with three counts of aggravated indecent dealing with a child (his daughter, aged 13). He was acquitted of the first two counts and convicted of the third. The complainant made her first complaint around a decade after the offence was committed. The complainant's evidence-in-chief on the third count was

her mother entered her bedroom as the appellant was getting out of the complainant's bed. The complainant said her underwear was around her ankles, but was unable to say why, and that "I was asleep before and ended up finding out what happened".

The QCA dismissed the appellant's appeal (by majority). In dissent, McMurdo P found that the possibility that the complainant's evidence was a reconstruction rather than an actual memory had not been excluded beyond reasonable doubt. The High Court allowed the appeal, quashed the conviction and entered a verdict of acquittal.

The complainant's assertion that "his fingers were near my vagina" was in law evidence of an indecent dealing within the relevant particulars. Determination of whether the verdict was unreasonable was thus an issue of fact, turning on the QCA's own assessment of whether it was open to the jury to be satisfied of the appellant's guilt to the criminal standard: at [25]; *M* (1994) 181 CLR 487; *SKA* (2011) 243 CLR 400.

McMurdo P in dissent was right to conclude that the possibility of reconstruction had not been excluded: at [31], [40]. This was not a case in which the jury's advantage in seeing and hearing the evidence can provide an answer to the sufficiency of the evidence to support the verdict: at [31], [40]. The complainant's answers pointed to her further answers on the topic as a reconstruction. Her inability to give any details of the touching is consistent with that possibility: [29]; [40]. There was also marked inconsistencies between her sister's account and the complainant and her mother's accounts: [30]. Given the insufficiency of the evidence, it is not necessary to decide upon the adequacy of the QCA's reasons. However, there is force to the argument the reasons do not disclose assessment of the sufficiency and quality of the evidence of the particularised touching. It is not clear there was an independently formed conclusion about the capacity of the evidence to exclude the possibility of reconstruction: at [25].

9. IL v The Queen [2017] HCA 27; (2017) 345 ALR 375. Appeal from NSW

s 18(1) does not apply to self-killing – constructive murder - joint criminal enterprise: Osland v The Queen (1998) 197 CLR 316 - felony (constructive) murder: Sharah (1992) 30 NSWLR 292. Held: Appeal allowed.

The High Court, by majority (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), held that s 18 *Crimes Act* (Murder and manslaughter defined) did not cover the circumstance where the person committing the act causing death was the deceased: at [23]-[24].

The Crown alleged the appellant and the deceased L participated in a joint criminal enterprise to manufacture methylamphetamine (s 24(2) *DMTA),* punishable by life imprisonment. A gas fire burner ignited during the drug manufacture caused a fire and resulted in L's death. The Crown could not prove whether it was the appellant or L who lit the burner.

The Crown based its case on constructive murder (s 18(1)(a) *Crimes Act*), that is, the appellant was liable for murder because she and L participated in a joint enterprise to commit a crime (the foundational offence carrying life imprisonment) and the ignition of the ring burner was an act within the scope of that crime which caused the death of L: at [52].

The trial judge directed verdicts of acquittal for murder and in the alternative manslaughter. The CCA allowed the Crown appeal against the directed verdicts of acquittal and ordered a re-trial (*R v IL* [2016] NSWCCA 51). The High Court by majority allowed IL's appeal, set aside the orders of the CCA and dismissed the Crown appeal to that court.

s 18 does not apply to self-killing

Kiefel CJ, Keane and Edelman JJ held that s 18 (murder and manslaughter defined) requires the killing by one person of another. Section 18 is not concerned with the circumstance of a person who kills himself or herself intentionally or accidentally. Murder is thus not committed where a person kills himself or herself in an attempt to commit, or during or immediately after the commission of, a relevant crime (constructive murder). Nor is the offence of manslaughter committed when a person kills himself or herself in some other way: at [25].

Bell and Nettle JJ held that suicide or self-murder ceased to be a crime in NSW and self-manslaughter was never a crime. Thus assuming it were L's act of lighting the ring burner which caused L's death, that act was not the actus reus of a crime of murder or manslaughter; or, to put it another way, L and the appellant did not do between them all the things necessary to constitute a crime of murder or manslaughter. Thus the appellant could not be liable for L's death pursuant to joint criminal enterprise liability: at [79]-[80].

Joint criminal enterprise - Osland (1998) 197 CLR 316

Kiefel CJ, Keane and Edelman JJ stated that the attribution of acts under the doctrine of joint criminal liability was made clear in *Osland v The Queen* (1998) 197 CLR 316. The important point is that it is the *acts* which are attributed from one person (the actor) to another who shares the common purpose and, by attribution, becomes

personally responsible for the acts. It is not the *liability* of the actor which is attributed. Nor the *actus reus* of some notional crime without a mental element that might be committed by the actor: at [29], [40].

Bell and Nettle JJ also emphasised that joint criminal enterprise liability is limited to participation in acts constituting the actus reus of a crime and has nothing to say about liability for acts which are not the actus reus of a crime or are incapable of constituting the actus reus of a crime.

Felony constructive murder - Sharah (1992) 30 NSWLR 292

Some of the High Court justices referred to the NSW CCA case of *R v Sharah* (1992) 30 NSWLR 292.

Sharah had been discussed by the NSW CCA below in *R v IL* [2016] NSWCCA 51 at [36]-[37]. In *Sharah* Carruthers J set out the elements it was necessary for the Crown to prove for "felony [constructive] murder":

> "(i) that there was a common purpose between the appellant and [the co-offender] in company to rob [another man] whilst [the co-offender] was, to the knowledge of the appellant, armed with an offensive weapon, namely, a sawn-off double-barrelled shotgun;
>
> (ii) that during the course of the armed robbery [the co-offender] wounded [the other man] and during the course of such armed robbery with wounding or immediately thereafter, [the co-offender] discharged the gun causing the death of [the victim];
>
> (iii) that the discharge of the gun by [the co-offender] during or immediately after the armed robbery with wounding of [the other man], was a contingency which the appellant had in mind, whether or not the gun was fired intentionally and whether or not in furtherance of the common unlawful purpose."

The CCA in *IL* [2016] NSWCCA 51 at [36] said it may be questioned whether the third element (foresight of the discharge of the gun) was an unnecessary importation into the offence of constructive murder. Foresight is an element of the concept of extended joint criminal enterprise, necessary to render a participant in the joint criminal enterprise liable for acts of other participants; it had not previously been a requirement of constructive murder under s 18. This has been noted in *Batcheldor & Walsh* [2014] NSWCCA 252 per R A Hulme J at [128]-[132] and the NSW Law Reform Commission, *Complicity*, Report 129, (2010) at 148-149 [5.37].

However, *Sharah* has never been overruled and remains a binding authority: *R v IL* [2016] NSWCCA 51 at [37].

In the High Court, Bell and Nettle JJ noted questions arising about the correctness of *Sharah* but the resolution of that matter can await another day: at [89].

Gageler J (dissenting) said that *Sharah* has been consistently followed and was not challenged in this case. It is consistent with *Surridge* (1942) 42 SR (NSW) 278 at 283: at [102].

Gordon J (dissenting) stated that *Sharah* should not be followed. There is no foundation for the inclusion of that third element. The NSW Law Reform Commission correctly noted that until *Sharah* the constructive murder limb of s 18(1)(a) had required only that the act or omission causing death be connected with the acts forming part of the foundational offence. If the parties have agreed to commit the foundational offence, neither felony murder at common law nor constructive murder under s 18(1)(a) requires any additional foresight on the part of the accomplice: at [166].

10. Knight v Victoria [2017] HCA 29; (2017) 345 ALR 560**.** Stated case from Victoria

Specific provision creating preconditions for parole order identifies plaintiff by name and only applies to plaintiff – Crump v New South Wales (2012) 247 CLR 1. Held: s 74AA Corrections Act 1986 (Vic) is not constitutionally invalid.

The plaintiff Julian Knight was sentenced to terms of life imprisonment in respect of seven counts of murder and 10 years each for 46 counts of attempted murder. The sentencing judge imposed a non-parole period of 27 years which expired on 8 May 2014.

On 2 April 2014 the Victorian Parliament inserted s 74AA into the *Corrections Act* 1986 with the heading "*Conditions for making a parole order for Julian Knight*". Section 74AA states the Parole Board must not order Julian Knight be released on parole unless satisfied he is "in imminent danger of dying, or is seriously incapacitated and as a result, he no longer has the physical ability to do harm to any person….."

On a stated case, the High Court held that s 74AA is not constitutionally invalid: at [38].

Section 74AA does not interfere with an exercise of judicial power. The minimum term sets a period during which Mr Knight was not eligible to be released on parole. Whether or not he would be released on parole at the expiration of the minimum term was outside the scope of the exercise of judicial power constituted by imposition

of the sentences. Making it more difficult to obtain a parole order does nothing to contradict the minimum term that was fixed: at [26]-[29].

Crump (2012) 247 CLR 1 cannot be distinguished and should not be reopened. That s 74AA has an operation more specific than s 154A *Crimes (Administration of Sentences) Act NSW* (because it specifically names the plaintiff) is a distinction without difference. The legal and practical operation of s 154A in respect of each member of that class, including the plaintiff in *Crump*, was identical to that of s 74AA in respect of the plaintiff: at [25].

11. The Queen v Holliday [2017] HCA 35; (2017) 347 ALR 436. Appeal from ACT

Incitement to procure third person to commit kidnapping - incitement offence not established – s 45 Crimes Act (ACT) Held: Crown appeal dismissed.

The respondent (on remand in custody) offered a fellow inmate a reward to have people outside prison kidnap two witnesses and force them to adopt a statement exculpating the respondent of the offences he was facing. The inmate did not proceed and reported the respondent.

The trial indictment alleged the respondent "committed the offence of incitement in that he urged [the inmate] to kidnap" each witness. The Crown case was that the respondent urged the inmate to procure a third person to commit the kidnappings. The respondent was convicted and appealed to the Appeal Court of the ACT Supreme Court which set aside the verdicts and substituted verdicts of not guilty. The prosecution appealed to the High Court. The High Court dismissed the prosecution appeal.

Section 47(1) *Criminal Code* (ACT) states a person commits the offence of incitement if the person "*urges the commission of an offence*". Section 45(1) stated "*a person is taken to have committed an offence if the person aids, abets, counsels or procures the commission of the offence by someone else*".

The offence of kidnapping was not committed. The respondent could not be convicted of urging the commission of kidnapping contrary to s 47. Section 45 has no operation until the substantive offence has been completed: at [36], [67]; [77]. This is supported by *Walsh v Sainsbury* (1925) 36 CLR which held that the procurement provision in the *Crimes Act 1914* (Cth) did not create a new and substantive offence and did not operate until the substantive offence had been committed: [38]; [69]–[70]; [75]–[76].

Kiefel CJ, Bell and Gordon JJ held that there is no offence of incitement to procure in the *Criminal Code* (ACT). Section 45 has no operation until the substantive offence has been completed. And, once the substantive offence has been completed, s 45 does not create a discrete offence of aiding, abetting, counselling or procuring. Instead, by reason of s 45, the person is liable to be charged with the substantive offence. There is no offence under s 45 to which s 47 can attach: at [42].

12. The Queen v Dookheea [2017] NSWCCA 36; ***(2017) 347 ALR 529*** Appeal from Victoria.

Trial judge directed jury that Crown required to prove accused's guilt "not beyond any doubt, but beyond reasonable doubt" – VCA allowed conviction appeal. Held: Crown appeal allowed. Orders of VCA set aside and respondent's conviction appeal to VCA dismissed.

The High Court held there was no miscarriage of justice where the trial judge directed the jury that the Crown must prove the accused's guilt "*not beyond any doubt, but beyond reasonable doubt*".

It is both unnecessary and unwise for a trial judge to attempt explanatory glosses on the words "beyond reasonable doubt": [24]-[27]; *Green* (1971) 126 CLR 28 and *La Fontaine* (1976) 136 CLR 62.

It is generally undesirable for a trial judge to contrast reasonable doubt with any doubt. But it will not always result in a substantial miscarriage of justice: at [28]. The question is whether the words spoken in terms of the record of the summing up are such that the jury would have derived a false perception of the basis for deciding whether the Crown has proved its case. That is a question to be decided by taking the summing up as a whole and as a jury listening to it might understand it (*Green*; *La Fontaine*). Where the accused has been represented at trial by competent counsel, the reaction of defence counsel is a cogent consideration: at [37].

There was no miscarriage of justice in this case: at [28], [39].

Practice of distinguishing between criminal and civil standards of proof: Nonetheless, the practice in Victoria and NSW of contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities is encouraged. It conveys to a jury that being satisfied beyond reasonable doubt is not simply concluding the accused may have committed the offence or that it is more likely than not the accused committed the offence. What is required is a much higher standard, the highest known to the law: proof beyond reasonable doubt: at [41].

13. Chiro v The Queen [2017] NSWCCA 36; *(2017) 347 ALR 546* Appeal from SA.

Persistent sexual exploitation of a child - after general verdict, judge should have asked jury to identify acts of sexual exploitation found to be proved − appellant should be sentenced on facts most favourable to appellant where factual basis of jury's verdict unknown. Held: Sentence appeal allowed; conviction appeal dismissed. Matter remitted to SA CCA for re-sentence.

Note: NSW has a similar provision to the SA provision in s 66EA *Crimes Act* ('Persistent sexual abuse of a child').

The appellant was convicted by jury of persistent sexual exploitation of a child (s 50(1) *Criminal Law Consolidation Act* 1935 (SA)). The Crown alleged that between 2008 and 2011 the appellant committed six sexual acts ranging from kissing the complainant on the lips to fellatio. The judge sentenced on the basis the appellant had committed each of the particularised acts.

The High Court dismissed the appeal against conviction but allowed the appeal against sentence.

The High Court held that on a conviction for "persistent sexual exploitation of a child" (s 50(1)) - if the jury returns a general verdict of guilty, the judge should request that the jury identify the underlying acts of sexual exploitation that were found to be proved unless it is otherwise apparent to the judge which acts of sexual exploitation the jury found to be proved: at [1].

After the general verdict, the judge should have exercised her discretion to ask the jury to specify which of the particularised acts of sexual exploitation they were agreed had been proved: at [46]. There was also nothing to prevent the judge directing the jury before they retired that if their verdict was guilty, they would be asked to state which of the alleged acts of sexual exploitation they were unanimously agreed (or agreed by statutory majority) had been proved: at [47].

A judge is not required to sentence on facts most favourable to an offender, but should make his or her own findings as to aggravating and mitigating circumstances: at [52]; *Cheung* (2001) 209 CLR 1. However, it is different with an offence under s 50(1). The underlying acts of sexual exploitation are the actus reus of the offence and it is for the jury to find the acts which comprise the actus reus. A jury cannot be compelled to explain the basis of its verdict. Consequently, where a jury returns a verdict of guilty to s 50(1) and the judge does not or cannot get the jury then to identify which alleged acts of sexual exploitation were found to be proved, the offender will have to be sentenced on the basis most favourable to the offender: at [52]. The appellant was sentenced as if he had been found to have committed all of the alleged acts. The sentence was infected by error and was also manifestly excessive: at [53].

14. Hamra v The Queen [2017] HCA 38; *(2017) A Crim R 582.* Appeal from SA.

Persistent sexual exploitation of a child - Generalised nature of complainant's evidence - not possible to identify two or more acts of sexual exploitation – s 50 does not always require evidence which allows acts of sexual exploitation to be delineated by reference to differentiating circumstances. Held: Appeal dismissed.

Note: The Judicial Commission notes the SA provision differs from the NSW offence in s 66EA *Crimes Act* 1900 (NSW). In NSW the charge must "describe the nature of the separate offences alleged to have been committed by the accused", and the time period during which the offence occurred: s 66EA(5). The SA legislation centers upon the course of conduct constituting the sexual exploitation (eg "touching the complainant's vagina") and not on the particular offence. The specification required for an offence under s 66EA is outlined in *ARS v R* [2011] NSWCCA 266 at [115]–[123] (see jirs.judcom.nsw.gov.au).

The appellant was charged with persistent sexual exploitation of a child (s 50(1) *CLCA* (SA)). The trial judge found there was no case to answer because the complainant was not able to relate the alleged acts to any particular occasion, circumstance or event beyond "what typically or routinely or generally occurred." It was thus impossible to identify two or more acts to constitute the offence. An appeal by the prosecution to the SA CCA was allowed. The appellant appealed to the High Court.

Dismissing the appeal, the High Court held ss 50(1)-(2) plainly requires the jury to identify two or more acts, over a period of three days or more, which could be charged as sexual offences. However, s 50 does not always require evidence which allows acts of sexual exploitation to be delineated *by reference to differentiating circumstances*. The particular, unique circumstances of each separate occasion need not always be identified in order for a conclusion to be reached that two or more separate acts occurred, separated by three days or more. In this case, there was a case to answer by reference to the complainant's evidence even if all of the separate, individual acts alleged in each category could not be delineated by particular, different circumstances: at [45].

15. DPP v Dalgliesh (a pseudonym) [2017] HCA 41; (2017) 349 ALR 37. Appeal from Victoria.

Crown appeal on ground of manifest inadequacy - s 5(2) Sentencing Act 1991 (Vic) - court must have regard to "current sentencing practices"- Court of Appeal held that current sentencing so low as to reveal error in principle - – appellate intervention was required to correct error. Held: Crown Appeal allowed

The High Court allowed a Crown appeal from the VSCA. The VSCA dismissed an appeal by the DPP against a sentence for incest. In the VSCA, the parties made submissions on the adequacy of "current sentencing practices" – a matter which courts in Victoria must have regard to (s 5(2)(b) *Sentencing Act 1991* (Vic)). The VSCA assessed the adequacy of A's sentence by reference to current sentencing practices, finding that the sentence, "though extremely lenient, was not wholly outside the permissible range" (Part A of VSCA reasons). The Court assessed sentencing information provided and found this range is so low that it "reveals error in principle" in that it is not proportionate to the objective gravity of the offending or the moral culpability of the offender**.** (Part B of VSCA reasons).

The High Court held that the VSCA in dismissing the appeal. Having reached a conclusion that current sentences were so manifestly disproportionate to the gravity of the offending and the moral culpability of the offender as to bespeak an error of principle, it was the proper function of the VSCA to correct that injustice: at [2], [63].

The considerations a sentencing judge must have regard to by s 5(2) cannot be applied mechanically. The balancing of factors listed in s 5(2) in order to arrive at a sentence that is just in all the circumstances is a matter of instinctive synthesis: at [4]-[5]; *Wong v The Queen* (2001) 207 CLR 584. While s 5(2)(b) states a factor that must be taken into account, that factor is only one factor, and it is not said to be the controlling factor: at [9].

16. Van Beelen v The Queen [2017] HCA 48; (2017) 349 ALR 578. Appeal from SA.

s 353A Criminal Law Consolidation Act 1935 (SA) - second or subsequent conviction appeals - "fresh and compelling" evidence - SAFCSC erred by refusing leave on basis fresh evidence not "compelling" - no substantial miscarriage of justice. Held: Appeal dismissed.

Note: NSW has a similarly worded provision to s 353A CLCA (SA). Section 100(1) *Crimes (Appeal and Review) Act* 2001 (NSW) states the NSW CCA may, on application by the DPP, order an acquitted person be retried for a life sentence offence if satisfied: (a) there is fresh and compelling evidence; and (b) it is in the interests of justice. The definitions of "fresh" and "compelling" in s 102 are similar to s 353A(6).

Section 353A(1) *Criminal Law Consolidation Act* 1935 (SA) allows the SAFCSC to determine a second or subsequent conviction appeal. The SAFCSC must be satisfied there is "fresh and compelling evidence that should, in the interests of justice, be considered." Evidence is "compelling" if it is: (i) reliable; (ii) substantial; and (iii) highly probative in the context of the issues in dispute at the trial. The appeal may only be allowed if the SAFCSC is satisfied there was a substantial miscarriage of justice.

At the trial, the pathologist who performed the autopsy gave evidence as to the time of the deceased's death based on the deceased's stomach contents and time of her last meal. In 2015, at the application to bring a second conviction appeal, the appellant relied on evidence from Professor H as to recent advances in knowledge about gastric emptying and who concluded the pathologist's estimate of the time of death was "unequivocally highly erroneous". The High Court held the SAFCSC erred in refusing permission to appeal, however, dismissed the appeal. The SAFCSC erred in finding the evidence was not "compelling": at [32]. The construction of the words "reliable", "substantial" and "highly probative" are accorded their ordinary meaning. The criterion of reliability requires the evidence to be credible and provide a trustworthy basis for fact finding: at [28]. It was in the interests of justice for Professor H's evidence to be considered on appeal: at [2], [32]. However, there was no substantial miscarriage of justice. After consideration of the evidence at trial, the SAFCSC rightly concluded there is not a significant possibility a properly instructed jury, acting reasonably, would have acquitted the appellant had the pathologist's erroneous opinion not been in evidence: at [75].

ANNEXURE B - SUPREME COURT CASES 2017

Commissioner of Police v Howard Silver & Sons [2017] NSWSC 981 (Wilson J)

Imitation firearms – "produced and identified" as a toy – magistrate erred in construction of s 4D(4) Firearms Act 1996

The *Firearms Act* applies to imitation firearms (s 4D). An "imitation firearm" is defined in as "an object that, regardless of its colour, weight or composition or the presence or absence of any moveable parts, substantially duplicates in appearance a firearm but that is not a firearm" (s 4D(3)). An exception is contained in s 4D(4) which

provides that "*an imitation firearm does not include any such object that is produced and identified as a children's toy".*

The Magistrate found various items confiscated by police fell within the exception in s 4D(4) thus allowing them to be returned to the defendant company. Wilson J allowed the Commissioner's appeal and remitted the matter to be dealt with in accordance with the law.

In interpreting the meaning of s 4D(4) the magistrate erred by confining his consideration of whether or not the items were children's toys to whether they were produced, packaged and otherwise labelled as toys. The purpose of the production (manufacture) of the item is but one part of the statutory definition. Separate regard must also be had to the "identification" of the item: at [45]. The words and evidence relevant to both "production" and "identification" had to be separately considered and determined. How the items were to be identified depended upon matters intrinsic to the items themselves, not the packaging or other removable paraphernalia: at [50].

The objective evidence relevant to the identification of the items included (at 51):

1. the items were made of metal or die-cast metal rather than plastic or other light weight material;
2. they were heavy to hold, similar to a comparable firearm;
3. many items had moveable parts consistent with the operation of a firearm;
4. the items were produced in colours consistent with a firearm rather than bright colours associated with children's toys; and
5. expert ballistics evidence was that the items substantially duplicated the appearance of the corresponding firearms, being self-loading pistols, revolvers, and select-fire rifles.

The judge failed to give proper attention to the purpose of the legislation to protect the community from illegal possession and use of firearms or imitation firearms. To conclude an item which substantially duplicated the appearance of a firearm was a children's toy because of its packaging was to reach a conclusion contrary to the purpose of the legislation: at [52].

Johnson (No 4) [2017] NSWSC 609 (Button J)

Assault causing death whilst intoxicated - s 25A Crimes Act - meaning of "intoxicated"

The accused was charged with murder; in the alternative, assault causing death, whilst intoxicated, under s 25A(2) *Crimes Act 1900* (which commenced on 31.1.2014). The meaning of being intoxicated was not yet the subject of judicial consideration. Button J directed the jury that *"intoxicated"* is an ordinary English word, more plainly expressed as being *"drunk"*. Intoxicated involves something more than a person having a small amount of alcohol in the body, without it affecting that person or only affecting the person to a very small degree. A person who is merely tipsy or "happy" would not be thought of as intoxicated: at [8]-[11].

DPP v Owen [2017] NSWSC 1550 (RA Hulme J)

Failure to caution - police officers' evidence of defendant's conduct post-arrest - charged with resist arrest and assault police officer – Magistrate erred in excluding evidence under s 138 Evidence Act

The defendant pleaded guilty to charges of resist and assault police. The conduct allegedly took place whilst the defendant was being arrested on a warrant for failing to appear. The Magistrate dismissed the charges. The Magistrate found that the police did not caution the defendant. In the absence of a caution, ss 138, 139 *Evidence Act* applied, rendering the arrest of the defendant improper and the remainder of the prosecution evidence inadmissible.

RA Hulme J allowed the appeal and remitted the matter to the Local Court to be dealt with according to law. The magistrate erred in finding there was impropriety in the conduct of police. Even if there had been such impropriety, s 138 was not engaged as the evidence in question was not obtained by, or in consequence of, an illegality or impropriety.

Section 138 is engaged when there is a link between the obtaining of evidence and either some contravention of an Australian law ("illegality") or impropriety. The evidence must have been *obtained* either illegally or improperly, or *in consequence of* an illegality or impropriety: at [62]. It is difficult to see how the defendant's alleged behaviour could be linked to the failure to caution. The Magistrate did not properly address the issue of causation. Otherwise, it would be clear s 138 was not engaged, even if it was open to find there had been improper conduct by the police: at [72]-[74].

Section 139 is concerned with questioning. The magistrate accepted there was no questioning or intention to question. But if it be the case that she upheld the objection and excluded the evidence under s 139, that was also erroneous. The defendant was not "under arrest for an offence" (s 139(1)(a)). Even if he was, he was not being questioned; he was being processed in relation to the outstanding warrant. The provisions of s 139 were

not engaged. There was thus no impropriety that engaged s 138 on this basis: at [75], [82].

DPP v Hughes [2017] NSWSC 492 (Bellew J)

Possession, production, dissemination child abuse material – s 91H(2) Crimes Act – mental element of production or dissemination

Bellew J held that the magistrate erred in finding that malice was an element under s 91H(2): at [88]. For a charge of possession, the mental element is that the possession must be intentional: at [82]; *Clark* (2008) 185 A Crim R 1. For a charge of production or dissemination, the mental element has not been authoritatively determined. However in the absence of some specificity in the terms of s 91H(2), there is no warrant to conclude that proof of any specific intent, including malice, is required (*He Kaw Teh* (1985) 157 CLR 323). Thus for an offence contrary to s. 91H(2) the prosecution must prove beyond reasonable doubt that a defendant voluntarily and intentionally performed the particular physical act in question: at [83]-[84].

DPP v Nikolovski [2017] NSWSC 1038 (Adamson J)

Police officer intimidated whilst in execution of duties – properly charged under offence of intimidate under s 13(1) Crimes (Domestic and Personal Violence) Act 2007 (CDPV Act) – not Assault police in execution of duties under s 60 Crimes Act

Adamson J held it was an error for the Magistrate to dismiss a charge under s 13(1) *CDPV* Act. The Magistrate found the defendant had intimidated a police officer but dismissed the charge on the ground that the charge ought to have been laid under s 60 *Crimes Act* given the victim was a police officer acting in the execution of duties. Adamson J found that no assumption can be made that Parliament intended the specific provision in s 13 CDPV Act to override the general provision in s 60 *Crimes Act* as they are contained in different statutes; there is no statutory intention to have one provision give way to another: at [13]-[16], [21]. The laying of charges is solely for the prosecuting authorities: at [22].

Ghazzawy [2017] NSWSC 474 (Bellew J)

Sentence – preparatory acts of terrorism

Bellew J outlined sentencing considerations in relation to a provision directed specifically to conduct connected to preparatory acts of terrorism by reference to other cases: *Khazaal* [2009] NSWSC 1015; *Kahar; Ziamani* [2016] 1 WLR 3156; *Lodhi* (2007) 199 A Crim R 470.

R v Hayward [2017] NSWSC 1170 (R A Hulme J)

s 29(d) Children and Young Persons (Care & Protection) Act 1998 – FACS Reports produced under subpoena not admissible in District or Supreme Courts in criminal jurisdiction

Section 29 ('Protection of persons who make reports or provide certain information') of the *Children and Young Persons (Care & Protection) Act* 1998 enables a report to be made in respect of a young person under care and protection of the Department of Family and Community Services (FACS). The accused sought to rely on material produced under subpoena by FACS. R A Hulme J held that under the clear terms of s 29(1)(d), FACS and all other reports referred to in s 29(1) are not admissible in the District or Supreme Courts in their criminal jurisdiction: at [48]-[66]. The right of an accused to have a fair trial was unambiguously abrogated in that respect: at [42]. In this case, all material produced under subpoena by FACS is caught by the ambit of "report" in s 29, namely, "the report, or evidence of its contents." This would apply to "internal memoranda, case summaries, referrals to other services, affidavits and case management plans": at [62]-[65].

Two cases in which s 29 have been considered are not binding authority on the exceptions to admissibility: at [36]-[38] referring to *The Application of the AG for NSW dated 4 April 2014* [2014] NSWCCA 251 (only binding in terms of its finding that s 29 enables a court to order production of reports under Pt 2 in response to a subpoena and over objection insofar as they disclose or tend to disclose the identity of the person who made the report: at [34]); see also *Director General, Dept of Family and Community Services v FEW* [2013] NSWSC 1448 (analysis confined to the compellability of production and the scope of the words 'in relation to' in s 29(1)(d)(iii)): at [37]–[38].

ANNEXURE C - LEGISLATION 2017

1. Fines Amendment Act 2017

Commenced 21 March 2017

Fines Act 1996

Office of State Revenue now has discretion to take civil enforcement action against fine defaulter without first suspending or cancelling driver's licence, if Commissioner of Fines Administration is satisfied civil enforcement

action is preferable because enforcement action under Pt 4 Div 3: (a) is unlikely to be successful in satisfying fine, or (b) would have excessively detrimental impact on fine defaulter: s 71(1A)

Victims Rights and Support Act 2013 (*VRSA)*
Commissioner of Fines Administration can enforce confirmed restitution orders made under *Victims Rights and Support Act* 2013 against an offender. Previously, such orders could be enforced only as judgment debt requiring application to court. Enforcement action may be taken under *Fines Act* and additional enforcement costs may become payable: s 70B(4). Restitution amounts are taken to be a fine imposed by court and the Act then applies in same way as to court imposed fines: ss 112C(1), 112D.

***2. Criminal Legislation Amendment (Organised Crime and Public Safety) Act* 2016**
Schedule 5 commenced 31 March 2017

Schedule 5 amends *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.

***3. Parliamentary Contributory Superannuation Amendment (Criminal Charges and Convictions) Act* 2017 (NSW)**
Commenced 1 June 2017

Amends *Parliamentary Contributory Superannuation Act* 1971 to disqualify all former members of parliament from entitlement to pension if convicted of a serious offence for conduct during time in office.
Inserts s 24C *Crimes (Sentencing Procedure) Act* 1999 to provide that when sentencing an offender who is / was a member of Parliament the court must not take into account, as a mitigating factor, the offender's loss of entitlement to parliamentary pension because of their conviction.
The amendments have a retrospective effect. The amendments extend to MPs convicted of:
. any serious offence committed before the commencement of those amendments; and
. any conviction before the commencement of those amendments; and
. a person who ceased to be a member before the commencement of those amendments (and to any entitlement of the person to a pension or lump sum that accrued or was paid before that commencement): Sch 1 cl 11A
The new s.24C *Crimes (Sentencing Procedure) Act* 1999 was applied in *Macdonald; Maitland* [2017] NSWSC 638 at [262].

***4. Criminal Code Amendment (High Risk Terrorist Offenders) Act* 2016 (Cth)**
Commenced 7 June 2017

Act inserts Division 105A into the *Criminal Code* (Cth) to create a scheme for continuing detention orders for terrorist offenders.
A continuing detention order commits the offender to detention in a prison for the period the order is in force: s 105A.3(2).

The Attorney-General may apply to a Supreme Court of a State / Territory for a continuing detention order in relation to a terrorist offender: s 105A.5(1).
A "terrorist offender" is defined (s 105A.3) as a person:

. convicted of a serious offence under Part 5.3 (terrorism) *Criminal Code* (or certain other offences under 105A.3(1)(a)); and
. either serving a sentence of imprisonment for that offence, or subject to a continuing detention order or interim detention order.

The application cannot be made more than 12 months before the end of a sentence of imprisonment the offender is serving, or, if the offender is subject to an existing continuing detention order, the period for which order is in force: s 105A.5(2).
Provision is made for interim detention orders for a period of no more than 28 days: s 105A.9
Under s 105A.7(1) a Supreme Court may make a continuing detention order if:

. after having regard to the matters specified under s 105A.8, the Court is satisfied to *a high degree of probability* the offender poses an unacceptable risk of committing a serious Part 5.3 offence if released into the community, and
. the Court is satisfied there is no other less restrictive measures that would be effective in preventing the unacceptable risk.

A continuing detention order may not exceed a period of 3 years and must be limited to the period reasonably necessary to prevent the unacceptable risk: s 105A.7(5).
Successive orders may be made: s 105A.7(6).
A continuing detention order must be reviewed annually, or sooner where offender makes application for review: ss 105A.10-11.
Provision is made for right of appeal: s 105A.17.
A court sentencing a person convicted of a "terrorist offence" must warn the person that, after the end of the person's sentence, an application may be made for a continuing detention order: s 105A.23(1). Failure to give warning does not invalidate sentence or prevent an application under Division 105A: s 105A.23(2).

***5. Terrorism Legislation Amendment (Police Powers and Parole) Act* 2017 (NSW)**

Commenced 22 June 2017

The Act responds to recommendations by the State Coroner on the Lindt Cafe siege.

Terrorism (Police Powers) Act 2002
New Part 2AAA authorises reasonably necessary police force in response to incident declared to be terrorist acts.

Police Commissioner may declare an act a terrorist act if satisfied: (a) an incident to which police are responding is / is likely to be a terrorist act; and (b) planned and coordinated police action is required to defend any persons threatened by the terrorist act or to prevent/terminate their unlawful deprivation of liberty: s 24A

If a declaration is made under s 24A, the police action authorised in responding to the incident includes authorising, directing or using force (including lethal force) that is reasonably necessary, in the circumstances as they perceive them, to defend any persons threatened by the terrorist act or to prevent/terminate their unlawful deprivation of liberty: s 24B(1)

Crimes (Administration of Sentences) 1999
Provision is made for restrictions on the grant of parole for terrorism related offenders: Division 3A, Part 6.

"Terrorism related offender" includes an offender (ss 159A and 159B):

. serving a sentence for, has been convicted of, or charged with, a terrorism offence;
. subject to a control order under the *Criminal Code* (Cth), Pt 5.3;
. has associations with a terrorist organisation;
. Has made statements or carried out activities advocating support for terrorist acts or violent extremism; or
. Has associations or affiliation with persons / groups advocating support for terrorist acts or violent extremism.

A terrorism related offender who is otherwise eligible for parole is not to be released unless the Parole Authority is satisfied that the offender will not engage in, or incite or assist others to engage in, terrorist acts or violent extremism: s 159C(1).

A terrorism related offender's parole may be revoked or suspended if the Authority becomes aware the offender may engage in, or incite or assist others to engage in, terrorist acts or violent extremism: ss 159C(2), (3)

If an offender is known to the court to be a terrorism related offender, a court may also decline to make a parole order under s 50 *Crimes (Sentencing Procedure) Act* 1999 (which requires a court, when imposing a sentence of imprisonment of 3 years or less, with a NPP, to make an order directing the offender's release on parole at the end of the NPP): s 159C(4)

The amendments under Div 3A extend to applications for parole orders which are pending on, or which were made before, the commencement of the amendments on 22.6.2016: s 159D(5).

***6. Crimes Amendment (Penalty Unit) Act* 2017 (Cth)**

Commenced 1 July 2017

The value of a penalty unit for Commonwealth offences increased from $180 to $210: s 4AA(1) *Crimes Act* 1914 (Cth). Applies to an offence committed on or after the Act's commencement date.

***7. Justice Legislation Amendment Act* 2017**

Commenced 14 August 2017

Bail Act 2013
s 16A Show cause requirement - applies to a serious indictable offence under the *Firearms Act* 1996 that involves acquiring, supplying, manufacturing or giving possession of a pistol or prohibited firearm or a firearm part that relates solely to a prohibited firearm: s 16B(1)(d)(iii) *Bail Act.*

Children (Criminal Proceedings) Act 1987
Grants Children's Court power under *Children (Criminal Proceedings) Act* to also transfer back-up and related offences when committing person to another court: new s 31(6)
Prosecutor required to produce a certificate to Children's Court specifying any back-up or related offence: s 31(6)(a).
Where back up or related offence is transferred to another court under s 31(6), the proceedings for that offence to be dealt with in accordance with ss 167-169 *Criminal Procedure Act* 1986 (a reference in those provisions to Local Court is taken to be reference to the Children's Court for that purpose): s 31(7).

Crimes Act 1900
Alternative verdict: An offence under s 193C(2) (dealing with property suspected of being proceeds of crime, value less than $100,000) to be an alternative verdict to an offence under s 193C(1) (dealing with property suspected of being proceeds of crime, value of $100,000 or more): s 193E(2B)
s 47 'Use explosive substance or corrosive fluid with intent' - amended so that petrol is an explosive substance under that provision.

Crimes (Sentencing Procedure) Act 1999
In proceedings relating to prescribed sexual offences, victim impact statements (VIS) are to be read out in camera unless the court is satisfied:
(i) special reasons in the interests of justice require VIS to be read in open court; or
(ii) the victim consents to VIS being read out in open court.
The victim is entitled to choose to have a person or persons present near them, when statement is read out (whether in open court, in camera or via CCTV): s 30A(3C).

Criminal Appeal Act 1912
s 5AA(4) CCA's powers when determining an appeal from the Supreme Court in its summary jurisdiction - The CCA may now also order a new trial in such a manner as the CCA thinks fit (in response to *Bulga Underground Operations Pty Ltd v Nash* [2016] NSWCCA 37).

Mental Health (Forensic Provisions) Act 1990 (these amendments commenced on 28 August 2017)
s 32 Diversionary power for summary proceedings where defendant affected by mental illness or condition - New terminology is inserted including replacing "developmentally disabled" with "cognitively impaired". Cognitive impairment is defined and includes (without limitation) intellectual disability, borderline intellectual functioning, dementia, acquired brain injury, drug or alcohol related brain damage, and autism spectrum disorder: new s 32(6).
Magistrate may discharge the defendant "to enable the provision of support in relation to the defendant's cognitive impairment": new s 32(3)(b)

***8. Crimes Amendment (Intimate Images) Act* 2017**

Commenced 25 August 2017

The Act amends the *Crimes Act* by inserting new Division 15C into Part 3 (Recording and Distributing intimate Images'). The main provisions include:

New offences

s. 91P Record intimate image without consent - an offence to intentionally record an intimate image of a person without their consent, knowing or being reckless as to consent.

s 91Q *Distribute intimate image without consent* - an offence to intentionally distribute an intimate image of a person without their consent, knowing or reckless as to whether the person consented to the distribution.

s 91R *Threaten to record or distribute intimate image* - an offence to threaten to record or distribute an intimate image of a person without their consent, intending to cause the person to fear the threat will be carried out.

Penalty for each offence: 100 penalty units, or 3 years imprisonment or both. (The offences are Table 2 offences. Local Court penalty: 2 years imprisonment and/or a fine 50 penalty units: ss 268(1A), (2AA) *Criminal Procedure Act* 1986, s 268(1A), (2AA).)

The prosecution of a person under 16 years for any of the offences cannot be commenced without consent of DPP: ss 91P(2), 91Q(2), 91R(6).

The offences are "personal violence offences" under s 4 *Crimes (Domestic and Personal Violence) Act* 2007.

Definitions

s 91I(1) – amends definition of '*private parts'* to include: sub-section (b) "the breasts of a female person, or transgender or intersex person identifying as female".

s 91N - defines '*Intimate image' , 'Distribute', 'Engaged in a private act'*

s 91O - defines '*consent*': A person consents to the recording or distribution of an intimate image if the person freely and voluntarily agrees to the recording or distribution of the intimate image: s 91O(2),(3). Consenting on a particular occasion is not to be regarded as consenting to its recording or distribution on another occasion: s 91O(4),(5). Distributing an image of him/herself is not to be regarded as having consented to any other distribution of the image: s 91O(6).

s 91O(7) - provides non-exhaustive list of circumstances in which a person does not consent to the recording or distribution of an intimate image, including where person:- is under 16; does not have capacity to consent including because of cognitive incapacity; is unconscious or asleep; consents because of threats or terror, or because unlawfully detained.

Rectification orders; offence of failing to comply

s 91S - a person guilty of an offence against s 91P or s 91Q may be ordered by court to remove, retract, recover, delete or destroy intimate image recorded or distributed. Contravention of order: 50 penalty units /imprisonment for 2 years/both.

Exceptions – s 91T

A person does not commit an offence against ss 91P or 91Q if conduct was:- for medical or scientific purpose; by a law enforcement officer for a genuine law enforcement purpose; or required by a court or reasonably necessary for legal proceedings.

Further exceptions - A person will not commit an offence against ss 91P or 91O if a reasonable person would consider conduct of accused person acceptable, having regard to: nature and content of image; circumstances in which image was recorded or distributed; age, intellectual capacity, vulnerability and other relevant circumstances of person depicted in image; degree to which privacy of person in image affected; the relationship between accused person and person depicted.

***9. Firearms and Weapons Legislation Amendment Act* 2017**

Commenced 1 November 2017

Amends the *Firearms Act* 1996 and *Weapons Prohibition Act* 1988 to clarify that a firearm or prohibited weapon includes a disassembled firearm or prohibited weapon (in response to *Jacob* [2014] NSWCCA 65 regarding whether the disassembled components of a crossbow fell within the definition of a crossbow under the *Weapons Prohibition Act*).

Any collection of the component parts of a thing that if assembled would be a firearm or prohibited firearm is taken to be a firearm or prohibited firearm: s 4(2)(c) *Firearms Act*

An equivalent provision concerning disassembled prohibited weapons: *s* 4(2)(a1) *Weapons Prohibition Act.*

New offences of possessing/using firearm or prohibited weapon by remote control

s 51I *Firearms Act* - offence of possessing or using a firearm, pistol or prohibited firearm by remote control, unless authorised by permit. Maximum penalty 5 years imprisonment for a firearm; 14 years for a pistol or prohibited firearm.

s 25D *Weapons Prohibition Act* - creates a similar offence in relation to prohibited and military-style weapons. Maximum penalties of 14 years / 20 years imprisonment, respectively.

Above offences can be dealt with summarily unless prosecutor elects to have offence dealt with on indictment: s 268 and Sch 1, Table 2 *Criminal Procedure Act* 1986.

Restrictions for persons subject to interim AVO's or registrable persons
Firearms Act provides a permit must not be issued to a person who:

- Is subject to an AVO *or interim AVO* or who has, at any time within 10 years before making the application for a permit, been subject to an AVO (other than an AVO which has been revoked): s 29(3)(c);
- Is a registrable person or corresponding registrable person under the *Child Protection (Offenders Registration) Act* 2000: s 29(3)(f).

Similar restrictions in relation to the issuing of weapons permits apply under s 10 *Weapons Prohibition Act*.

***10. Rural Crime Legislation Amendment Act* 2017**

Commenced on November 2017

Crimes (Sentencing Procedure) Act 1999
s 21A(2)(l) New aggravating factor of "geographical isolation of the victim" included under vulnerable victim provision.