CRIMINAL LAW UPDATE 2019-2020

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PUBLIC DEFENDERS
CRIMINAL LAW CONFERENCE 2020

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1. Sentence Appeal Cases

2. Conviction Appeals and Other Cases

1. Evidence- ***A1 (No. 2)*** [2019] NSWSC 663; ***Rossi-Murray*** [2019] NSWSC 479; ***DPP v Madina & Douglas*** [2019] VSCA 73; ***Hague*** [2019] VSCA 218; ***BC*** [2019] NSWCCA 111; ***DPP v Stanizzo*** [2019] NSWCA 12; ***Cvetjovski (Cvetkovski)*** [2019] NSWCCA 100; ***Denton*** [2019] NSWCCA 81; ***Taleb*** [2019] NSWSC 241

2. Appeals- ***El Ali (No 2)*** [2019] NSWCCA 289; ***Carter*** [2019] NSWCCA 11; ***Holt*** [2019] NSWCCA 50; ***CJE26*** [2019] NSWCCA 139

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Annexures

SENTENCE APPEALS

1. GENERAL SENTENCING

Intensive Correction Orders (ICO)

Note: The High Court refused the Special Leave application by the offender in ***Fangaloka*** [2019] NSWCCA 173 on 5.2.2020, stating the application does not give rise to any reason to doubt the correctness of the decision. The application concerned the construction of s 66 (see (ii) below). [*Fangaloka v The Queen* [2020] HCASL 12].

(i) ICO a form of imprisonment: Three-stage process

Fangaloka [2019] NSWCCA 173 at [44]-[45]: The making of an ICO is a "custodial sentence" requiring a three-stage process ((Pt 2, Div 2 *Crimes (SP) Act*; applying *Zamagias* [2002] NSWCCA 17; *Douar* (2005) 159 A Crim R 154).

A court must determine:

> 1. That no penalty other than imprisonment is appropriate, having considered all possible alternatives (s 5 *Crimes (SP) Act*; *Zamagias*; *Douar*)
>
> 2. The length of the sentence: *Douar*.
>
> 3. Whether any alternative to full-time imprisonment should be imposed.
>
> On this last point, the CCA said this does not mean an express obligation to consider whether it is appropriate the sentence should be served by way of an ICO. The legislation does not oblige the court to consider whether it is appropriate that a sentence of less than 2 years be served by way of an ICO. Otherwise, the Local Court (where imprisonment is limited to 2 years) would be required to consider imposing a sentence by way of ICO in every case in which imprisonment was appropriate: *Fangaloka* at [60]-[61]. See also *Karout* [2019] NSWCCA 253 at [89]–[90]; but cf *Casella* [2019] NSWCCA 201 at [63], [65].

(ii) s 66 Community safety the paramount consideration

Crimes (SP) Act 1999 - s 66 Community safety and other considerations

> *(1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender.*
>
> *(2) When considering community safety, the sentencing court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.*
>
> *(3) When deciding whether to make an intensive correction order, the sentencing court must also consider the provisions of section 3A (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant."*

R v Pullen [2018] NSWCCA 264 (Harrison J; Johnson and Schmidt JJ agreeing): 'Community safety' is not achieved simply by incarceration, but linked with considerations of rehabilitation. The CCA said that community safety as the "paramount consideration" in s 66(1) means other considerations, including the purposes of sentencing in s 3A *Crimes (Sentencing Procedure) Act* 1999, were subordinate. This is likely to occur most frequently in the case of a young offender with limited or no criminal history and excellent prospects of rehabilitation. But in every case balance must be struck and appropriate weight be given to all factors by way of instinctive synthesis (*Markarian* (2005) 228 CLR 357): at [84]-[89]. The CCA allowed the Crown appeal against an ICO and imposed a fresh ICO on re-sentence.

There has been some controversy following ***Fangaloka*** [2019] NSWCCA 173 (Basten JA; Johnson and Price JJ agreeing). In ***Fangaloka*** the CCA said an alternative reading of s 66 (to that in *Pullen*) is

"restrictive rather than facilitative". Thus the paramount consideration is whether an ICO, or full-time detention, is more likely to address the risk of reoffending. Unless a favourable opinion is reached on that question, an ICO should not be imposed. That obligation is not in derogation of the more general purposes of sentencing in s 3A, or other matters (s 66(3)), which must be given due weight: at [63], [65].

The Crown appeal (robbery in company, ICO 2 years) was allowed. The judge (although he did not refer to *Pullen*) erred by giving little weight to considerations other than community safety; and by treating s 66 as providing a "general overriding principle" placing the risk of reoffending at a higher level objective than other objectives in s 3A: at [53], [65]–[67].

Casella [2019] NSWCCA 201 (Beech Jones J; N Adams J, Bathurst CJ agreeing) questioned the correctness of the construction in ***Fangaloka*** but did not need to resolve the matter: at [102], [108], [111].

Kennedy [2019] NSWCCA 242 (Payne JA and Fullerton J; Adamson J agreeing): (Crown appeal) The Crown submitted the judge, by referring to *Pullen*, treated s 66 as "qualifying the need to have regard to the general purposes of sentencing" (*Fangaloka* at [45]): at [62]. The CCA said it did not regard ***Fangaloka*** as overruling *Pullen*. What ***Fangaloka*** itself decides may be open to doubt (***Casella***). The judge's reference to *Pullen*, by which he was bound, was not an error: at [81].

Karout [2019] NSWCCA 253 (Fullerton J; Hoeben CJ at CL agreeing; cf Brereton JA) said the Legislature would have made plain any intention to impose on courts an obligation to give paramount consideration to community supervised programs as a means of ensuring community safety as one of the purposes of sentencing in s 3A(c), or an obligation to give reasons for concluding that the other purposes of sentencing in s 3A, alone or in combination, dictate that even where the offender's risk of reoffending is such that community protection can be sufficiently addressed by an ICO, a sentence of full-time custody is appropriate: at [88]-[90]; ***Fangaloka*** applied.

Blanch [2019] NSWCCA 304 (Campbell J; Hoeben CJ at CL agreeing: Price J agreeing with additional comments): Campbell J reviewed the differences of opinion in *Pullen,* ***Fangaloka*** and ***Casella,*** stating it was not necessary to settle "these controversies", although they needed to be borne in mind as part of the appeal's context: at [1], [5], [42]-[53]. Campbell J states at [51]:

- Under 66(1) community safety "must be the paramount consideration". The section's limited sphere of operation is when deciding whether to make an ICO.
- When considering that matter the court is to assess which of an ICO or full-time detention is more likely to address the risk of re-offending: s 66(2).
- Community safety may be paramount but the court *must also consider* the whole range of factors including questions of law, mixed questions of fact and law, and questions of fact relevant to sentence, and mode of service: s 66(3)
- The paramount consideration of community safety must be weighed and assessed in the context of all facts, matters and circumstances relevant to the sentencing task applying the instinctive synthesis approach (*Pullen* at [87]; ***Fangaloka*** at [65] – [66]; ***Karout*** at [88]): at [51].

(iii) Other cases

Failure by judge to give reasons or direct himself as to principles governing ICOs

Blanch [2019] NSWCCA 304: (drug supply) The CCA allowed the applicant's appeal against his sentence of full-time imprisonment and on re-sentence imposed an ICO: see at [89]ff.

The gravamen of this case at first instance was that imprisonment was inevitable but that an ICO was appropriate. The judge was thus required to direct himself as to the applicable principles, specifically s 66, governing the decision whether to make an ICO. He failed to do so: at [60]-[61].

Section 66, whether referred to expressly or by implication, required the judge to consider as a paramount consideration the requirements of community safety by reference to which of an ICO or full-time detention would more likely address the offender's risk of re-offending. It was not necessary that the judge set out the section, or refer to it in express terms, but his reasons make clear he did not direct

himself in substance by reference to the principles it establishes which govern the decision whether to make an ICO: at [1], [2]-[3], [60], [62].

The judge's reasons failed to address, in accordance with the legislation, the critical issue presented for determination. He did not examine "all of the material relevant to the particular issue": at [1], [3], [63]; *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 at [130].

A court is not required in every case in which a short sentence of imprisonment is under consideration (for an offence not excluded from Part 5 by s 67) to go through this process. There must be some relevant material, which could include a cogent argument by counsel: at [68]-[69]; ***Fangaloka*** at [60].

Whether failure to have regard to community safety as paramount consideration in accordance with s 66 in considering whether to make ICO

Cross [2019] NSWCCA 280: (Aggravated kidnapping) The applicant submitted the judge erred in consideration as to whether the sentences could be served by way of ICO by not taking into account community safety as required by s 66.

The appeal was dismissed. The judge had determined a length of sentence that precluded an ICO, that is, exceeding 2 years (s.68). There could be no error in not expressly then referring to s 66. There is no requirement to consider s 66 other than when deciding whether to make an ICO: at [26]-[27], [34]-[40].

The judge expressly said she was considering whether the sentence be served by ICO and explained why she was declining to order an ICO. Failure to expressly identify she was undertaking the three-step process (referred to in ***Fangaloka***) does not demonstrate error when it is plain from remarks she undertook the sentencing exercise in accordance with that process: at [32]–[33].

(iv) Availability of ICO

Sentences of 6 months

Casella [2019] NSWCCA 201 at [105] per Beech-Jones J; [110] per N Adams J: Nothing in the legislation precludes imposing an ICO for a sentence of 6 months. The statement in ***Fangaloka*** [2019] NSWCCA 173 (at [56]) that "in practice, Pt 5 is unlikely to be applied to very short sentences (for 6 months or a lesser period)" does not have legislative basis or binding effect.

Objective seriousness - Failure to assess

Twaddell [2019] NSWCCA 116: The CCA allowed the appeal. The sentencing judge failed to assess the objective seriousness of the offences. The judge recited the facts without commenting upon any aspect bearing upon objective gravity, stating: "*The Crown submits that the offences fall within midrange and I understood submissions to include the aggravated break, enter and steal. In my view…objective gravity of the offence falls a little below midrange*."

It can be sufficient for a judge to indicate briefly the objective seriousness of an offender's conduct (*Gal* [2015] NSWCCA 242). However, this is a clear case where the judge reproduced verbatim the agreed facts and neglected to enunciate any independent evaluation of objective seriousness: at [35]-[37]; *Van Ryn* [2016] NSWCCA 1.

Objective seriousness - Notional point on spectrum of culpability not necessary

DP [2019] NSWCCA 55: The sentencing judge did not err in concluding objective seriousness was "*in the middle of a very wide range*" of offending for an offence of aggravated sexual assault (s 61J(1) *Crimes Act*). While assessment of objective seriousness might have been expressed consistently with established circumstances of aggravation, the finding was open. The distinction between offending in the mid-range or above is imprecise. The appointment of objective seriousness referable to a notional point on a spectrum of culpability (although convenient) is not a necessary component of sentencing. To

express objective seriousness in that way is rarely definitive of the evaluative assessment of the gravity of the offending or culpability of the offender: at [42]; *Yeung* [2018] NSWCCA 52 at [19]-[30].

Objective seriousness – SNPP offence: reasons - no need to classify by reference to some scale

McDowall [2019] NSWCCA 29: The applicant submitted the judge erred in making no finding of the objective seriousness of a SNPP offence of take motor vehicle with assault in circumstances of aggravation. The CCA dismissed the appeal.

As this is a SNPP offence, there is a statutory requirement to give "reasons for increasing or reducing the standard non-parole period": s 54B(4) *Crimes (Sentencing Procedure) Act 1999; Muldrock* (2011) 244 CLR 120 at [29].

This does not mean an obligation to "classify" the objective seriousness by reference to some scale such as "mid-range" or "high" or "low": at [35]; *Sharma* [2017] NSWCCA 85; *Muldrock* at [29].

The requirement to give reasons for an assessment of objective seriousness cannot be satisfied by the use of words such as "mid-range" or "high" or "low", without more, although these words may often be used in the context of an evaluative description of the offending conduct: at [36].

What *is* required is that the judge "identify fully the facts, matters and circumstances" which bear on the sentence imposed, including those which go to objective seriousness: at [36]; *Muldrock* at [29].

The sentencing judge met the statutory requirement: at [37].

Objective seriousness - Noting factors to help place offending on spectrum

Simpson [2019] NSWCCA 137: Elaborate reasons need not be provided for objective seriousness, but the parties and this Court need to understand the basis for any conclusion. In this case, the judge recited submissions from the applicant, said nothing about the Crown's, then stated conclusions not supported by the facts: at [32].

In some cases, adequate explanation can be provided by noting what factors are present and absent to help to place the offending on the spectrum. This need may be highlighted in cases where guideline judgments list factors which aggravate an offence, such as s.112 *Crimes Act* (*Ponfield* (1999) 48 NSWLR 327). In this case, one factor 'vandalism' from the guideline judgment was relevant: at [27]-[30].

Objective seriousness – error taking into account prior record and conditional liberty

Dixon [2019] NSWCCA 85: (Aggravated enter dwelling with intent steal, s 112(2) *Crimes Act*) The CCA allowed the appeal. In assessing objective seriousness, the sentencing judge erred in taking into account the applicant was on parole and had a long criminal history. These are relevant as subjective considerations, and are not part of the assessment of objective seriousness: at [54]-[55]; *Elhassan* [2018] NSWCCA 118. Moral culpability was reduced given the lack of planning, that the offender left the premises and the victim followed him with a baseball bat. It is difficult to see how the judge could have concluded objective seriousness was between the middle and low range without taking into account as aggravating factors these two matters. The case was in the low range: at [51]-[54].

Juvenile offender - objective seriousness - age and mental condition relevant when causative of offending

BM [2019] NSWCCA 223**:** The CCA allowed the juvenile applicant's appeal against sentence for child sexual assault. The agreed facts stated his age at the time of the offences was "13, 14 or 15". The judge erred in assessing objective seriousness by failing to take into account his age which ought to have been determined at 13 years, 10 months, and mental condition. Both were material considerations which were causally connected with and contributed to commission of the offences: at [14]-[18]; [20]; *Tepania* [2018] NSWCCA 247 at [112]; *AA* [2017] NSWCCA 84 at [55].

Form 1 offences – error taking into account on objective seriousness

Cummins [2019] NSWCCA 163: The sentencing judge erred in including the victims of Form 1 offences when assessing the objective seriousness of the principal armed robbery counts. The two principal counts of armed robbery each involved one victim. At those robberies, the applicant threatened other victims who were subject of the separate Form 1 offences. However, in sentencing for each principal count, the judge erroneously stated there were "*two victims*" and a "*number of victims*": at [50]-[54].

RO [2019] NSWCCA 183: The Crown conceded the sentencing judge erred in stating that: "*… taking into account those matters on the Form 1* I find the offending to be in the mid-range of offending for matters of this kind. *Without the matter on the Form 1 I find that the offending* would have been only slightly below the mid-range for offending of this kind." (emphasis added) It was an error to take into consideration the Form 1 offence which concerned another incident at a different time, and in finding the Form 1 offence elevated objective seriousness of the offending: at [55]; *Abbas* [2013] NSWCCA 115.

Form 1 offences - error as to further period added

Huang [2019] NSWCCA 144: The judge erred by stating, "*I impose a head sentence … from which I take 25% for the plea of guilty and to that I add one year … to represent the matters on the Form 1 document*".

The Form 1 matters should have been factored into the total sentence for Count 1 before the 25% discount for the guilty plea was applied and not added afterward. Form 1 matters are taken into account on sentence and this is not a separate sentencing exercise in respect of each Form 1 matter: at [41]-[44]; ss 32-35 *Crimes (Sentencing Procedure) Act* 1999; *Abbas* (2013) 231 A Crim R 413.

Commonwealth additional offences s 16BA Crimes Act 1914 – procedure not followed – CCA not able to remedy

Purves [2019] NSWCCA 227: Section 16BA(1) *Crimes Act* provides for the procedure by which additional offences may, following conviction, be taken into account. On being satisfied of various requirements, the procedure requires the court then to ask the convicted person whether s/he admits guilt of the additional offences, and wishes to have them taken into account.

It was an error to take into account additional offences in the absence of this procedure. The procedure was not brought to the attention of the sentencing judge. The judge thus did not make the statutory inquiries and the applicant did not make necessary admissions and state he wished the additional offences to be taken into account: at [5].

The satisfaction required by subs (1) is that of the court before which the person was convicted. The procedural error cannot be remedied by this Court on appeal: at [6].

The matter was remitted to the District Court.

Disputed facts – basis of drawing inferences - test as to whether a conclusion is inference or conjecture rests on reasonableness

Gwilliam [2019] NSWCCA 5: The applicant was sentenced for 'wound with intent to cause GBH'. The applicant claimed another man produced the knife. The sentencing judge made conclusions explaining the applicant's conduct that: the applicant was not intending to buy drugs for a friend, did not have cash to pay, arranged the meeting to get drugs on credit, brought the knife and inflicted GBH on the victim to take the drugs.

The applicant submitted the judge erred in those conclusions and as he was not given an opportunity to address them was denied procedural fairness. The CCA dismissed the appeal.

The test as to whether a conclusion is inference or conjecture rests on reasonableness: on the basis of primary facts, is it reasonable to draw the inference. For an inference to be reasonable it must rest on something more than mere conjecture (*Baden-Clay* [2016] HCA 35 at [47]). In a criminal case, the conclusion of reasonableness must go one step further, and exclude other reasonable hypotheses (*Luxton v Vines* [1952] HCA 19 at 358): at [104].

The question is whether the judge's conclusions were available deductions from the evidence, or impermissible speculation: at [105]; *Lane* (2013) 241 A Crim R 321; [2013] NSWCCA 317. In answering that question, it is important to bear in mind the context of the sentence proceedings and matters in dispute.

Determining why these events occurred aided in determining the principle matter of dispute: who brought and produced the knife. The judge's conclusions were reasonable and available inferences. It should have been obvious to the parties the judge would make findings of fact on these aspects, without needing to raise each: at [106]-[108], [123]-[124].

Simpson AJA observed it was not open to the applicant to give a reason for bringing the knife because he claimed another man produced it. That issue having been found against the applicant, the judge was left to draw inferences available on the evidence as to the applicant's motive in arming himself: at [5].

'Indictable offence' not particularised by Crown – erroneous to determine factual issue at "preliminary hearing" - s 33B(1)(a) Crimes Act

Dean [2019] NSWCCA 27: The applicant was charged with possess offensive weapon with 'intent to commit an indictable offence' (s 33B(1)(a) *Crimes Act*). The Crown did not particularise the 'indictable offence'. At the request of the parties, the judge convened a "preliminary hearing" to determine as a preliminary issue what the 'indictable offence' was. The judge found it was "with intent to murder" in favour of the Crown, rather than "intimidation" as put by the applicant.

The CCA allowed the appeal and remitted the matter to the District Court.

The fact-finding exercise miscarried. Evidence later emerged at the actual sentence hearing which could have supported the applicant's case that he intended to scare, not kill, his wife. But it was effectively beyond the judge's consideration and led to procedural unfairness: see at [23].

Particularisation of the 'indictable offence': The count as framed disclosed an offence known to law and failure to establish to the criminal standard an inessential particular of the charge will not be fatal. However, in this case the 'indictable offence' was a fact essential to the charge which should have been particularised. The applicant lost the opportunity to litigate factual matters inherent in the elements of the offence. Fundamental to the Crown's obligation of fairness is that particulars of a charge contain description of the conduct said to constitute the offence: at [19]-[22].

No breach of principle in De Simoni (1981) 147 CLR 383

Toksoz [2019] NSWCCA 10: The applicant was sentenced for 'accessory to the fact to serious offences' (s 350 *Crimes Act*). He was present when his co-offender wounded two people then drove the co-offender from the scene.

The sentencing judge stated: "…but in addition to that *the Offender failed to report the matter to the police* at any time and when questioned by police as to the Principal Offender's identity he *failed to disclose that matter* (emphasis added)."

The applicant submitted the judge breached the principle in *R v De Simoni* (1981) 147 CLR 383 as those matters gave rise to more serious offending under s 315 "Hindering Investigation' which has a maximum penalty of 7 years imprisonment.

The CCA dismissed the appeal.

The judge proceeded on the basis of facts which satisfied the elements of the offences charged. Even if those facts did constitute an offence contrary to s 315, it would not automatically follow *De Simoni* was breached. The sentencing process will not miscarry if sentencing proceeds on facts that merely satisfy the elements charged, even if one of those elements can amount to a circumstance of aggravation sufficient to found guilt for another more serious offence. However the sentencing process may miscarry if those facts amounted to such a circumstance which is not an element of the offence charged (*Turkmani* [2014] NSWCCA 186): at [36].

Further, s 315(3) states: *"It is not an offence against this section merely to refuse or fail to divulge information or produce evidence."* The two failures referred to by the judge fall within s 315(3). The

applicant could not be prosecuted for an offence under s 315, and there was no breach of *De Simoni*: at [39].

Commencement date of sentence – significant disadvantage by delay

Tompkins [2019] NSWCCA 37: The judge erred by not taking account the effect of delay on sentence.

The applicant was on parole at the time he committed the index offences. His parole was revoked upon arrest. The balance of his parole was 23 months. The applicant was not sentenced for the index offences until 20 months later. The sentencing judge commenced sentence on the date it was imposed.

The CCA backdated commencement by six months. The judge failed to take into account the significant disadvantage of delay. Failure to take it into account except in relation to a finding of special circumstances is strongly suggestive the judge otherwise failed to take it into account: at [52]; *White* [2016] NSWCCA 190; 261 A Crim R 302.

2. MITIGATING FACTORS

Bugmy (2013) 249 CLR 571 - causal link between significant childhood deprivation and offending not required

Special leave to appeal to the High Court was refused on 14.12.2018 in *Perkins* [2018] NSWCCA 62, on the issue of whether *Bugmy* (2013) 249 CLR 571 requires *any causal link* between significant childhood deprivation and the offending for that background to be taken into account as a mitigating factor (*Perkins v R* [2018] HCATrans 267).

In ***Irwin*** [2019] NSWCCA 133 (Crown appeal allowed on manifest inadequacy) Walton J (Simpson AJA, Adamson J agreeing) said that the High Court in *Bugmy* did not say a causal link is required: at [116].

The judge erred in declining to apply the principles enunciated in *Bugmy* (at [115]):

> (i) The judge accepted as a factual conclusion, as recognised by expert evidence, a background of deprivation. It was unnecessary in those circumstances to require a causal link between that background and the offending: at [116]-[118]; *Perkins* at [77], [80]-[83] per White JA; [99]-[100] per Fullerton J; *Buxton* [2017] NSWCCA 169 at [99].
>
> (ii) The judge attached no weight to the respondent's deprivation and abuse, despite finding he was "raised in an abusive and dysfunctional environment" which may well be "the cause of his substance abuse and criminal behaviour". The likely explanation is the judge was influenced by the absence of a "clear" causal connection: at [120]-[122].

One expert's opinion was substance/medication induced psychotic disorders derived from upbringing and related to offending. Another expert disagreed, but accepted drug use was the main factor in offending, and the "pathway" into addiction and offences derived from disadvantage and were causally related to diagnosed conditions: at [122].

Thus the respondent's background was relevant. The weight attached depends on the circumstances of those factors and relationship to the offending: at [123].

Application of Bugmy (2013) 249 CLR 571 principles not discretionary

Irwin [2019] NSWCCA 133 (above): Simpson AJA (at [2]-[5]) said it was an error for the sentencing judge to "decline to apply the *Bugmy* principles". The application of the *Bugmy* principles is not discretionary; it is a matter of evaluation what impact they should have. The specific question in *Bugmy* was whether the effects of early disadvantage and deprivation diminish over time to reduce the extent to which it may be taken into account. As stated by the High Court:

> "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" (*Bugmy* at [44]).

Thus it was open to, and necessary for, the judge to assess the impact on the respondent of the circumstances of his early life.

Children / Youth - community protection as deserving "particular weight" not applicable to sentencing of juveniles - Bugmy (2013) 249 CLR 571

CA [2019] NSWCCA 93: The applicant aged 12 years 10 months was sentenced for 'specially aggravated B&E' (s 112(3) *Crimes Act*). The applicant and 17 year old co-offender broke into the 78 year old female victim's home striking her with objects. The applicant, of Aboriginal heritage, was as a child subject to domestic violence and drug and alcohol abuse by his parents. Cognitive function was in the extremely low range. He was sentenced to imprisonment for 3 years 9 months, NPP 2 years.

The CCA (Garling J, Hidden J agreeing; Hoeben CJ at CL dissenting) allowed the appeal and re-sentenced the applicant to 3 years, NPP 1 year 4 months.

The judge, who faced an "unenviable task," failed to have regard to youth, immaturity and impulsivity (*KT v R* [2008] NSWCCA 51; 182 A Crim R 571) in the following respects:

- The judge said considerations of community protection deserved "*particular weight*" and "*considerable weight*" referring to *Bugmy* (2013) 249 CLR 571 at [43]-[44] and *Engert* (1995) 64 A Crim R 67 at pp.68, 71.

  However, neither case concerns sentencing of juveniles or is applicable to the present circumstances. Both cases involved adult offenders, and those case passages state only that a judge is required to take account of all relevant factors, including profound childhood deprivation and the effect of mental disorder: at [118]-[119].

- The judge erred in equating the offender with his co-offender as to the effects of immaturity and impulsivity as causal features of the offence. Attention needed to be given to the significant age disparity of 4½ years: at [117].

- The judge's remarks ("*calculated, cruel and callous attack*", "*an act not borne from the immaturity and impulsivity of youth*") refers to the entire attack and all of the applicant's actions, and was not limited to the element of gratuitous cruelty involved: at [116].

Children / Youth - youth, immaturity and impulsivity - evidentiary basis not usually required

Howard [2019] NSWCCA 109: The applicant turned 18 less than a month before committing an offence of 'throw explosive substance with intent to burn' (s 47 *Crimes Act).* He threw a Molotov cocktail during a group fight. He was sentenced to imprisonment for 9 years 6 months, NPP 6 years (riot on a Form 1).

Fullerton J (Macfarlan J agreeing; Bellew J dissenting) allowed the appeal and imposed a new sentence of 6 years 9 months, NPP 4 years.

The sentence was manifestly excessive given the sentencing judge found it appropriate to take into account s 6 *Children (Criminal Proceedings) Act 1987* (on the basis that Act would have applied had the offence been committed 27 days earlier), and accepted youth required emphasis on rehabilitation. The applicant's youth and immaturity and subjective circumstances (remorse and insight) were not reflected in the sentence: at [10], [12].

The cognitive, emotional and/or physiological immaturity of a young person can contribute to offending. Emotional maturity and impulse control may not be developed until the mid-20's (*BP* [2010] NSWCCA 159): at [13].

In the brief time the applicant picked up the Molotov cocktail, it is unrealistic to attribute to him the mature decision-making of an adult. It might be otherwise were he a gang member with a designated role in the planned confrontation who came armed with the Molotov cocktail: at [17].

Evidentiary basis: There need not be an evidentiary basis for a finding that immaturity contributed to the commission of the offence beyond the facts of the offending and circumstances of the offence. In most cases it is the offending conduct, coupled with youth, that allows the inference that an unpremeditated or unplanned criminal act was due to immaturity and compromised capacity for mature decision-making: at [14].

However, in some cases it may be necessary to adduce expert evidence to establish emotional, sexual or physical immaturity was causally related to particular offending. For example, an offence of 'use carriage service to procure person under 16 to engage in sexual activity' as in ***Clarke-Jeffries*** [2019] NSWCCA 56: at [14].

Failure to deal with submission re reduction of moral culpability due to traumatic brain injury / mental condition

Isbitzki [2019] NSWCCA 247: Error was found where the judge acknowledged the applicant's submission that moral culpability was reduced due to causal connection between offending and the applicant's traumatic brain injury, but did not deal with that submission in a principled way: at [39]; *Aslan* [2014] NSWCCA 114; *Yun* [2017] NSWCCA 317; *Tepania* [2018] NSWCCA 247 referred to. The judge made no assessment of the impact of the brain injury as to objective seriousness or moral culpability for the offending. No reference was made to the central tenet in the medical report, namely the causative role of the applicant's brain injury in his involvement with co-offenders and offending. To the contrary, the judge asked whether there was an evidentiary basis to find the offender was "not aware of the wrongfulness of his offending": at [43].

See also ***Masters*** [2019] NSWCCA 233: The applicant submitted moral culpability was reduced due to a causal link between his mental conditions and offending. The judge made no reference to the impact of mental health on moral culpability. The judge fell into error in failing to consider whether moral culpability was reduced, in light of expert and other evidence: at [22]-[26].

Assault on applicant by corrective services officer – ongoing consequences

Stines [2019] NSWCCA 115: The CCA allowed the applicant's sentence (robbery with wounding) on the ground of manifest excess. An assault by a corrective services officer five years earlier while in custody caused severe injuries and had exceptionally severe and ongoing consequences for the applicant's imprisonment. The applicant gave evidence at trial against that officer. Its consequences - segregation in the prison system, not being able to participate in programs and rehabilitation services and being on protection - make his subjective case very powerful: at [37]-[48].

Sexual assault – 'prior relationship of friendship' can be a mitigating factor but not in this case

Wan [2019] NSWCCA 86: The CCA allowed the Crown appeal against sentences for sexual assault. The sentencing judge erred in taking into account the 'prior sexual relationship' between the complainant and offender as a mitigating factor.

The judge referred to *NM* [2012] NSWCCA 215 at [58] where the Court said a prior sexual relationship between a victim and an offender may, *depending upon the particular circumstances of the case*, be an important mitigating factor in sentencing for sexual offences. In *NM*, the relationship between the offender and the victim warranted a lower assessment of objective seriousness: at [83].

However, in this case, the relationship of friendship was not characterised by ongoing sexual activity. The friendship served to explain how the offending came to occur but was not a mitigating factor: at [84].

s 21A(3)(i) Crimes (SP) Act - remorse - unfair where applicant not cross-examined and judge made no finding

Mihelic [2019] NSWCCA 2: (drug supply) The sentencing judge erred by not taking into account remorse. In evidence, the applicant stated he took "full responsibility" for his actions, apologised to the

community, friends and family; is drug free in goal and treated time on remand as a full-time rehabilitation program. The applicant was not cross-examined on these matters: at [65].

A judge is not obliged to accept evidence of remorse, even when the offender has given evidence on oath and even where there is no cross-examination: at [69]; *Alvares; Farache* (2011) 209 A Crim R 297 at [65]; *Newman* [2018] NSWCCA 208 at [28], [31].

However, this case is a different category: there was no cross-examination as to remorse; the applicant removed himself from the drug supply environment but was brought back into it by the undercover operative; the judge does not express opinion on whether the remorse is genuine; the applicant indicates he has been drug free and gives a rational basis for his remorse.

Fairness: Even where rules of evidence do not apply (as in sentence proceedings) it is a rule of fairness that, if it is said a witness is not telling the truth or is mistaken as to a fact, that proposition should be the subject of cross-examination: at [74]; *Marelic v Comcare* (1993) 47 FCR 437 at 442; *Haberfield v Dept Veterans' Affairs as Delegate for Comcare* (2002) 121 FCR 233 at 345.

Whether or not the Crown puts in issue the genuineness of remorse, it should be expected that if a judge is not to believe an accused's sworn testimony, some comment should be made to that effect: at [77]. The judge did not refer to remorse. Where a judge does not refer to a required aspect of mitigation, it must be assumed no regard has been given notwithstanding the workload of District Court judges: at [64].

Removal of children as a result of offending not extra-curial punishment

RH [2019] NSWCCA 64: (child sexual offences) The applicant assisted her partner to sexually abuse her young daughter. The applicant was sentenced to full-time imprisonment and would not see her children until they turned 18.

The CCA rejected the applicant's submission that removal of her underage children from her care during much of their childhood amounted to extra-curial punishment. "Extra-curial punishment" involves loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for the offence, or by reason of having committed the offence: *Silvano* (2008) 184 A Crim R 593 at [29]. The removal of children was in order to provide for their safety and care, and did not involve any punishment for the offender: at [52], [56]. It was the consequence of her offending against one of them: at [57].

3. AGGRAVATING FACTORS

s 21A(2)(e) Crimes (SP) Act - offence committed in home of victim – not applicable to manslaughter by excessive self-defence

Patel [2019] NSWCCA 170: The applicant was convicted of manslaughter by excessive self-defence which occurred in the deceased's home. The judge erred in finding the offence aggravated by s 21A(2)(e). Section 21A(2)(e) does not aggravate an offence where an occupant of the home creates the perceived threat to which the offender responds by self-defence. The risk to safety and security of the deceased's home was created by her own actions: at [19]-[20].

s 21A(2)(j) - on "conditional liberty" includes being 'at large' after parole revoked

Turnbull [2019] NSWCCA 97: The applicant was on parole when he committed further offences and his parole revoked. He was not taken into custody and remained "*at large*" when he committed the index offences subject of this appeal.

The sentencing judge did not err in finding an offence aggravated because the applicant "was on *conditional liberty, namely parole*" under s 21A(2)(j) .

Technically, the judge was wrong to identify the nature of the conditional liberty as 'parole', but was correct to say the applicant was 'at large on conditional liberty'. Even if that were not correct, the list of

aggravating features in s 21A(2) is not exhaustive (see s 21A(1)(c)). It was open to take into account the applicant's status at the time of the offending: at [21]-[24]; [166].

However, the judge erred in treating the commission of an offence while on conditional liberty as aggravating objective seriousness of the offence: at [24]. Although commission of an offence while at conditional liberty is, by s 21A(2)(j), an aggravating factor, it is not a circumstance that aggravates objective criminality. The distinction is a fine one: at [17]-[18]; [120]; [166]; *Simkhada* [2010] NSWCCA 284 at [25]; *Martin* [2011] NSWCCA 188 at [17]; *Elhassan* [2018] NSWCCA 118 at [12]–[18].

s 21A(2)(k) – assault by correctional officer on inmate – abuse of position of trust or authority

Waterfall [2019] NSWCCA 281: An assault by the offender-correctional officer on an inmate was held to be an abuse in position of trust and authority over the victim within s 21A(2)(k). The role of the correctional officer is not merely to ensure that the general community is protected but also to ensure that prisoners are kept under supervision in a safe, secure and humane environment and manner: at [34]-[37].

In the circumstances of this particular offending, the sentencing judge was entitled to give significant weight to the relationship of trust as an aggravating factor rather than find, as the applicant suggested, that the most important or critical factor was the extent of the injuries sustained by the victim: at [42].

This case is discussed further below under 'Particular offences – Assault'.

s 21A(2)(n) – error to find offence aggravated by "planning"

Hordern [2019] NSWCCA 138: The applicant was sentenced for sexual assault of his neighbour's daughters. The applicant, a mechanic, exchanged text messages with his neighbour over several weeks and on the day of the offences about working on his neighbour's car. On the day he worked on the car, the applicant went into his neighbour's house to wash his hands when he assaulted the first victim. He then entered the house a second time and assaulted the second victim.

The judge erred in finding the offending was "part of a planned or organised criminal activity" under s 21A(2)(n) based on the text messages. The messages do not provide a firm foundation for inference of manipulative activity, and were insufficient to prove the applicant knew the girls were in the house prior to entering on the first occasion: at [38].

s 21A(2)(o) "financial gain" – identification information offence s 192J Crimes Act

Lee [2019] NSWCCA 15: The judge did not err in finding as an aggravating factor that the applicant committed for "financial gain" (s 21A(2)(o)) an identification information offence contrary to s 192J *Crimes Act*. Financial gain is not an inherent characteristic of offences under s 192J. It is not uncommon for false identity documents to be created for purposes other than financial gain]. (Cf. offences of supply drugs of a large commercial quantity where it is almost inevitable that financial gain is an inherent characteristic (*Prculovski* [2010] NSWCCA 274; *Wat* [2017] NSWCCA 62)): at [61].

4. PROCEDURAL FAIRNESS

Note: See ***HT v The Queen [2019] HCA 40***, discussed below under High Court cases.

(i) Cases not involving procedural unfairness

Procedural fairness does not require judge to disclose preliminary views

Casella [2019] NSWCCA 201: (Appeal allowed on ground of manifest excess). The CCA rejected a ground of procedural unfairness. The applicant submitted the sentencing judge did not "fairly raise" or imply he was considering a full-time term of imprisonment, and thus lost the opportunity to address on alternatives to full-time custody.

- Procedural fairness may be denied where the case is conducted on a particular basis by both parties and the judge deals with the matter in a different fashion without giving any indication s/he proposes to do so. If a judge expressly or impliedly represents to a party that it is unnecessary to deal with a particular issue

and decides that issue adversely, questions of procedural fairness may arise (*Pantorno v The Queen* (1989) 166 CLR 466 at 47): at [49].

- Procedural unfairness only arises where an offender has been denied an opportunity to pursue a particular submission or to call relevant evidence or in circumstances where some representation has been made to him that would dissuade him from taking a course which had been intended: at [50]; *Tweedie* [2015] NSWCCA 71 at [54].

The above does not mean the judge had a duty to advise defence counsel on how he should conduct his case, or absent the circumstances in [49] above, express any preliminary views that s/he may have formed on the appropriate sentence: at [50]; *Pantorno* at 472.

The Crown did not conduct the case on the basis a custodial sentence was not in issue. The submissions recognised the possibility of a custodial sentence: at [51]-[52].

No procedural unfairness where discount for guilty plea lower than Crown submission

ES [2019] NSWCCA 262: There was no procedural unfairness where the judge imposed a lower discount for a guilty plea than submitted by the applicant or the Crown.

The judge did not indicate to the parties that she *would* find a figure within the suggested range and gave no indication of what discount she was considering. The judge observed only that the Crown's top figure (20%) was the bottom of the applicant's range (20%-25%). This was not an indication of what she proposed to do, only a neutral observation on the submissions: at [53].

The present case is distinguished from *Baroudi* [2007] NSWCCA 48 (clear acceptance by judge of length of the non-parole period conceded by Crown) and *Button* [2010] NSWCCA 264 (judge announcing sentence that *would* be imposed then imposes greater non-parole period): at [53].

(ii) Cases involving procedural unfairness

Adverse finding made without notice – risk of offending and rehabilitation

Neil Harris (a pseudonym) [2019] NSWCCA 236:

On the risk of offending, the sentencing judge said to the ODPP solicitor, "*My impression is that the risk of reoffending is minimal if at all*." The applicant's counsel submitted risk of reoffending was "*low to moderate*." The judge found the likelihood of reoffending was "*moderate*". The CCA found no procedural unfairness because the judge had not departed from a proposed finding without notice to the applicant. The ODPP solicitor had made *no* concession and sought to dissuade the judge from such a finding. It does not appear the applicant had no opportunity to further address on the matter in submissions in reply: at [40]-[41]; *DL* [2018] HCA 32; *Rodgers* [2018] NSWCCA 47.

Note per N Adams J (Gleeson JA and Harrison J agreeing) at [42]:

> "I do not consider that it places too heavy a burden on a representative of an offender that when a sentencing judge states a potential favourable finding to an ODPP solicitor who then seeks to dissuade him from that to clarify the position during submissions in reply. In the present case she was afforded the opportunity to do so but did not. Although representatives may on occasion believe that the judge is "hinting" that he or she will be going in a particular direction, unless that is expressly stated it should not be presumed. ….. it was beholden on her to make further submissions to clarify this given the attitude taken by the Crown."

However, on the matter of rehabilitation, the CCA found procedural unfairness because the judge went on to adversely find without notice that *prospects of rehabilitation were "poor to moderate*". Whether an offender is unlikely to reoffend and has prospects of rehabilitation are distinct matters, yet share much in common. The Crown did not suggest it, there is no basis for it in the psychologist report, and it is inconsistent with the assistance offered by the applicant. The judge was required to raise this with the applicant: at [43]-[44].

Adverse findings beyond agreed facts – no opportunity to address court

Purdie [2019] NSWCCA 22: (drug offences) There was a denial of procedural fairness where the sentencing judge made adverse findings of facts beyond the agreed facts, without giving the applicant

an opportunity to address those findings: at [51]-[52], [58]; *DL v The Queen* (2018) 92 ALJR 764; *Nguyen* [2015] NSWCCA 268.

The judge's factual findings included the "inevitable inference" the applicant was approached because friends believed he could supply and source drugs and was trusted to make the delivery. The findings heightened culpability and implicated prior involvement in supply and a greater level of participation and planning: at [54].

The applicant was deprived of a fair hearing. The matter was remitted to the District Court: at [58]-[59].

Assessment of objective seriousness without explanation, contrary to Crown and applicant's submissions - procedural fairness raised

Simpson [2019] NSWCCA 137: Procedural fairness was raised where both the Crown and counsel described objective seriousness as towards the bottom–lower end of the range. Without explanation, the judge found offending fell within or just below mid-range. Counsel was entitled to believe the judge had accepted the Crown's submission: at [25]-[27]. (The appeal was allowed on the basis the judge erred in assessing objective seriousness: at [25]-[26]).

Judge indicates acceptance of submission of special circumstances, but no mention in remarks - procedural unfairness established

Kha [2019] NSWCCA 215: The applicant submitted to the sentencing judge that special circumstances be found. The Crown indicated support. The judge stated, "*Prima facie I think that must be so*". However, special circumstances were not mentioned in remarks on sentence.

The CCA (Ierace J; Bathurst CJ and Hidden AJ agreeing) found procedural unfairness and allowed the appeal. The applicant was led to believe it was unnecessary for him to further submit on that issue, in view of the Crown's position and the judge's stated preliminary view. Not being informed the judge had reversed that view, the applicant lost the opportunity to persuade the judge to find special circumstances: at [38]. If the judge's position changed after hearing, it was open to him to invite written or further oral submissions (*Brennan* [2018] NSWCCA 22 at [93]-[95]): at [35].

5. COMPARABLE CASES & STATISTICS

Comparable cases showing sentence manifestly excessive

Ebrahami [2019] NSWCCA 273: (deemed supply large commercial quantity drugs ss 25(2), 29 *DMTA*) The CCA accepted the applicant's reliance on comparable cases and allowed the appeal on the ground of manifest excess.

Whilst comparable cases have limitations as each case turns on its own facts and the offender's subjective circumstances, the cases did provide a "yardstick against which to examine" the present sentence (per Simpson J in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [304]; *Hili & Jones* (2010) 242 CLR 520 at [54]): at [40].

The aggregate sentence, and indicative sentence for the main drug supply offence, sit well towards the top of the range of the comparable cases, but those cases mostly involved quantities greatly in excess of the large commercial quantity and a number of other similar offences: at [41]

The CCA noted counsel's assistance in providing comparable cases on appeal. The sentencing judge was not given assistance. District Court judges have a heavy workload. It is desirable they are assisted as much as possible through statistics and comparable cases if available, by both parties: at [2],[41]-[42].

Mansfield [2019] NSWCCA 266: (reckless wounding s 35(4) *Crimes Act*). Allowing the appeal on the basis of manifest excess, the CCA found, inter alia, the judge erred in characterising the wounding offence as above the mid-range having regard to the actual wound to the victim. Comparison with the

facts in two cases, *Tweeddale* [2012] NSWCCA 99 and *McCullough* (2009) 194 A Crim R 439, supports the conclusion the applicant's offending was notably less serious: at [45].

Manslaughter - One useful comparative case

Lees [2019] NSWCCA 65: Senior counsel for the appellant referred to number of comparative cases of manslaughter by motor vehicle.

The CCA accepted one comparable case in concluding the sentence was manifestly excessive.

Although manifest excess is not established simply by comparison of sentences in other cases with different facts, such cases can be of assistance: at [94].

One case, *Gordon (No 8)* [2017] NSWSC 574, was useful. There is a close similarity in the facts, and also important differences. However, the importance of this case is that it is a recent decision of this Court and no challenge was made to the sentence by the Crown. When one compares that sentence, it is significantly more lenient: at [94]-[97].

Limited utility of statistics and cases for comparison

Moore [2019] NSWCCA 264: The applicant pleaded guilty to three offences: cause GBH with intent to cause GBH (s 33(1)(b) *Crimes Act);* detain with intent to obtain an advantage, occasion ABH (s 86(2)(b)); and use offensive weapon with intent commit indictable offence, namely intimidation (s 33B(1)(a)).

He relied on statistics and comparable cases to argue the indicative sentences and aggregate sentence were manifestly excessive.

The CCA found reliance on statistics by the NSW Judicial Commission did not assist the applicant:

- The statistics were for "*Aggregate/Effective – Terms of Sentence*" imposed for each of the three offences – being aggregate or total effective sentences imposed for multiple, as well as single, offences. However, information was not provided by counsel on what the other offences were, and what the actual sentence for the offence in question was: at [76].
- The statistics do not show the extent of any reduction for a guilty plea, making difficult any comparison with the applicant's reduction of 10% for indicative sentences: at [77].

The comparative exercise with other cases also has difficulties. There are only three cases; they involve a different mixture of offences and maximum penalties to the present case; and one of the cases upheld a Crown appeal where re-sentencing applied the double jeopardy principle which has since been abolished in NSW: at [78]-[81].

6. DISCOUNT FOR ASSISTANCE

Section 23 *Crimes (Sentencing Procedure) Act* 1999 provides:

> *(1) A court may impose a lesser penalty than it would otherwise … having regard to the degree to which the offender has assisted … law enforcement authorities in the prevention, detection or investigation of … the offence…"*
>
> *(2) In deciding whether to impose a lesser penalty … and the nature and extent of the penalty …, the court must consider….—*
>
> *…….*
> *(b) the significance and usefulness of the offender's assistance …*
> *(c) the truthfulness, completeness and reliability …*
> *(d) the nature and extent of the offender's assistance or promised assistance,*
> *(e) the timeliness …*
> *(f) any benefits that the offender has gained or may gain …..*
> *(g) whether the offender will suffer harsher custodial conditions …..*

(h) any injury suffered by the offender or the offender's family, or any danger or risk of injury …..
(i) whether the assistance … concerns the offence for which the offender is being sentenced or an unrelated offence,……

Whether admissions to police may constitute 'assistance to authorities'

Howard [2019] NSWCCA 109: The applicant was sentenced for 'throw explosive substance with intent to burn' under s.47 *Crimes Act*. The sentencing judge found police would have apprehended the applicant through CCTV footage.

The CCA accepted the applicant's submission that admissions to police that he threw a Molotov cocktail with the intention of trying to hit a rival gang member (thus showing the specific intention required by s 47) constituted assistance to authorities within s 23: at [1], [5], [9], [65].

However, it was never put to the sentencing judge that the admissions should be dealt with by s 23 (*Zreika* (2012) 223 A Crim R 460). Had the sentencing judge been invited to consider reducing the sentence to be imposed because of that assistance, she would have been obliged to assess its value referable to ss 23(2) and (3): at [1], [5].

The judge did take into account the applicant's admissions as part of his overall subjective case. In these circumstances, there is no miscarriage of justice: at [1], [5], [66]; *Zreika.*

Note: In relation to this case, the Authors of *Criminal Law News*[1] state:

> "*Comment*
> No authority was cited for the proposition that an offender's admissions to police following arrest come within the concept of "assistance to authorities" that warrants consideration of allowing a specific quantified reduction of sentence under s 23 of the Crimes (Sentencing Procedure) Act. There is no known precedent for regarding such admissions in this way. The High Court in *CMB v Attorney General (NSW)* (2015) 256 CLR 346; 151 ALD 8; [2015] HCA 9; BC201501285 recognised admissions as being within s 23 but that was in relation to disclosure of otherwise unknown guilt of the type described in *R v Ellis* (1986) 6 NSWLR 603 at 604.
>
> With the acceptance that admissions made to police following arrest constitute "assistance to authorities", thus inviting consideration of allowing a quantified sentence reduction under s 23, it remains to be seen whether this will create a new area of disputation in sentence proceedings at first instance, and on appeal, for example as to "significance and usefulness" (s 23(2)(b))."

Disclosure of unknown guilt - whether admissions capable of coming within s 23

Le [2019] NSWCCA 181: The applicant was charged with cultivate cannabis. Police located the plants at a house where the applicant was present. He participated in a recorded walk-through of the premises, identified items, admitted he lived there and that he was hired to look after the plants.

The applicant submitted he gave unknown information to the police and the sentencing judge failed to take into account his admissions as "assistance" pursuant to s 23: at [40]-[42].

The CCA held the applicant did not disclose otherwise unknown guilt and the admissions were therefore not 'assistance' within s 23(1): at [50]-[54]; *Ellis* (1986) 6 NSWLR 603; *CMB v AG NSW* (2015) 256 CLR 346. The applicant was found at the scene with the plants and there was evidence he lived there. His comments confined his role to low in the hierarchy and he was sentenced on this limited role: at [53]. The mere fact one participates in a recorded interview is not entitled to any weight, of itself, in mitigation. Otherwise it would run the risk of imposing punishment on someone who exercised their right to silence: at [54]; *Browning* [2015] NSWCCA 147.

Even if the admissions *were capable* of coming within s 23(1), whether a lesser sentence is warranted depends upon criteria in s 23(2): at [55]; *XX* [2017] NSWCCA 90 at [56]. The applicant did not nominate any other person or undertake to give evidence, and made the admissions after initially refusing police entry. This was not a case where he came forward to disclose criminality: at [56].

[1] *Crim LN* July 2019, Vol 26(6)

Evidence by appellant at co-offender's sentence hearing did not assist Crown - undertaking still of benefit to State – where respondent held in immigration detention

Dagg (a pseudonym) [2019] NSWCCA 132: The respondent received a discount upon undertaking to give evidence against co-offender W. W pleaded guilty. The respondent was called by the Crown to give evidence not at trial but at W's sentencing hearing. The respondent's evidence was unfavourable. The Crown appealed submitting he failed to fulfil his undertaking.

The CCA dismissed the Crown appeal. The ordinary rule is that failure to adhere to an undertaking will result in re-sentence, save in unusual circumstances: at [17]. The present facts are unusual:

- First, it is not true the undertaking provided no benefit to the State. The undertaking was "crucial" to W's prosecution and influenced W's decision to plead guilty. It would be different if the respondent had recanted from his undertaking before W pleaded guilty. The respondent should not necessarily receive the full benefit of his 7.5% discount. The benefit of his evidence at sentence is much less value than at trial, but cannot be zero: at [22]-[23].
- Second, the respondent is from New Zealand and had been detained at an immigration detention centre for 61 days beyond his release date. It would be wrong to resentence the respondent to serve an additional 78 days reflecting the absence of his 7.5% discount. It is very hard to do other than give full value for the 61 days deprivation of liberty, albeit in immigration detention than a correctional centre: at [24].

Note: The respondent argued his discount was to give future assistance at W's *trial*, not W's *sentence hearing*, so it was of no consequence to him that W pleaded guilty. The CCA rejected this argument. An undertaking in the standard form to give assistance at *"any proceedings (including any appeal and re-trial)"* does not exclude a sentence proceeding: at [9], [18]-[19]; *Stavropoulos* [2007] NSWCCA 333 at [57].

Error to rely on matters in confidential affidavit in assessing objective seriousness

Neil Harris (a pseudonym) [2019] NSWCCA 236: (supply pistol) The judge erred when assessing objective seriousness by taking into account evidence from the confidential affidavit (s 23 *Crimes (SP) Act*) that the applicant knew the person to whom he supplied pistols was engaged in criminal activity. The Agreed Facts made no such mention: at [46], [62]. N Adams J (Gleeson JA and Harrison J agreeing) stated that where an affidavit of assistance is tendered:

- The same caution regarding 'induced statements' should be exercised when a letter/affidavit of assistance is tendered pursuant to s 23. Those authorities are to the effect that induced statements cannot be used against the offender: at [61]; see *Bourchas* (2002) 133 A Crim R 413; *JMS* (2010) NSWCCA 229; *Govindaraju* [2011] NSWCCA 255.
- When an affidavit of assistance is tendered, the basis of the tender should be agreed and clearly stated and any restriction identified: at [61]; *Bourchas.*
- The judge should have clarified admissibility of the contents of the confidential affidavit to the fact-finding exercise, particularly where there was conflict between the Agreed Facts and the confidential affidavit: at [65].

7. PARTICULAR OFFENCES

(i) Homicide

Murder - cases of premeditation and intent to kill - no reliable relationship between assessment of objective seriousness and sentences in other cases

Park [2019] NSWCCA 105: The applicant appealed his murder sentence, submitting the judge erred in finding objective gravity was significantly above mid-range because the case involved premeditation, an intention to kill, and a brutal assault. The applicant relied upon comparison with a series of cases

submitting such factors do not necessarily elevate objective seriousness above mid-range, and were examples of premeditated murders of similar or greater seriousness with sentences less than his.

The CCA dismissed this ground of appeal.

There does not appear to be any reliable relationship between an assessment of any particular degree of objective seriousness and sentence imposed. Some cases described as well above mid-range have lesser sentences. Because the assessment of objective seriousness is an evaluative discretionary matter, reference to previous decisions in similar cases is fraught with difficulties: at [34].

The statement "An intention to kill and premeditation are usual elements in a murder of mid-range objective seriousness" (in *Nguyen* (2007) 180 A Crim R 267; [2007] NSWCCA 363) cannot be taken to mean that 'offences of murder involving premeditation and an intention to kill are in the middle range'. The two features are not unusual elements of such an offence, and are also often part of the objective facts of worst case category offences: at [50]-[53].

Manslaughter - sentence appeal allowed

Lees [2019] NSWCCA 65: The CCA allowed the applicant's appeal against sentence for manslaughter of 16 years, NPP 12 years and imposed a new sentence of 12 years, NPP 9 years.

The applicant drove her motor vehicle into her long-term partner after an argument. There was a background of domestic violence. The sentencing judge found the offence did not arise out of the offender responding to an assault by the deceased in the context of domestic violence.

Effect of psychiatric problems on moral culpability: The judge failed to have regard to the effect of the applicant's psychiatric problems on moral culpability: at [91]. The applicant's mental condition was not confined to the issue of domestic violence. It had an effect beyond that, which the judge did not take into account: at [87]. Expert opinions were that there was a more generalised problem, and explain how the applicant could intend to drive the vehicle into the deceased, yet have no intention to cause serious bodily harm or not formed an intention at all: at [90]-[93]; *Muldrock* (2011) 244 CLR 120.

(ii) Sexual offences

s 25AA Crimes (Sentencing Procedure) Act 1999 - child sexual offences - current sentencing practices

Section 25AA *Crimes (Sentencing Procedure) Act* 1999 commenced on 31 August 2018. Section 25AA states that for a child sexual offence, the offender is to be sentenced in accordance with the sentencing patterns and practices at the time of sentencing.

O'Sullivan [2019] NSWCCA 261: The applicant was sentenced for indecent assault offences under s 81 *Crimes Act* (repealed) committed between 1972 and 1983. The appeal was dismissed.

- The sentencing judge appreciated that although s 25AA allowed a judge to have regard to current sentencing practice, other restraints were operative such as the maximum penalty and the absence of any non-parole period.
- The judge appreciated the wide spectrum of offending covered by then s 81. Section 81 encompassed a wide range of more serious conduct which would now constitute sexual intercourse: at [33]-[34], [46].

Cattell [2019] NSWCCA 297: The CCA allowed the Crown appeal.

- The absence of any consideration of s 25AA(1) in the judge's remarks leads to the inference the judge overlooked the obligation to sentence in accordance with sentencing patterns and practices that applied at the time of sentencing: at [116].
- It was important the judge expressly state how the respondent was being sentenced as not all offences fell within s 25AA. There is no reference to this distinction in remarks: at [117]-[118].

- The judge expressed concern about lack of statistical information. As to current sentencing "patterns," it is not unexpected the Crown was unable to provide statistical material given the recent enactment of s 25AA. This will resolve over time and be provided by Judicial Commission statistics and comparative cases: at [122].

Use carriage service to procure person under 16 - offender just turned 18; victim 15 - not a case of grooming

Clarke-Jeffries [2019] NSWCCA 56: The CCA held the applicant's sentence was manifestly excessive for 'use carriage service to procure person under 16 to engage in sexual activity' (s 474.26(1*) Criminal Code* Cth), 'solicit child pornography material' (s 474.19(1)(a)(iv)) and 'demand with menaces' (s 249K(1)(a) *Crimes Act* NSW).

The CCA set aside the original sentence of 4 years 4 months, NPP 2 years and imposed a new sentence of 2 years imprisonment, with conditional release after 9 months recognisance.

The applicant, aged 18, sent the 15 year old victim persistent explicit text messages demanding nude photos. The victim complied. The applicant used the photos to demand money from her.

The CCA said there was considerable displacement between the judge's favourable findings, in terms of objective seriousness and subjective case, and sentences imposed. Three matters of significance were:

- *Youth*. The applicant at the time of the offending had just turned 18. Because it is an element of s 474.26(1*)* that the sender of the communication be at least 18, the applicant would not have committed an offence at all had he not turned 18. That circumstance highlighted his youth and relevant sentencing principles: at [48]; *KT* (2008) 182 A Crim R 571 at [22]ff.

  Importantly, there was unchallenged expert evidence that immaturity had materially contributed to the offending which the judge failed to take into account: at [50]-[51].

- *Victim's age*. Regarding s 474.26, the victim was aged 15. This was not a case of a person of mature years grooming a much younger victim: at [52].

- *Mental state*. Insufficient weight was given to the applicant being an inappropriate vehicle for general deterrence due to mental illness at time of offending: at [53].

Comparative cases by the Crown were distinguishable, involving much older offenders and calculated and predatory conduct: at [55]ff.

(iii) Assault

No principle that nature of injuries necessarily determines assessment of objective seriousness - assault by correctional officer on inmate – recklessly inflict GBH

Waterfall [2019] NSWCCA 281: The applicant was convicted for recklessly inflict GBH contrary to s 35(2) *Crimes Act*. The applicant, a correctional officer, punched the victim-inmate's jaw at least three times. The inmate suffered a fracture requiring surgery for removal of a tooth, temporary wiring of jaws, realignment of the fracture and permanent titanium plate.

The applicant submitted the judge failed to give sufficient weight to the fact the injuries were at the lower end of the scale for GBH. The CCA dismissed his appeal.

The sentencing judge did not err by finding the offence was in the upper mid-range of objective seriousness: at [43].

Although the injury will, to a significant degree, determine seriousness and appropriate sentence, that is not the only matter taken into account. The manner in which the injury was inflicted, the reason for infliction of the injury and circumstances surrounding the offence are relevant: at [29]; *McCullough* [2009] NSWCCA 94; 194 A Crim R 439.

Whilst it may be that in some cases the most significant factor will be the nature of the injuries, there is no principle which mandates it will be the most important factor or necessarily determine the assessment of objective seriousness. This, of itself, makes it difficult for the applicant to overcome the

threshold point of establishing some error of fact or principle in accordance with *House v R* (1936) 55 CLR 499: at [33].

The judge was entitled to give significant weight to the relationship of trust as an aggravating factor rather than find that the most important factor was the extent of injuries: at [42]. The power differential which arises when a correctional officer assaults an inmate was a significant aggravating factor, being an abuse of the position of trust or authority (s 21A(2)(k) *Crimes (SP) Act*); and that it was an unprovoked assault with pre-meditation must increase objective seriousness: at [31], [34], [37].

Comparable cases: The judge rightly pointed out that a number s 35 cases - which were provided to demonstrate relationship between the injuries and the level of sentence - involved a plea of guilty, different circumstances and none incorporates the matrix of circumstances in this matter of a serious violence offence by a correctional officer against a prisoner: at [50]-[51].

(iv) Firearms

Consideration of sentences for two firearm offences relating to the <u>one</u> firearm

Taha [2019] NSWCCA 240: The applicant was sentenced for, inter alia, Possess loaded firearm in public place (Count 1 - s 93G *Crimes Act*) and Possess unauthorised pistol (Count 3 - *Firearms Act* s 7(1)).

Both offences concerned the same pistol. The judge imposed identical indicative head sentences.

Senior counsel for the applicant submitted that as Count 3 captured only minimal criminality above and beyond that captured by count 1, the objective criminality of count 3 should have been assessed as much less. Further, it was incumbent upon the judge to address double punishment, given the one firearm gave rise to two offences (*Pearce v The Queen* (1998) 194 CLR 610; at [46]): at [50].

The CCA found it was not incumbent on the judge to impose implicitly wholly concurrent indicative sentences for counts 1 and 3. Nor did the identical indicative head sentences show erroneous lack of discrimination, or double punishment. The offences had some different "un-included" elements. Count 1 captured the criminality of possessing a "loaded" firearm in a public place, and Count 3 captured the separate criminality of the firearm specifically being a *pistol* possessed without authorisation: at [100]–[101]; *Pearce* (1998) 194 CLR 610; *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328.

However, a significant measure of implicit concurrence between the indicative sentences for counts 1 and 3 was necessary, to reflect that the various characteristics of *one* firearm were being reflected in *two* counts: at [104].

The appeal was allowed on other grounds including that the aggregate sentence was manifestly excessive: at [105], [107]-[109].

On re-sentence, a greater degree of implicit cumulation between the indicative head sentences was provided, resulting in a reduced aggregate sentence: at [113]-[114].

Possess loaded firearm - motive or purpose for obtaining firearm relevant

Sumrein [2019] NSWCCA 83: The CCA allowed the appellant's appeal against sentence for possess loaded firearm in a public place (s 93G(1) *Crimes Act*). The judge failed to take into account the applicant's stated motive for obtaining the firearm was to protect himself and family due to fearing for their safety after an earlier drive-by shooting: at [46]. While not advancing that motive as "mitigation", his motive for obtaining the gun was relevant to objective gravity and moral culpability: at [46]; *Mack* [2009] NSWCCA 216.

Possession of a firearm in connection with a criminal enterprise is a matter which elevates objective gravity of the offence (authorities referred to). That feature was absent here and did not deserve to be characterised as "of minor consequence": at [45].

(v) Drug offences

Manufacturing and supply – concurrency and accumulation

Campbell; Smith [2019] NSWCCA 1: The CCA allowed the Crown appeal against sentence for a number of drug offences including possess precursor, manufacture and supply methylamphetamine. Amongst other matters, the judge erred by finding the criminality of the supply offence was encompassed within the manufacture offence. The supply offences had no relationship with the manufacture offence. The drug the subject of the supply offences was the subject of some other episode of manufacturing. Further, the precursor possession offences did not relate to the manufacture offences but to intended manufacture in the future: at [184]-[185]. The level of notional partial accumulation was overly generous: at [196].

It is not the case that for drug manufacturing and supply offences the sentences should be concurrent, or even substantially concurrent. This is so even where the drug the subject of the supply offence is part of the drug the subject of the manufacture offence (*Kwok* [2018] NSWCCA 200): at [281].

Offences represented distinct phases of sophisticated criminal enterprise

Grogan [2019] NSWCCA 51: The CCA dismissed the applicant's appeal against sentence for manufacture drug, drug supply and knowingly deal with proceeds of crime

There was no error in totality and accumulation. The extent to which, if at all, the criminality of a supply offence may be comprehended by the criminality of a manufacture offence in the context of a sophisticated drug enterprise is a question of fact (*Kwok* [2018] NSWCCA 200). The three offences each represented distinct phases of a sophisticated criminal enterprise, albeit with some common and overlapping elements. The offences occurred during different periods, or on a different date. It would not have reflected the extent to which the offences were distinct and separate without some level of accumulation: at [28], [31].

There was no double punishment by accumulating the proceeds of crime sentence upon the other sentences to reflect additional criminality. The proceeds offence was not "part and parcel of the supply and manufacture offences" as in *Brent Redfern v R* (2012) 228 A Crim R 56; [2012] NSWCCA 178: at [23]. The money (proceeds) was from the supply but not merely possessed by the applicant - in which case he might have had a *Redfern v R* argument. The money was in fact being used for purchasing materials for the further manufacture of drugs. The acts constituting the offences are "temporally and factually distinct": at [34].

Drug possession – custodial term outside statistical range – custodial sentence warranted

Ahmad [2019] NSWCCA 198: The CCA dismissed the applicant's appeal against sentence of 6 months imprisonment for one offence of possess prohibited drug (3.8g cocaine; s 10(1) *DMTA* 1985) (on a s 166 Certificate) imposed by the District Court whilst being sentenced for other serious drug matters.

Judicial Commission statistics showed that 97% of cases for possess prohibited drug in the Local Court following a plea of guilty in the four year period to June 2018, received a sentence not involving a custodial term.

However, manifest excess cannot be established by pointing to a statistical range and arguing the sentence falls at or near the top. That the sentence compares to the small number sentenced to imprisonment says nothing about whether the judge erred. Although the general pattern of sentence is relevant, statistics are of very limited assistance in determining whether sentencing discretion miscarried: at [48], [50]; *SS* [2016] NSWCCA 197; *Windle* [2011] NSWCCA 277.

The circumstances applying to offenders in the Local Court will be very different to the District Court. This was a serious example of a possess small quantity offence with an amount in excess of the traffickable quantity (3g) in the context of related indictable drug offences: at [49], [54], [60].

Drug supply – error labelling offender a "middleman" - difficulties in using "shorthand description" of an offender's role

Thomas [2019] NSWCCA 88**:** The CCA allowed the applicant's appeal for supply drug. The judge erred in finding the applicant was a "middleman" and the offence was at the mid-range of objective seriousness. There was little to suggest the applicant had done more than a "courier" on the agreed facts: at [75]-[78].

The judge's shorthand description of "middleman" was not used to indicate the applicant was a "link in the chain". The difficulties that arise by using a "shorthand description" of an offender's role occur in this case: at [74]. An assessment of the applicant's role is not to be determined by selection of a label. The criminality of a drug supply offender is assessed by consideration of involvement in the steps taken to effect the offences. Problems may emerge when a court attempts to categorise their role as, in many cases, the full nature and extent of the drug enterprise is unlikely to be known to the court: at [76]; *Paxton* [2011] NSWCCA 242; (2011) 219 A Crim R 104 at [131]-[132].

Supply large commercial quantity methylamphetamine – ICO manifestly inadequate

Qi [2019] NSWCCA 73: The CCA allowed the Crown appeal against an Intensive Correction Order (ICO) of 2 years 6 months imposed for supply large commercial quantity methylamphetamine (1983g) (s 25(2) *DMTA*). A new sentence of imprisonment of 3 years, NPP 1 year was imposed.

The respondent, aged 22, pleaded guilty, and was found by the sentencing judge to be a drug user otherwise of good character with family support and lack of criminal history.

On appeal, senior counsel for the respondent emphasised the less prescriptive approach to sentencing in drug matters in *Parente* [2017] NSWCCA 284: at [67].

The CCA held the ICO was manifestly inadequate for reasons (at [71[-[83]) including:

. The penalty of Life imprisonment reflects Parliament's view of the seriousness of the offence. Without purporting to promulgate any sort of prescriptive rule, an inevitable function of that maximum penalty is that it would only be in very exceptional circumstances that a sentence other than full-time imprisonment would be imposed. The standard non-parole period of 15 years is to the same effect.

. This was not a very exceptional matter. A young person of otherwise good character, with challenging upbringing and dependence upon gambling and drugs, involved to a significant degree in supply, is not an uncommon occurrence in Australian society.

. Almost 2 kg of methylamphetamine, at a purity of 57.5%, is smaller than the maximum (infinite) quantity of the drug captured by the offence, but it is well beyond the "border line" between "commercial quantity" and "large commercial" quantity. This is not a case where offending just "tipped over" into its more serious form.

Supply drugs – overemphasising role of weight as factor in sentencing

Roberts (a Pseudonym) [2019] NSWCCA 102: The CCA allowed the sentence appeal on a count of knowingly taking part in not less than large commercial quantity of methylamphetamine (s 25(2) *DMTA*).

The judge erred by mistaking the threshold quantity for the offence as 500g, rather than 1kg.

The judge also erred in overemphasising the role of drug weight: at [70]. He emphasised that he calculated the amount as double the threshold for the large commercial quantity. He distinguished a third count by saying, "the amount is over the commercial quantity, but only over by a fractional amount: at [52]-[53].

While quantity has some relevance to seriousness, it is not the decisive factor. Weight must be considered in the context of all relevant facts. It is a fallacy to assume that any case involving more than 250g of heroin is likely to be worse than any case involving only 250g or less. For example, a case involving a small quantity of heroin as being of very great seriousness when to create an addiction in an infant: at [50]-[51]; *Markarian v The Queen* (2005) 228 CLR 357 at [33].

8. APPEALS

ss 5(1), 5G Criminal Appeal Act 1912 - judge's decision to refuse to discharge jury - principles in Crofts (1996) 186 CLR 427 apply – not House v The King (1936) 55 CLR 499.

Section 5(1) *Criminal Appeal Act* allows a person to appeal against conviction.

Section 5G allows the DPP or any party to appeal against a judge's refusal to discharge the jury.

In ***Hamide*** [2019] NSWCCA 219 the applicant's single ground of appeal was that there was a substantial miscarriage of justice due to irregularities in the evidence at trial and the trial judge's failure to discharge the jury.

The CCA stated that in an appeal against conviction under s 5(1) where one of the grounds is that a miscarriage of justice was occasioned by a trial judge's refusal to discharge the jury, the relevant principles to be applied in determining that ground are those in *Crofts v The Queen* (1996) 186 CLR 427, not *House v The King* (1936) 55 CLR 499: at [127], [170].

In *Crofts*, the High Court stated:

> "The duty of the appellate court… is not confined to examining the reasons given for the order …. . The appellate court must also decide for itself whether… the result of the refusal to discharge the jury occasioned *the risk of a substantial miscarriage of justice"* [emphasis added] (at 440-441): at [80].

The CCA said *Crofts* applies even though a decision not to discharge the jury is a discretionary one. This is because the appeal under s 5(1) is against conviction; it is not against the failure to discharge the jury. That difference is fundamental, and grounds the difference in the tests that this Court applies on appeal: at [126]-[127].

s 6(3) Criminal Appeal Act 1912 - re-sentencing - no obligation to specify higher sentence unless particular circumstance warrants

RO [2019] NSWCCA 183: The CCA allowed the applicant's appeal and imposed the same length of aggregate sentence as the sentencing judge backdated by 8 months.

In re-exercising the sentencing discretion, the CCA considered whether the Court ought to specify the higher sentence where a higher sentence is warranted (s 6(3) *Criminal Appeal Act*). The Court stated:

- In re-sentencing under s 6, the Court puts aside the sentence imposed at first instance: at [1]; [81], [89]; [117]; ***Turnbull v R*** [2019] NSWCCA 97 at [44]–[46].
- If the Court concludes a greater sentence is warranted, it is not obliged to specify what the sentence was but may instead simply dismiss the appeal: at [87], [89]; *Gal* [2015] NSWCCA 242; *O'Grady* [2015] NSWCCA 168.
- The Court may decide to specify the sentence warranted, as done in ***Turnbull*** at [57]-[63]: at [88]. However, in light of observations in *Gal*, the Court should only take this course if some 'particular circumstance' warrants it: at [1], [89], [120].

Beech-Jones J (Bathurst CJ agreeing) said a 'particular circumstance' may be where the Court is considering the application of s 6(3) to an aggregate sentence and needs to identify the indicative sentences for each offence: at [89]. This is appropriate in this case where the judge erred as to backdating - unless the indicative sentences are specified, the Court cannot determine whether an aggregate sentence of lesser, greater or same length is warranted: at [104].

N Adams J did not consider the application of s 6(3) to an aggregate sentence to be a 'particular circumstance'. There is no need to set out proposed indicative sentences unless a new aggregate sentence is to be imposed. It would be sufficient to note the new indicative sentences were higher without specifying them: at [120], [124].

s 6A Criminal Appeal Act 1912 - appeal against limiting term allowed – re-sentence

Jomaa [2019] NSWCCA 98: Pursuant to s 6A, the CCA allowed the applicant's appeal against his limiting term imposed under s 24 *Mental Health (Forensic Provisions) Act* 1990.

The applicant was found guilty after a special hearing of directing a criminal group and drug supply. The sentencing judge erred in taking into account specific deterrence, even at a reduced level, given the applicant's mental condition. The judge found he was "unlikely to be able to reoffend" and that "there is no need to give any weight to the protection of the community". These two findings precluded the judge's third finding that "the need for specific deterrence is … reduced". The applicant's state was unlikely to change. There was no likelihood of returning to drug dealing or criminal behaviour requiring forethought: at [41].

On re-sentence, personal deterrence was not a relevant consideration. General deterrence is reduced but cannot be discounted completely due to the prevalence and harm to community safety inherent in trafficking illicit drugs: at [51].

Appeal - sentence is unreasonable or plainly unjust - principles

Singh [2019] NSWCCA 110: The CCA cited *Hughes* [2018] NSWCCA 2 where the principles relating to a claim that a sentence is unreasonable or plainly unjust were summarised:

> *"*[86] *Consideration of sentence appeal*
>
> When it is contended that a sentence is manifestly excessive it is necessary to have regard to the following principles derived from *House v The King* (1936) 55 CLR 499; [1936] HCA 40 at 505; *Lowndes v The Queen* (1999) 195 CLR 665; [1999] HCA 29 at [15]; *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54 at [6]; *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 at [58]; *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [25], [27]; and *Hili v The Queen*; *Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [59]:
>
> > (1) appellate intervention is not justified simply because the result arrived at in the court below is markedly different from sentences imposed in other cases;
> >
> > (2) intervention is only warranted where the difference is such that it may be concluded that there must have been some misapplication of principle, even though where and how is not apparent from the reasons of the sentencing judge, or where the sentence imposed is so far outside the range of sentences available that there must have been error;
> >
> > (3) it is not to the point that this Court might have exercised the sentencing discretion differently;
> >
> > (4) there is no single correct sentence and judges at first instance are allowed as much flexibility in sentencing as is consonant with consistency of approach and application of principle; and
> >
> > (5) it is for the applicant to establish that the sentence was unreasonable or plainly unjust.
>
> See *Obeid v R* [2017] NSWCCA 221 (R A Hulme J, Bathurst CJ, Leeming JA, Hamill and N Adams JJ agreeing) at [443]."

CONVICTION APPEALS and OTHER CASES

1. EVIDENCE

s 18 Evidence Act - spouse compellable, in part, to give evidence – relates to "physical harm"

A prosecution witness who is the spouse, de facto, parent or child of a defendant may object to giving evidence: s 18(2). Section 18(6) provides a person who objects must not be required to give the evidence if:

> *(a) there is a likelihood harm would or might be caused (whether directly or indirectly) to the person, or to their relationship with the defendant …., and*
> *(b) the nature and extent of that harm outweighs the desirability of having the evidence given.*

A non-exhaustive list of mandatory balancing factors to be considered for s18(6) is set out under s 18(7).

A1 (No.2) [2019] NSWSC 663: C1 objected to giving evidence against her husband (charged with murder) under s 18 out of fear she would be killed by third parties

Johnson J held that a witness was compellable to give evidence on some topics but not others under s 18; and that s 18 relates to "physical harm."

- s 18 relates also to physical harm, not only harm to a "relationship" as commonly applied. Section 18(6) refers to a separate category of *"harm"* to the person and *"harm"* should be construed widely. Real concerns as to physical harm to C1 exist to satisfy the relatively low threshold in s 18(6)(a): at [58]-[60].
- Severing of evidence under s 18 is permitted. The language does not require an all-or-nothing approach: *"the substance and importance of any evidence"* (s 18(7)(b)); *"whether any other evidence concerning the matters"* is available to the Crown (s 18(7)(c): at [70], [77]-[79].

  Murder is a grave offence and evidence of motive is available without direct evidence from C1: ss 18(7)(a)-(c). However, C1's evidence will be significant to locations and addresses to link the Crown circumstantial case: at [67]-[69].
- Comment to jury. It is open to the Court to inform the jury that C1 *"had taken an objection to giving evidence in this particular [redacted] area"* and that *"there are legal reasons why [the Court] upheld that objection"*: at [88].

ss 38, 65(2) Evidence Act ; ***cl 4 Dictionary - witness with head injuries cannot recall earlier statements***

R v Rossi-Murray [2019] NSWSC 479: Rothman J refused the Crown application to adduce prior representations by witness JM under s 65(2) and leave to cross-examine JM under s 38.

JM, a prisoner, suffered head injuries which he states affect his memory. On a voir dire, JM gave evidence he was attacked by three men, does not remember making statements to police or anything about the attack and has had significant difficulties with memory since.

Section 65(2); Cl 4 Dictionary: s 65 'Exception: criminal proceedings if maker not available' is usually utilised where someone has fled the country or is dead. However, if a person does not fit within one of the paragraphs in cl 4(1) Dictionary ('Unavailability of persons'), the person is available to give evidence about the fact (cl 4(2)): at [29].

Clause 4(c) states a person is unavailable if "*mentally or physically unable to give the evidence*". Rothman J found the Crown failed to prove, on the balance of probabilities, that JM has a mental or physical inability to give the evidence within cl 4(c); and therefore failed to prove he is unavailable. Consequently s 65 is not available to the Crown: at [33].

Section 38: Rothman J found that the evidence given by JM is unfavourable under s 38(1)(a) as JM has knowledge and is not making a genuine attempt to give it.

However, leave is refused. For the accused to cross-examine JM, the Court would be putting the accused in the position of establishing the probative value of the evidence of the witness (or his memory or capacity to give worthwhile evidence), in order to destroy it. That is a bizarre effect, and inconsistent with a fair trial and basis upon which this material can be adduced. There is material from an induced statement which would require warnings of unreliability. Yet the Court would be required to hold it is of significant probative value, notwithstanding the warning. More importantly, it would put on the accused an onus to disprove its truth. The danger of unfair prejudice outweighs its probative value (s 137, s 192): at [57]-[60].

The circumstance is different from a statement read to the Court because a witness is unavailable. JM is present and the impression to a jury would be that the witness simply does not wish to give evidence. It would have the same effect as imposing on the accused the burden of *Browne v Dunn* (1893) 6 R 67 (see *RPS v R* (2000) 199 CLR 620 at [57]-[60]): at [60].

s 65(2) Evidence Act - Prosecution reliance on hearsay representations of deceased accomplice not permitted

DPP v Madina (A pseudonym) & Douglas (A pseudonym) [2019] VSCA 73 (Crown interlocutory appeal) The Crown appealed against the trial judge's refusal to admit prosecution evidence, pursuant to s 65(2)(d), of hearsay statements by 'Witness T' who died in 2013. T was an accomplice who allegedly participated in the offences committed by each accused.

The VSCA dismissed the appeal. It could not be concluded the accomplices' representations were made in circumstances making it likely they were reliable under s 65(2)(d): at [57]; *Sio* (2016) 259 CLR 47; *Asling* [2018] VSCA 132 applied.

Evidence showed T was under pressure at the time he made statements to police. He had been charged with two murder offences (unrelated to the accused). The circumstances of the murders and making of T's statements could not be disclosed because of extensive claims of public interest immunity by police. No evidence enabling assessment of T's motives in cooperating with police was disclosed or of the benefits he received was made. Compliance with s 65(2)(d) presupposes a substantial understanding of the circumstances that make it likely the representations in issue are reliable, but it was not possible to reach such an understanding here: at [26], [54]-[59].

s 65(8) Evidence Act - third party confessions - a previous representation adduced by defendant

Hague [2019] VSCA 218: The applicant was convicted of murder. On appeal, the applicant sought to lead fresh evidence of evidence by W and MD that 'M' had confessed to them he committed the murder. At trial, M could not be located and was therefore 'unavailable' to give evidence.

The VSCA made observations on s 65(8).

At common law, third party confessions were inadmissible as an exception to the hearsay rule (*Bannon v The Queen* (1995) 185 CLR 1): at [212].

Section 65 allows for admissibility in criminal proceedings of otherwise inadmissible hearsay evidence. The VSCA observed it unlikely that either s 65(2)(c) or (d) could be invoked to render M's supposed confessional statements admissible as evidence of the truth of that which was asserted. It would be hard to argue those statements were made in circumstances that make it 'highly probable' the statements were reliable (s 65(2)(c)), or even likely that they were reliable (s 65(2)(d)): at [218].

However, s 65(8) relevantly provides:

> *(8) The hearsay rule does not apply to—*
> *(a) evidence of a previous representation adduced by an accused if the evidence is given by a person who saw, heard or otherwise perceived the representation being made …*

It seems clear s65(8) was intended to enable evidence to be led of third party confessions provided the person giving that evidence saw or heard the confessional statement being made. Section 67 provides a mechanism whereby reasonable notice must be given of an intention to rely upon s 65(8). Of course, even if such evidence is led, the judge may be required to give an unreliability direction [in accordance with s 32 of the *Jury Directions Act* (Victoria)]. That direction will identify factors that render the evidence potentially unreliable, the need for caution and weight: at [220].

The effect of s 65 (8) is that first–hand hearsay, whether in oral or documentary form, is not excluded by the hearsay rule when such evidence is adduced by the defendant in a criminal proceeding, provided that the person who made the previous representation is not available to give evidence: at [222].

[The fresh evidence was not ultimately permitted].

Note: These observations correspond with S Odgers, *Uniform Evidence Law* (14th ed) at p.440 [EA.65.300] "a previous representation adduced by a defendant" (s 65(8)).

Doli incapax presumption not rebutted – ss 97, 101 tendency evidence - multiple complainants

BC v R [2019] NSWCCA 111**:** The appellant, aged 11-13 at time of offences, was convicted of child sexual assault offences against four complainants. The CCA (1) quashed three counts in relation to

complainant K on the Crown's failure to rebut doli incapax; (2) held each complainants' evidence was properly admitted as tendency evidence.

Failure to rebut doli incapax presumption

To rebut the *doli incapax* presumption, the Crown must prove the applicant understood his acts were "seriously or gravely wrong", not merely naughty or mischievous: at [49]; *RP* (2016) 259 CLR 641. In *RP*, the High Court said (at [9]) that the need to prove knowledge of the moral wrongfulness of the conduct "directs attention to the child's education and the environment in which the child has been raised": at [44].

However, the Crown did not adduce any such evidence concerning the applicant's maturity or character to prove knowledge of moral wrongfulness. The Crown case was that it was open for the jury to draw the inference the applicant had knowledge of wrongfulness of his acts "from the circumstances of the acts" (citing *RP* at [41] per Gageler J): at [44]-[45], [51]. Those circumstances were that:

- the complainant K was only 5 or 6 years old;
- the applicant said to K, "Quickly stop" when he heard an adult approaching;
- the applicant then said "… you can't tell anyone or [you'll] get in trouble": at [44]-[45].

These circumstances were insufficient to rebut *doli incapax*. Without evidence of contemporaneous maturity or intelligence (though such evidence is not always necessary), the applicant's age relative to K's carries little weight in assessing his understanding. The statements to K were equivocal and equally consistent with understanding conduct was merely naughty or mischievous, not that he knew his conduct was seriously or gravely wrong: at [50]-[54].

ss 97, 101 - Tendency evidence correctly admitted

In a multiple complainant case, for evidence of one complainant to be significantly probative of offending against the other, there must ordinarily be some feature which links the two: at [72]; *Bauer* (2018) 92 ALJR 846 at [58]; *McPhillamy* (2018) 92 ALJR 1045 at [31].

The applicant is incorrect to argue the tendency evidence lacked significant probative value because of "significant differences between the alleged offending for various counts." When *considered together*, all the tendency evidence provided strong support to show the appellant's tendency to engage opportunistically in sexual activity with underage girls despite a high risk of detection (citing *Hughes* (2017) 92 ALJR 52 at [62]): at [75]-[76].

McPhillamy is distinguishable from this case. There is no time gap, there were regular assaults over 16 years following the same pattern, each incident shared common features of obtaining the child's cooperation and their very young age: at [79]-[82]. The evidence was significantly probative of the applicant having assaulted the four complainants: at [82], [97]; s 97(1) *Evidence Act.*

Prejudicial effect was substantially outweighed by high probative value (s 101(2)): at [96]. The trial judge guarded against disproportionate weight being given to the evidence, and prevented prejudicial effect, by addressing each count individually and then asking whether the evidence enabled the jury to be satisfied the applicant had the relevant tendency: at [91]; [96]; *Hughes*.

ss 117, 119, 125 Evidence Act – client legal privilege – DPP a "client" - loss of privilege due to fraud or abuse of power

DPP v Stanizzo [2019] NSWCA 12: The respondent brought an action for malicious prosecution. The respondent alleged the victims and witness had made false allegations against him. He sought access to statements by victims and a witness taken by a DPP solicitor and Crown Prosecutor, and conference notes. The judge rejected a claim of client legal privilege by the Director of Public Prosecutions, finding privilege was lost because the documents were prepared in furtherance of a fraud or offence (s 125(1)(a)), or deliberate abuse of power (s 125(1)(b)) (s 125 'Loss of client legal privilege: misconduct'). The CCA allowed the DPP's appeal.

ss 117, 119:

The CCA affirmed the Director is a "client" within s 117. The DPP solicitor and Crown Prosecutor were persons providing legal services to the Director as client. The Director was entitled to object to the

production of the conference notes on the ground of "client legal privilege": at [25]-[26]; s 119; *R(Cth) v Petroulias (No 22)* [2007] NSWSC 692; *Hamilton v State of NSW* [2016] NSWSC 1213.

The conference notes of communications between the victims and the lawyers acting on the Director's behalf were "privileged documents": at [27]; *Sugden v Sugden* (2007) 70 NSWLR 301.

s 125:

To enliven s 125, an allegation must be in clear and definite terms, and there must be some prima facie evidence that it has some foundation in fact: [30]-[33]; *Commissioner of AFP v Propend Finance* (1997) 188 CLR 501.

Section 125(a) relates to "*a communication made … by a client or lawyer*". The notes were communications by the victims and witness, not the Director or the lawyers. Further, it would not be sufficient that the Director or his lawyers had reasonable grounds for believing the victims and witness lied to maintain a prosecution. Rather, it was necessary to demonstrate reasonable grounds for finding the Director or his lawyers were party to the fraud being aware the evidence was false: at [43].

Section 125(b) required finding the documents were prepared in furtherance of a deliberate abuse of power and the lawyers or the Director knew or ought reasonably to have known the communications were false: at [46].

There was no such evidence of fraud or abuse of power: at [37]-[46]. There was no evidence justifying finding the victims and witness "falsely and maliciously induced the prosecution of [Mr Stanizzo] by making false and malicious allegations to the police": at [40].

The evidence was insufficient to support a finding under ss 125(1)(a)-(b): at [33], [40]-[41].

s 137 Evidence Act – dangerous driving cause death - expert evidence concerning drug use

Cvetjovski (Cvetkovski) [2019] NSWCCA 100: The appellant was convicted of dangerous driving cause death (s 52A(1)(c) *Crimes Act)*. Blood testing showed presence of methylamphetamine. The CCA held the trial judge did not err in not excluding under s 137 Crown expert evidence from pharmacologist Dr Perl regarding the likely impact of the drugs on the appellant at the time of the collision.

- Section 137 may require the exclusion of otherwise relevant evidence. Relevant evidence can rationally affect the assessment of the probability of the existence of a fact in issue to different degrees: *IMM* at [45].
- Section 137 requires the "probative value" to be weighed against the danger of unfair prejudice. *This again requires that the evidence be taken at its highest in the effect it could achieve on the assessment of the probability of the existence of the facts in issue: IMM* (2016) 257 CLR 300 at [47]-[49].
- In assessing probative value, it is not for the trial judge to say what probative value a jury should give to evidence but only what probative value the jury acting rationally and properly directed could give. Unless evidence is so lacking in credibility or reliability that it would not be open to a jury acting rationally and properly directed to accept it, the probative value must be assessed at its highest: *Bauer* (2018) 92 ALJR 846 at [95].

Dr Perl's evidence was highly relevant to critical facts in issue: whether the appellant had been inattentive and in control, crucial to the ultimate conclusion of whether he had engaged in dangerous driving: at [35].

The alleged prejudicial effect was the evidence invited the jury to reason that, because the appellant used drugs, it was more likely he drove in an irresponsible or dangerous manner. This was addressed by directions that the evidence could not be used to say the accused is a person of bad character because he took a drug. No complaint was made at trial or appeal about that direction: at [38]-[40].

The evidence had significant probative value and with clear repeated directions there was no danger of misuse. The evidence was relied on as a piece of circumstantial evidence to explain the cause of the collision: at [44].

s 137 Evidence Act - drawings by complainant of penis showing "abnormal skin flap" – photographs of penis properly excluded

Denton [2019] NSWCCA 81: The respondent was on trial for child sexual assault. The evidence was that he showed the complainant the skin at the tip of his penis, saying it was "abnormal." Drawings by the complainant of the respondent's penis with a label "abnormal skin flap" were admitted as Exhibits. The Crown sought to tender police photographs of the respondent's penis for the jury to compare. There was no expert opinion on whether there was anything abnormal or distinctive about the penis. The trial judge ruled the photographs inadmissible.

The CCA dismissed the Crown appeal (s 5F *Criminal Appeal Act*). The probative value of the photographs was outweighed by the danger of unfair prejudice (s 137): at [5], [9], [34]. There was a possibility the jury would make the comparison on the false assumption the photographs depicted a penis that was other than normal. There was no evidence supporting that assumption: at [32].

This is different to a witness giving a house sketch plan and the admissibility of a police photograph of the house. That involves comparison of specific known criteria such as room or furniture location. Similarly, the complainant gave evidence the respondent had a tattoo on his buttock and a photograph of the tattoo was tendered. This involved a comparison of clearly identifiable features of the object or thing depicted in the photograph: at [29].

s 138 - police interview excluded - suspect seeks to exercise right to silence; declines to answer questions - police persistent questioning

Taleb [2019] NSWSC 241: Hamill J excluded under s 138 the accused's electronically recorded police interview (containing admissions) where police questioning was impermissibly persistent after the suspect said he wished to remain silent from the outset and repeated this on six occasions. It is true he gave answers or said "no comment" to some questions, and asked why police were charging him and what evidence they had. However, until he spoke with his solicitor three hours later, the officers did not appear to be prepared to stop questioning when he said he wished to remain silent. Taking all matters under s 138(3) into account, the right against self-incrimination and desirability that such interviews be terminated once a suspect expresses clear desire not to answer questions, Hamill J ruled the evidence was improperly obtained: at [128]-[133]; *FE* [2013] NSWSC 1692; *R v Ireland* (1970) 126 CLR 321.

2. APPEALS

Application to set aside or vary orders of CCA

El Ali v R (No 2) [2019] NSWCCA 289**:** The applicant made an application to vary or set aside prior orders of the Court made in *El Ali* [2019] NSWCCA 207, on the basis the Court had failed to address grounds 2 and 5 in the notice of appeal.

As a preliminary matter, the CCA held it had jurisdiction to reconsider the orders notwithstanding that they had been entered. The CCA had two sources of power to deal with this application: (i) *r 50C Criminal Appeal Rules*; and (ii) s 12 *Criminal Appeal Act*: at [12]-[17]. The CCA held it was appropriate to grant leave to reconsider the matter because it could not be clearly stated from the Court's published reasons whether grounds 2 and 5 had been adequately addressed: at [53]. However, on consideration, the CCA declined to vary its orders and dismissed the application: at [54]-[55].

Defence of mental illness rejected by judge alone – appeal allowed – s 7(4) Criminal Appeal Act

Carter [2019] NSWCCA 11: (Wound with intent to murder) The CCA allowed an appeal pursuant to s 7(4) *Criminal Appeal Act* against conviction by a judge alone where the judge had rejected a defence of mental illness.

At trial it had been the joint position of the parties, based on unanimous expert opinion, that verdicts of not guilty on the grounds of mental illness should be returned (s 38 *Mental Health (Forensic Provisions) Act* 1990).

The appellant submitted s 7(4) permits the Court to determine for itself whether the appellant was mentally ill. Section 7(4) provides:

> "*If, on any appeal, it appears to the court that, although the appellant committed the act… charged …, the appellant was mentally ill, so as not to be responsible, according to law … the court may quash the conviction and … order that the appellant be detained in strict custody.*"

The CCA held the appellant was mentally ill so as not to be responsible according to law. The CCA quashed the convictions, entering special verdicts of not guilty on the ground of mental illness.

- The sole condition of the exercise of the power in s 7(4) is that it appears to the Court that the accused was mentally ill. The power is used sparingly: at [10]–[14]; [268]–[279]; *Jenkins* (1963) 64 SR(NSW) 20; *Derbin* [2000] NSWCCA 361; *Da-Pra* [2014] NSWCCA 211.
- Section 7(4) confers power on the Court to examine and to act upon its view of the evidence: at [13], [27], [269], [278]. That process of determination does not require identification of error in the verdict, in the sense of it being unreasonable or unsupportable: at [272]; *Jenkins*; cf s.6(1) *Criminal Appeal Act*.
- Even if the verdict is not unreasonable, it is open to the Court to exercise the special power conferred by s 7(4): at [278]; *Da-Pra*.

Whether appropriate order for new trial - verdicts of acquittal - s 8(1) Criminal Appeal Act

Note: See also below 'High Court Cases' - *The Queen v A2, Magennis & Vaziri* [2019] HCA 35 ('A new trial?')

Holt [2019] NSWCCA 50: The applicant was convicted by jury of two counts of aggravated indecent assault (counts 4 and 5) and found not guilty of aggravated sexual assault. The applicant's two co-accused were found not guilty of a number of counts of aggravated sexual assault.

The CCA held the applicant was entitled to a retrial on counts 4 and 5 and entered verdicts of acquittal. The principles to be applied in determining whether a new trial be ordered under s 8(1) *Criminal Appeal Act* are set out in *Gilham* [2012] NSWCCA 131 at [648]ff: see reproduced at [84].

A number of those principles favour a verdict of acquittal in this case (see at [85]-[88]):

- The seriousness of the conduct in Count 5 is not particularly high.
- The Crown case is not strong, particularly when regard is had to the six verdicts of acquittal.
- Over six years have passed since the events. There is a considerable risk a new trial would give the prosecution an opportunity to supplement or "patch up" a defective case.
- It is very much in the applicant's interests not to be put to the expense and worry of a further trial. Almost two-thirds of his good behaviour bond has been served. The expense and length of a further trial is not justified when regard is had to the events of the offence.
- There are real practical difficulties with a re-trial. It would be difficult, if not impossible, to adduce evidence only of Count 5 without traversing the verdicts of acquittal, particularly where the complainant's evidence was the events occurred without consent. The jury verdicts mean the sexual intercourse episodes cannot be so described, nor evidence be given to that effect. There has to be a major change in the Crown case. There would have to be evidence of the allegations of the acquitted counts giving rise to unfairness to the applicant. If not led, this would still give rise to unfairness as Count 5 cannot be looked at in isolation.

See also ***Castagna; Agius*** [2019] NSWCCA 114

CCA jurisdiction to grant application to remove person from Child Protection Register

CJE26 [2019] NSWCCA 139: The CCA does not have jurisdiction to grant an application to remove a person from the Child Protection Register in respect of a Class 1 or Class 2 offence under the *Child Protection Offenders Registration Act* 2000. Imposition of reporting obligations are neither a "conviction" or "sentence" within the Court's jurisdiction as defined by s 5 *Criminal Appeal Act* 1912: at [9].

However, it was noted s 2 *Criminal Appeal Act* extends "sentence" to include an order made by a trial court under s 3D *Child Protection Offenders Registration Act*. Section 3D confers a separate power on a court to order that a person guilty of an offence that is not a class 1 or class 2 offence comply with reporting obligations: at [10]. It is arguable the CCA would have power to grant an application in such a case.

3. PROCEDURE

Prosecutor cross-examined accused about parts of evidence not put to complainant - no miscarriage - Browne v Dunn (1893) 6 R 67; R v Birks (1990) 19 NSWLR 677

Hofer [2019] NSWCCA 244: (Appeal against conviction for sexual assault). The applicant submitted the Prosecutor impermissibly suggested the applicant was lying about certain matters because his counsel had not put those matters to the complainant in cross-examination: at [34]; *Browne v Dunn* (1893) 6 R 67; *Birks* (1990) 19 NSWLR 67.

Dismissing the appeal, (Fagan J; Fullerton J agreeing with additional comments; Macfarlan JA dissenting) held there was no miscarriage of justice caused by the Crown's cross-examination:

- In criminal cases, breach of the rule in *Browne v Dunne* may be used to attack an accused's evidence only rarely and may need to be applied with "some care": [120]-[125]; *Llewellyn* [2011] NSWCCA 66; *MWJ v The Queen (*2005) ALJR 329 at [18]; [41].
- If a jury is to draw an inference adverse to the accused for such a breach, three premises must be demonstrated: (1) The matter was not put to the witness; (2) Defence counsel had a duty to put in cross-examination all relevant matters of which the accused had provided instructions; and (3) Counsel fulfilled this duty: at [123].
- The jury is then invited to infer that because the matter was not put, counsel must have had no instructions on it; therefore the accused must have fabricated his evidence on the matter after questioning of the witness concluded (a "*Birks* comment"): [123].

In this case, the questioning was not enough to convey to the jury an implication of recent invention. It did not go beyond the first premise of a *Birks* comment and conveyed no more than that the Crown was critical of counsel's lack of thoroughness in questioning: at [130]-[132].

Birks comments by the Crown, in general. A Prosecutor should only pursue such cross-examination where there is a proper basis: at [113]; [203]. This ground has been gone over so often at intermediate appellate level that defence counsel should be well aware to take action to avert unfair prejudice: at [204].

- If it is not accepted by the Crown that fault lay with a defence legal representative, the accused may call his/her solicitor to establish instructions: *Birks* at 681E.
- If the accused does not waive privilege to reveal instructions, the Crown will not have a foundation for asserting recent invention: *Llewellyn* at [138(c)].
- If questioning clearly implies recent invention, defence counsel would need to seek a direction from the judge that failure to put the matter may be from reasons other than fabrication and the jury should not draw the inference: at [204].
- The prosecutor should apply for leave to reopen the Crown case for the limited purpose of recalling the witness so counsel can put the matter. If counsel declines, the Crown can invite the witness to comment upon the matter. Leave to ask a leading question may need to be sought: at [113] per Fullerton J; at [205] per Fagan J; *MWJ v The Queen* at [40].

Crown in closing address referred to evidence inadmissible against appellants - no substantial miscarriage of justice

Charbaji [2019] NSWCCA 28: AC and HC were convicted of murder at a joint trial with J who was charged with accessory after the fact. The Crown, in closing address, suggested that evidence admitted

only against J could be used in considering the guilt of the appellants, AC and HC. The judge refused to discharge the jury and directed the jury not to take that evidence into account against the appellants.

The CCA dismissed the appeal.

The Crown impermissibly referred to evidence admissible only against J. Being a case where by reason of irregularity or otherwise, an accused has not received a trial according to law or has not received a fair trial, the question arises as to whether those references by the Crown constituted a "*substantial miscarriage of justice*": at [99]-[100]: s 6(1) *Criminal Appeal Act*; *Filippou v The Queen* (2015) 256 CLR 47.

In determining whether there has been a substantial miscarriage of justice, the appellate court is not seeking to predict the outcome of a hypothetical error-free trial, but is required to decide whether, notwithstanding error, guilt was proven to the criminal standard on admissible evidence: [104]-[108]; *Kalbasi v WA* (2018) 352 ALR 1 at [12]-[13].

The Court must consider the impermissible statements, their importance in the trial having regard to the other evidence, the corrective direction by the judge and other directions: at [110].

In the context of the trial as a whole, the Crown's impermissible references did not permeate the entire trial so as to require the jury be discharged. The Court being satisfied guilt was proved to the criminal standard, there was no substantial miscarriage of justice: at [125]-[126]; *Kalbasi* at [13].

Prosecution duty of disclosure - duty to make further inquiries - complainant's overseas mental health records - test for temporary stay

Marwan [2019] NSWCCA 161: This case concerned whether the prosecution had a duty to make further inquiries. The applicant was charged with sexual intercourse without consent. The trial judge refused the applicant's application for a temporary stay for the purpose of asking the Crown to make inquiries about the complainant's UK mental health records.

The CCA (Leeming JA; RA Hulme J agreeing; Adamson J agreeing in a separate judgment) dismissed the applicant's appeal (s 5F *Criminal Appeal Act*).

In this case there is no prosecution duty of disclosure extending to the Crown making further inquiries in relation to the complainant's overseas mental health records: [17], [76]-[79]. However, it was observed there may be a case for such an obligation on the prosecution to arise: at [68]-[70], discussed below.

Test for temporary stay: a tangible risk the trial would be unfair

It is sufficient the applicant establish "*a tangible risk that the trial would be unfair*" if it proceeded without disclosure of the UK records: at [24]-[26]; *Gould v DPP (Cth)* [2018] NSWCCA 109; 359 ALR 142.

Legal nature of the duty of disclosure: duty to make further inquiries

An accused is entitled to a fair trial, and can insist a trial be stayed, permanently or temporarily, if it can be established that will not occur, absent adherence by the prosecution to a duty of disclosure: at [29]. The applicant has the onus of establishing this extends to a duty to make further inquiries in the present case, and that only if that occurs will risk of unfairness be avoided: at [38], [64].

The procedural and factual difficulties in obtaining overseas mental health records was discussed: at [40]ff; [54]ff.

No duty to make further inquiry in present case; duty may arguably arise

Leeming JA noted that in *Eastman v DPP (No 13)* [2016] ACTCA 65 at [343] the ACT Court of Appeal concluded (at [68]):

> "An aspect of [the prosecution duty of disclosure] requires the prosecution to inquire into information which may affect the credibility of potential Crown witnesses, *if there is sound reason to suspect that material exists which might impinge upon credibility or reliability*". ….. The obligation to investigate only arises 'if the information is sufficiently solid to cause reasonable persons conducting the prosecution to think that cross-examination based upon it might elicit answers materially affecting the credibility of the witness" (*The Queen v K* (1991) 161 LSJS 135 at 140).

Leeming JA observed he could accept that if the mental health of a complainant or key Crown witness were of central importance, and it could be said a reasonable prosecuting authority would make inquiries about that, then there could be a foundation for the obligation to disclose to extend to making such inquiries, lest the trial be unfair: at [70].

However in the present case, the evidence does not give rise to a "sound reason" (see *Eastman* above) to suspect the complainant's mental health history impinged upon credibility or reliability. Information of her depression/anxiety and not taking medication was disclosed, which the defence could use at trial: at [70], [73]-[74].

Pleas of not guilty not personally entered by accused

Amagwula [2019] NSWCCA 156: The lack of an oral plea by the accused himself did not render the subsequent trial a nullity. The trial judge had entered pleas of "Not guilty" on behalf of the unrepresented accused on arraignment before the jury panel. The CCA found the accused intended to plead "Not guilty" to all counts, and had entered "Not guilty" pleas at an earlier arraignment before another judge. There was no prejudice: at [40]-[41]. Although it remains common practice to require the accused to plead personally to each count, under the general law, failure did not vitiate the trial, so long as the accused knew the contents of the indictment and intended to plead not guilty. The plea by the accused is no longer a necessary safeguard of justice: at [40]; *R v Williams* [1976] 1 QB 373; *Janceski* (2005) 64 NSWLR 10; ss 130(3), 154 *Criminal Procedure Act*.

Incompetence of counsel

Roach [2019] NSWCCA 160 and ***Moustafa*** [2019] NSWCCA 89: Incompetence of counsel was raised in these cases. The CCA dismissed each appeal, applying the approach as outlined in *Alkhair* [2016] NSWCCA 4; 255 A Crim R 419 at [31].

4. JURY

Jury – failure to give Black direction

Joyce (a pseudonym) [2019] NSWCCA 187: The CCA overturned a conviction on the ground the jury should have been given a *Black* direction (That the judge has power to discharge the jury from giving a verdict where the judge is satisfied there is no likelihood of genuine agreement after further deliberation: *Black* (1993) 179 CLR 44).

The jury retired at 11am. Jury notes at 2pm and 4:30pm indicated deadlock. One juror had earlier told the court s/he had important work commitments the next day. At 4:44pm the judge asked the jury to continue deliberating, noting he was mindful of that juror's commitments. One hour later guilty verdicts were returned.

Both notes were well within an eight hour period meaning a majority verdict could not have been taken and the judge was not obliged to inquire as to the likelihood that it will reach a majority verdict: at [65]; *RJS* (2007) 173 A Crim R 100; *Hunt* (2011) 81 NSWLR 181; s 56(2) *Jury Act* 1977.

However, the jury should have been given the benefit of the *Black* direction, the advice to listen to and engage with one another, and that the power to discharge existed. A direction ought to have been given on the first jury note, and certainly on the second. Failure meant the jury were in a state of uncertainty and created pressure to reach verdict: at [44]-[48], [67].

As to the juror working the next day, the judge failed to make clear to that juror s/he would be discharged at the end of the day, whether or not verdict had been reached. The way the juror's notes were answered conveyed no information and created pressure on that juror and the whole jury: at [77].

Jury – improper conduct – Sheriff ordered to conduct investigation - s 73A Jury Act 1997

Agelakis [2019] NSWCCA 71: This is another recent instance of the CCA ordering the Sheriff (under s 73A *Jury Act*) to investigate whether jury members may have engaged in improper conduct or whether any irregularity occurred. See also *Higgins* [2018] NSWCCA 258.

The applicant was found guilty of sexual assault. The CCA found two matters giving rise to a reasonable apprehension, or suspicion, that the jurors concerned did not discharge their task impartially: at [22]; *Lane* [2017] NSWCCA 46 at [74].

First, the day before the guilty verdict was returned, one of the jurors posted comments on Facebook critical of sexual assault. That juror was also related by marriage to a complainant who had separately alleged sexual assault by the applicant of which he was acquitted.

Second, another juror was seen socialising with a prosecution witness: at [13]-[19].

There is an unresolved question as to whether the power to request the Sheriff to conduct an inquiry falls within s 12(1)(d) *Criminal Appeal Act*. At the least, this Court in its inherent jurisdiction can order such an investigation as it did in *Higgins*: at [25]-[29]; *Petroulias v McClellan* (2013) 85 NSWLR 463; *Lodhi v A-G of NSW* (2013) 241 A Crim R 477.

Jury given unrestricted access to video of complainant's evidence-in-chief and cross-examination from first trial

Section 306B *Criminal Procedure Act* 1986 provides:

> *306B Admission of evidence of complainant or special witness in new trial proceedings*
>
> *(1) If a person is convicted of a prescribed sexual offence and, on an appeal against the conviction, a new trial is ordered, the prosecutor may tender as evidence in the new trial proceedings a record of the original evidence of the complainant or a special witness.*

In ***AB (a pseudonym)*** [2019] NSWCCA 82 the judge erred in giving the jury unsupervised and unrestricted access to a DVD video, marked as an Exhibit, of the complainant's evidence-in-chief and cross-examination from the first trial pursuant to s 306B(1).

This constituted an irregularity, however, the appeal was dismissed on the basis no miscarriage of justice resulted.

The DVD should not have been marked as an exhibit. 'Tender as evidence' in s 306B(1) refers to the 'admission' or receipt in a subsequent trial, and does not prescribe the course to be adopted upon admission of such evidence: at [36], [40]-[42]; *CF* [2017] NSWCCA 318 at [65].

It was for one of the parties to persuade the judge of good reason why the DVD be available to the jury: at [42].

A judge should approach the issue on the basis it will "seldom, if ever", be appropriate to allow access to a recording in the jury room. The judge erred in basing her decision on that, absent good reason to the contrary, the DVD should be provided: at [43]; *CF*.

However, there was no miscarriage in this case. There was no risk of disproportionate weight being given to the evidence in the Crown case: the applicant did not call evidence; both the complainant's evidence-in-chief and cross-examination were recorded; the prime focus at trial was credibility of the complainant: at [44]-[50].

"Repetition warning" unnecessary: A "repetition warning" (that the jury should not give disproportionate weight to the complainant's evidence because it was repeated a second time - (*NZ* (2005) 63 NSWLR 628 at [210])) was not necessary. There was no significant risk the jury would give the complainant's recorded evidence disproportionate weight: at [53].

5. PARTICULAR OFFENCES

(i) Firearms

Possess imitation firearm - "identified as a children's toy" - ss 4D, 7(1) Firearms Act 1996

Darestani [2019] NSWCCA 248: The applicant was convicted of two counts of possess imitation pistol (s 7(1) *Firearms Act* 1996 - counts 1-2); and two counts of intimidate (s 13(1) *Crimes (Domestic and Personal Violence) Act 2007* - counts 3-4).

The applicant pointed an imitation pistol at two people (counts 3-4). Police later found two plastic toy pistols in his bags (counts 1-2) and he was arrested. The Crown case at trial was that the time of possession for the purpose of counts 1-2 was when the applicant was arrested: at [79]-[80].

Section 4D(3) *Firearms Act* defines an imitation firearm to mean:

> *(3) …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."*

Section 4D(4) states:

> (*4) However, an imitation firearm does not include any such object that is produced and identified as a children's toy.*

The applicant appealed against conviction for counts 1-2, submitting the Crown failed to disprove the items were "produced and identified" as children's toys within s 4D(4). The CCA quashed the convictions for counts 1-2 and entered verdicts of acquittal.

Construction and application of s 4D(4)

- The exception in s 4D(4) concerns the circumstances in which the object is being used. The verb "*identified*" means how the identity of a thing has been ascertained or asserted. Whether an object has been identified as a children's toy raises for consideration: matters intrinsic to the object, use and intention of the person using it, if the object is being used at the time it is asserted to be in possession: at [60]-[61]; *Commr of Police v Howard Silvers & Sons P/L* [2017] NSWSC 981.
- An object that by matters intrinsic would readily be identified as a children's toy could cease to be a toy because it has been asserted not to be a toy. For example, pressing a toy rifle into the back of someone's head saying, "this is a hold-up, hand over the money or I will shoot". The use and intention which accompanied that use would identify the plastic rifle otherwise than as a toy: at [62].
- Identification of the object as a toy is confined to the time of possession and past and future use of the object is irrelevant: at [66]–[67].

Counts 1-2 quashed

There was nothing in the applicant's use of the plastic pistols at time of possession which asserted them to be other than a toy: at [90].

The onus was on the Crown to prove that at the time the plastic pistols were found in possession, these were imitation pistols. The Crown did not exclude as a reasonable possibility that each plastic pistol was produced and identified as a children's toy: at [82], [91]-[92].

The trial judge's directions did not make the distinction between the possession counts and the intimidation counts clear to the jury: at [80], [92].

(ii) Murder

Accessory before the fact to murder - "assistance and encouragement" via words

Blundell [2019] NSWCCA 3: The appellant was convicted of accessory before the fact to murder.

The Crown case was that F (the principal offender) bashed the deceased. The appellant was not present but through words in text and Facebook messages "assisted, encouraged or procured" F to inflict grievous bodily harm.

The appellant's case was that F acted spontaneously and he could not have foreseen F would take such action.

N Adams J (Payne JA and Johnson J agreeing) quashed the conviction and ordered a new trial. The trial judge's directions were deficient.

N Adams J noted the case concerned proper directions when the Crown relies upon principles of accessorial liability but disavows any reliance upon joint or extended joint criminal enterprise: at [6].

Senior counsel for the appellant put grounds of appeal as follows:

Ground 1(a). Error in directing jury that "it is not necessary, in cases where the accused 'encouraged' the primary offender, for the Crown to prove that he was actually encouraged by the accused's words or actions".

Ground 1(a) was rejected. On the basis of the authorities, N Adams J did not accept that, in cases where a person is charged with being an accessory before the fact where they were not present at the scene and the alleged encouragement is by words alone, an additional element must be proved by the prosecution beyond reasonable doubt, namely, that the words *in fact* encouraged the principal offender. It is difficult to see how such a subjective concept could be established beyond reasonable doubt in any event: at [182].

Ground 1(b): Error in failing to give proper directions on causation

Ground 1(b) upheld. The directions were inadequate in explaining there had to be *intentional* encouragement of F, and that the appellant's words had to be *capable* of encouraging F to inflict grievous bodily harm: at [176], [184]-[186]; *Phan* (2001) 53 NSWLR 480 at [69], [78]).

Ground 1(c): Error in directing jury that assisting and encouraging is a continuous act that persists until the substantive offence is committed.

Ground 1(c) upheld. The judge's direction was based on the authority in *R v Robert Millar P*/L [1970] 2 QB 54 but that case has limited application and does not apply here. The direction caused unfairness as it undermined the defence case that F acted spontaneously: at [194], [198].

Ground 1(d): Error in failing to give proper directions as to knowledge and directing that recklessness would not suffice.

Ground 1(d) upheld. It was not sufficient the jury was only told they needed to be satisfied the appellant knew "all the essential facts and circumstances necessary to show that [F] intended to assault and inflict upon the victim grievous bodily harm". The jury ought to have been fully directed, that the Crown needed to establish the appellant *knew* F was *going to* intentionally inflict grievous bodily harm: at [209]; *Giorgianni* (1985) 156 CLR 473 at 50 (as applied in *Phan*).

The Crown evidence left open whether the appellant was simply reckless as to what F might do. Recklessness is an insufficient state of knowledge to implicate an accessory before the fact: at [213].

Ground 2: Error in directions applying concepts from joint criminal enterprise

Ground 2 upheld. This case concerned accessory before the fact to murder with no alternate case relying on joint or extended joint criminal enterprise by the Crown: at [76]. Generally, principles of extended joint criminal enterprise cast a wider net than principles of accessorial liability. Using concepts of joint criminal enterprise such as "enterprise", "design" and assault "with a view" to inflicting grievous bodily harm were apt to confuse: at [233]–[238].

Murder - whether accused's level of intoxication precluded requisite intent is a matter for jury

Siale [2019] NSWCCA 80: The CCA dismissed the applicant's murder conviction appeal. The applicant submitted it was not open to the jury to be satisfied beyond reasonable doubt that, due to his level of intoxication, he formed the requisite intent to inflict GBH.

The CCA said whether an accused's level of intoxication precluded him having the necessary intent is a matter for the jury to determine to be inferred from all of the surrounding circumstances: at [55]; *Blackwell* (2011) 81 NSWLR 119 at [105]. It was for the jury to determine, taking into account the evidence including expert evidence of the significant cognitive impairment due to intoxication. Neither expert stated the applicant would not have the capacity of forming the intention to inflict GBH. Even if the experts had stated a view, it was a matter for the jury on the evidence including expert opinions: at [60]. The jury was entitled to find the applicant formed the requisite intent based on evidence from the deceased's parents that the applicant knew where he was, spoke coherently, his attack was demonstrative of an intention to inflict GBH, and he walked normally from the scene: at [61]-[63].

(ii) Sexual offences

Aggravated sexual assault - basis of case not identified whether joint criminal enterprise or accessorial liability - erroneous direction recklessness sufficient for accessory at the fact

Decision Restricted [2019] NSWCCA 226: The CCA allowed the applicant's conviction appeal for aggravated sexual assault without consent, in company (s 61J *Crimes Act)*.

The basis of the Crown case was unclear as to whether the applicant was part of a joint criminal enterprise or a person with derivative or accessorial liability as an accessory at the fact. These are each separate and distinct bases of liability in important respects: at [51].

As explained in ***Blundell*** [2019] NSWCCA 3 at [233]-[238] (above), principles of extended joint criminal enterprise cast a wider net than principles of accessorial liability. The Crown conceded it opened its case to the jury on the basis of an alleged joint criminal enterprise, and never told the jury the case had been abandoned or modified. Yet it is unclear whether the jury was instructed the applicant was alleged to be guilty as an accessory at the fact or as part of a joint criminal enterprise: at [52]-[54].

The critical problem was the jury direction that recklessness as to consent was sufficient for the applicant to be found guilty. But assuming the jury was being instructed that this was an accessory at the fact case, the applicant could not be convicted unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Neither negligence nor recklessness was sufficient: *Giorgianni v The Queen* (1985) 156 CLR 473: at [58]-[61].

A miscarriage of justice was occasioned by the erroneous directions: at [73]–[74].

Aggravated indecent assault s 61M Crimes Act (rep) – mental element as to consent

Holt [2019] NSWCCA 50: The CCA entered verdicts of acquittal for convictions of Aggravated indecent assault under s 61M *Crimes Act* (now repealed).

The accused had also been charged with offences under s 61J and the judge erred in giving a global direction in accordance with then s 61HA(3)(c) which applied to 61J (and also ss 61I, 61JA). The trial judge erred in directing the jury the Crown had to prove there were no 'reasonable grounds' for believing the complainant consented to sexual activity: at [55], [63]-[64].

For s 61M offences, the common law test is that the Crown must prove the accused knew the complainant was not consenting or was reckless as to that fact: at [65]–[69]; *Bonora* (1994) 35 NSWLR 74 at 75, 80; *Kuckailis* [2001] NSWCCA 333 at [18]–[19]; *Greenhalgh* [2017] NSWCCA 94 at [5].

(iii) Drug offences

Import drugs* - ss 307.1, 307.3 *Criminal Code (Cth) – fault elements

Decision Restricted [2019] NSWCCA 171: The CCA set aside the applicant's conviction for two offences of import drugs under ss 307.1(1) and 307.3(1) *Criminal Code* Cth.

The drugs were imported in containers. Sections 307.1(1), (2) provide:

> *(1) A person commits an offence if:*
> *(a) the person imports or exports a substance; and*
> *(b) the substance is a border controlled drug or border controlled plant; ……..*
> *(2) The fault element for paragraph (1)(b) is recklessness.*

Different fault elements apply to subsection (1): intention in (a), but mere recklessness in (b): at [34].

The CCA allowed the appeal. The judge's summing up and directions blurred that distinction - and suggested the applicant intended to import the containers, and the jury could find the applicant guilty if satisfied she knew or was reckless that border controlled drugs were being imported: at [60], [65].

However, as held by High Court in *Smith v The Queen* (2017) 259 CLR 29, it is not enough for the Crown to show the accused intended to import something which, as it turns out, contains an illicit drug.

The prosecution is required to establish the applicant intended to import a *substance*, and knew or was reckless as to the substance being a border controlled drug: at [33], [36].

This trial took place in 2015 before the decision in *Smith v The Queen*. It is expected that conflation between the different fault elements would no longer occur: at [58].

Directions - Failure to direct jury of need to be unanimous as to possession of particular quantity of drugs

Decision Restricted [2019] NSWCCA 6: The appellant was convicted of two counts of supply drugs (s 25(2) *DMTA*). The drugs were located in various amounts in four different places at premises. The Crown relied upon deemed supply such that each separate quantity of drugs fell within the deeming provision (s 29 *DMTA*).

The CCA held the trial judge erred by directing the jury as to proof of possession in these terms:

> "… The question really asks you 'Are you satisfied beyond reasonable doubt that [A] was in possession, as I have defined it, of at least one of those individual finds of drugs?' …..
>
> In this regard, it is possible some of you might be so satisfied in relation to all of them. Some of you might not be satisfied in relation to all of them, but one or more of them. Even then, you might not all agree on the same one or more. That would not matter."

The erroneous direction left it open to the jury to convict, even if not unanimously satisfied that the appellant was in possession of one particular package, providing that each juror was satisfied he was in possession of at least one package albeit that the packages were different: at [46]; *The Queen v Klamo* (2008) 18 VR 644; *Lane* (2018) 92 ALJR 689.

There are two distinct types of case dealing with jury unanimity (*Klamo* at [75] citing *The Queen v Walsh* [2002] VSCA 98; (2002) 131 A Crim R 299 at 316): at [46]

(i) Alternative legal bases of guilt are proposed by the Crown but depend substantially upon the same facts. There is no need for a direction on 'unanimity' about one or other or more of these bases, at least if they do not 'involve materially different issues or consequences'.

(ii) Where one offence is charged, but a number of discrete acts is relied upon as proof and any one of them would entitle the jury to convict. If those discrete acts go to the *proof of an essential ingredient of the crime charged*, then the jury cannot convict unless they are agreed upon that act which, in their opinion, does constitute that essential ingredient. [Emphasis added.]

The present case falls into the second type of case: at [46]. The CCA quashed the conviction and ordered a new trial.

(iv) Other

Tendency to pervert the course of justice not an element of the offence - s 319 Crimes Act

Johnston [2019] NSWCCA 108: The CCA dismissed the applicant's appeal against conviction for pervert the court of justice under s 319 *Crimes Act*. The applicant, an off-duty police sergeant, prevented a probationary constable stationed at the same police station from administering a random breath test on her. The applicant told the constable it would be a conflict of interest for him to do so.

The CCA rejected the applicant's submission that the judge erred in not directing the jury that the act, besides being *intended* to pervert the course of justice, must also have a *tendency* to do so. This was the position at common law.

As a matter of statutory construction and based on authorities (see at [74]ff), it is not an element of the offence under s 319 that the act or omission in question had a *tendency* to pervert the course of justice: at [74]; [82]; *The Queen v Beckett* (2015) 256 CLR 305; *Einfeld* (2008) 71 NSWLR 31; *Karageorge* (1998) 103 A Crim R 157 considered.

As to intention, the CCA found it was open to the jury to be satisfied beyond reasonable doubt the Crown had proved the applicant had the necessary intention: at [97].

6. SUPPRESSION AND NON-PUBLICATION ORDERS

Sub-sections 8(1)(c), (e) Court Suppression and Non-publication Orders Act 2010 state:

> *"8 Grounds for making an order*
> *(1) A court may make a suppression order or non-publication order on one or more of the following grounds:*
> *……*
> *(c) the order is necessary to protect the safety of any person.*
> *…….*
> *(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice."*

Order "necessary" to protect safety - calculus of risk - s 8(1)(c)

AB (A Pseudonym) v R (No 3) [2019] NSWCCA 46; (2019) 97 NSWLR 1046: The CCA allowed the applicant's appeal against refusal for a non-publication order. An order of 20 years was necessary to protect the applicant's safety within s 8(1)(c): at [61]ff, [114].

The applicant's child sexual assault matter was misreported in the media. He and his wife received threats of physical harm including death threats, and suffered psychological trauma. The CCA held:

(i) Correct approach to meaning of "necessary" in s 8(1)(c) is calculus of risk

- The court below erroneously applied the 'probable harm' test to s 8(1)(c), which requires an applicant to prove that, in the absence of an order, it would be more probable than not that the person would suffer harm: at [56].
- The proper test for determining whether the making of an order is "*necessary* to protect the safety of any person" under s 8(1)(c) is the 'calculus of risk' approach. The court is to consider the nature, imminence and degree of likelihood of harm to the relevant person. If the prospective harm is very severe, it may be more readily concluded the order is necessary even if the risk does not rise beyond a mere possibility: at [56]-[58]; applying Basten JA in *Fairfax Digital Australia v Ibrahim* (2012) 83 NSWLR 52 at [46].
- The nature of the harm (death – from the death threats) would carry weight in the calculus of risk so that it would not be necessary the court be satisfied it was *probable* the threats would be carried out. The fact the possible harm was so serious satisfies the court under s 8(1)(c) an order was necessary: at [57].

(ii) Section 8(1)(c) includes physical and psychological safety

- The court below also failed to take into account the risks of physical and mental injury. Section 8(1)(c) is not limited to physical safety but includes psychological safety, aggravation of a pre-existing mental condition and risk of physical harm by suicide or self-harm: at [59]-[60].

There is a significant risk others might imperil the applicant and wife's physical safety and psychological well-being, and physical safety of his children, making an order necessary under s 8(1)(c): at [114].

Utility: There is utility in making the order even if identity has been revealed as it will dampen publicity. Irrespective of utility, once the court is satisfied the order is necessary it ought to be made: at [116]-[117].

Orders made after judgment published on internet - necessary to protect safety s 8(1)(c) – use of pseudonym for assistance to authorities

Brown (a pseudonym) (No 2) [2019] NSWCCA 69: The CCA made a pseudonym order and an order to redact parts of an already published judgment where the applicant had given assistance to authorities: at [42].

The judgment (the applicant's successful sentence appeal in *Brown* [2018] NSWCCA 257) was published on the internet (NSW Caselaw). No suppression or pseudonym orders had been sought at

sentence or appeal. A month later the parties (the applicant and NSW Police) advised they intended making a joint application that there be no publication of information tending to reveal the applicant's identity or his assistance to authorities. The Crown did not join or oppose the application.

Subsections 8(1)(a) to (e) require that the order sought be "necessary" to protect an identified interest. The exceptional nature of the power and the high threshold imposed by "necessity" means it is not enough that the Court finds the proposed order is convenient, reasonable or sensible. The Court must also consider whether the orders sought will be effective or lack utility: at [26]; *Rinehart v Welker* (2011) 93 NSWLR 311; *D1 v P1* [2012] NSWCA 314.

Applying the "calculus of risk" approach (***AB (A Pseudonym) (No 3)*** [2019] NSWCCA 46), it is appropriate to make the order - there being a sufficiently serious potential risk to the appellant's physical safety. The possible harm identified is so serious the Court is satisfied under s 8(1)(c) a pseudonym order is necessary: at [37]-[39].

The CCA made limited redactions identifying the applicant: at [42].

Assistance to authorities may be addressed in judgments without pseudonyms or redactions (*Greentree* [2018] NSWCCA 227). This case does not cast any doubt upon the settled procedure for dealing with cases involving assistance. Where parties wish a pseudonym be used, the issue should be raised directly with the Court so that the application can be considered on its merits and the Court's conclusion in its publication of reasons: at [34].

Delay: The CCA noted the gross delay in bringing the application. An application for suppression and/or pseudonym orders should be raised prior to or at a hearing: at [13]-[14], [34], [38]. It is incumbent upon police to communicate concerns about a person's safety to legal representatives and Crown. It is highly desirable the DPP and NSW Police establish a system to ensure this does not happen again: at [13]-[14].

Limited orders made in public interest - s 8(1)(e)

NSW v Williamson (No 2) [2019] NSWSC 936: Davies J made limited orders that there be no publication of the defendant's residence or employer's business for 12 months on the ground it was "necessary in the public interest" under s 8(1)(e).

Unwanted public and media attention which might have the effect of isolating the defendant from the small social groups within which he now moves and works would neither be in the public interest nor would assist rehabilitation, an object in s 3 *Crimes (High Risk Offenders) Act.* Rehabilitation and ability to refrain from re-offending would be jeopardised: at [31], [34]-[36], [40]-[42]; *State of NSW v Burns* [2014 NSWSC 1014; *The State of NSW v Fisk* [2009] NSWSC 778.

A limited order would be convenient, reasonable and sensible and in the public interest. The order is of such a limited scope it infringes any interest in open justice only to the smallest extent: at [43]; s 8(1)(e).

NSW Bar Council has standing to apply for variation of suppression order

JB [2019] NSWCCA 48: The CCA allowed the NSW Bar Council's application for variation to a suppression order in the conduct of disciplinary proceedings against a Crown Prosecutor. (The suppression order was in relation to a witness in a trial in which the Prosecutor appeared: see *JB (No 2)* [2016] NSWCCA 67).

Section 13(2)(e) states: *"Each of the following persons is entitled to apply for and to appear and be heard by the court on the review of an order under this section: ……*

> *(e) any other person who, in the court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should have been made or should continue to operate."*

The need for a suppression order or for particular restrictions or exceptions may vary over time. The persons referred to in s 13(2)(e) are persons who have an interest in the maintenance or continuation of the suppression order at the time the application for review is made. In this case, this includes the Bar Council and Law Society: at [25]-[32], [34], [35].

7. BAIL CASES

Bail - appeal lodged in CCA – strength of appeal – grounds of appeal - s 22 Bail Act

El Khouli [2019] NSWCCA 146: A court must not grant bail for an offence for which a conviction appeal is pending in the CCA unless special or exceptional circumstances exist: s 22(1) *Bail Act* 2013.

The applicant lodged an appeal in the CCA against conviction (and sentence). He relied on two matters going to the strength of his appeal: (i) the separate trial ground in his conviction appeal was strong, and (ii) the strength of his sentencing appeal on the ground of parity.

The CCA refused the application.

When the grounds of appeal are advanced as a factor demonstrating special or exceptional circumstances, there is a distinction between two types of cases:

> (1). Cases where the strength or merit of an appeal has been relied upon in isolation. Where the grounds of appeal are put forward as "the only or the *principal* factor" demonstrating special or exceptional circumstances, an applicant must show an appeal to be "most likely to succeed": at [22]; *Petroulias* [2010] NSWCCA 95 at [34]; *El-Hilli* [2015] NSWCCA 146 at [26].
>
> (2). Cases where the applicant relied upon that factor in combination with other factors including whether a substantial part of his/her sentence would have been served in custody by the time of the appeal. In this case, the relevant criteria in assessing the merits of the appeal are whether the grounds relied upon were reasonably arguable or that there were reasonable prospects for the appeal: at [27]-[28]; *El-Hilli* at [26].

The applicant has not demonstrated the grounds of appeal were strong, or that he is likely to succeed in either the conviction or sentence appeal. That being the only factor relied upon to demonstrate special or exceptional circumstances, the applicant fails to satisfy the threshold criteria under s 22(1) and bail must be refused: at [45].

Bail - special leave to appeal to High Court – s 22 Bail Act applies – bail granted

HT v DPP (NSW) [2019] NSWCCA 141: HT was the unsuccessful respondent to a Crown appeal in the CCA. HT was granted special leave to appeal to the High Court. (Note: HT's appeal to the High Court was ultimately successful – *HT v R* [2019] HCA 40].

The CCA granted bail holding that s 22 applied to this situation. Section 22 does not distinguish between appeals by an offender and appeals by the Crown. The applicant must therefore establish "special or exceptional circumstances": at [22].

Granting bail, Hamill J (Bathurst CJ and Bell P agreeing) noted:

(i) s 22 creates a significant hurdle

(ii) Unlike the "show cause" requirement in ss 16A and 16B, s 22 incorporates the exhaustive list of factors in s 18 to guide whether there is an unacceptable risk in releasing an offender.

(iii) "Special or exceptional circumstances" may exist from a combination of circumstances. It is not necessary to establish the appeal is almost certain to succeed.

(iv) Two considerations are whether the appeal is arguable or enjoys reasonable prospects of success and whether the sentence is likely to expire before the appeal is determined. Further, applications for special leave to appeal to the High Court are not liberally granted: at [23]-[24]; *El-Hilli & Melville.*

Factors in this case satisfying the "special or exceptional circumstances" test are:- the applicant has served the whole of the non-parole period imposed by the District Court; a significant portion of the non-parole period imposed by the CCA will have expired; it must be assumed the appeal is arguable, special leave having been granted, and enjoys some prospects of success: at [28]–[30].

Bail - Co-accused's conviction appeal successful - applicant's conviction quashed & new trial ordered - "special or exceptional circumstance" - unacceptable risk considered - bail granted

McGlone v DPP (Cth) [2019] NSWCCA 99: The CCA granted the applicant's release application where the co-accused successfully appealed his conviction in the High Court on the ground the summing up was unfair and he was denied a fair trial. The Crown concession that the applicant's convictions should be quashed and a new trial ordered qualifies as a 'special or exceptional circumstance' (s 22).

The Crown did oppose bail on the basis of unacceptable risk the applicant would fail to appear at a new trial (s 19(2)(a)). The question of 'special or exceptional circumstances' is assessed independently of 'unacceptable risk' in s 19(2), although whether there is an unacceptable risk must nevertheless be considered by reason of s 22(3). Whether the assessment of unacceptable risk will always or usually form part of a consideration as to whether there are special or exceptional circumstances, should be of no real moment, provided both matters are addressed: at [14].

In assessing unacceptable risk in any of s 19(2)(a)-(d), the Court is required to consider all matters in s 18(1) and only those matters in assessment of bail concerns in s 17: at [17]-[18]. The risk of flight is not greater now than it was when the applicant was on bail before his trial: at [20].

A. HIGH COURT CASES 2019-2020

1. ***McKell v R* [2019] HCA 5**; (2019) 93 ALJR 309. Appeal from NSW. Appeal allowed.

Directions – trial judge's summing up lacked judicial balance - comments unfair to appellant

The appellant's conviction appeal to the NSW CCA, on the ground a miscarriage of justice was caused by comments by the judge during summing up, was dismissed by majority (*McKell* [2017] NSWCCA 291).

The High Court allowed the appellant's appeal, quashed the convictions and ordered a new trial.

The judge's comments included suggesting a consignment may have contained drugs, the importation of which was the appellant's responsibility as part of "an organisation of great sophistication", when no such suggestion was made by the prosecution; and that a text message to his co-accused showed he was knowingly involved.

The statements were so lacking in balance as to be an exercise in persuading the jury of the appellant's guilt, were unfair and gave rise to a miscarriage of justice: at [4], [36], [40].

A trial judge may comment on factual issues, but is not bound to do so except to the extent the judge's other functions require it. The fundamental task of a judge is to ensure a fair trial where it is "for ... the jury alone, to decide the facts": at [1]-[2]; *RPS v The Queen* (2000) 199 CLR 620.

The issue is whether the comments were apt to create a "danger" or a substantial risk the jury might actually be persuaded of guilt by comments in favour of the prosecution case made with the authority of the judge: at [42]; *B v The Queen* (1992) 175 CLR 599 at 605-606.

The scope for comment: There is a risk that comments unnecessary for the performance of the duty to give fair and accurate instructions may occasion a miscarriage of justice. A judge should be astute to avoid that risk by refraining from comment that is not required. These points are most compelling in relation to expressions of opinion by a judge as to the determination of disputed issues of fact: at [48].

Fair and accurate instruction to a jury is always concerned with practical fairness to both sides: at [55].

2. ***Grajewski v DPP (NSW)* [2019] HCA 8**; (2019) 93 ALJR 405. Appeal from NSW. Appeal allowed.

Damage property s 195(1)(a) Crimes Act – requires alteration to physical integrity of property, even if temporarily

The appellant, a protester activist, suspended himself from a coal loader which was not damaged. The CCA held he was guilty of damaging property under s 195(1)(a) *Crimes Act*. Physical damage was not an essential element to s 195(1)(a). It was sufficient there was physical interference with the property and the coal loader was rendered temporarily inoperable (*Grajewski v DPP* [2017] NSWCCA 251)

The High Court allowed the appeal and quashed the conviction. Damage to property within the meaning of s 195(1) requires proof the act or omission has occasioned some alteration to the physical integrity of the property, even if only temporarily: at [9]. To damage a thing means to injure or harm the thing in some way that, commonly, lessens its value. Section 195(1) does not extend to any "interference" that results in the property being inoperable: at [13].

Nothing done by the applicant brought about any alteration to the physical integrity of the loader. The decision to shut down the loader was taken due to safety concerns for the applicant: at [54].

3. ***DPP Reference No 1 of 2017* [2019] HCA 9**; (2019) 93 ALJR 424. Appeal by Crown Victoria. Appeal allowed.

'Prasad direction' contrary to law

The High Court allowed the DPP's appeal from the VSCA. The question of law for determination was "whether the trial judge possesses the power to give a Prasad direction under the common law of Australia". The High Court held the 'Prasad direction' is contrary to law and should not be administered to a jury determining a criminal trial: at [58]. The Court could not "exclude the possibility" that juries are

unduly influenced by the imprimatur of the judge on the capacity of the evidence to support conviction. The exercise of the discretion to give a Prasad direction based upon the trial judge's estimate of the cogency of the evidence to support conviction is inconsistent with the division of functions between judge and jury and, when given over objection, the features of an adversarial trial: at [56]. It is for the jury as tribunal of fact to decide whether evidence establishes guilt beyond reasonable doubt: at [57].

4. ***Minogue v State of Victoria* [2019] HCA 31**; (2019) 93 ALJR 1031. Stated case from Victoria.

Specific provision in respect of plaintiff preventing making of parole order - not constitutionally invalid

The plaintiff, Craig Minogue, was sentenced to Life with NPP 28 years for murder. His NPP expired and he applied for parole on 3 October 2016. That application remains on foot.

On 1 August 2018, s 74AB *Corrections Act* 1986 (Vic) commenced. It applies specifically to the plaintiff and retrospectively. Section 74AB sets out "*conditions for making a parole order for Craig Minogue*" and states the Parole Board may make a parole order only if satisfied the plaintiff "*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*".

The High Court held that s 74AB was not constitutionally invalid: at [8], [22]; [34]; [49]. Section 74AB does not alter the plaintiff's sentence or impose additional or separate punishment; and does no more than alter conditions to be met before the plaintiff can be released on parole: at [9]; *Knight v Victoria* (2017) 261 CLR 306; *Crump v NSW* (2012) 247 CLR 1. Legislative amendments to parole that impose "strict limiting conditions upon the exercise of the executive power to release" a prisoner, may have altered a statutory consequence of the sentence but do not impeach, set aside, alter or vary the legal effect of the sentence (*Crump* at [35]):at [19].

5. ***The Queen v A2, Magennis & Vaziri* [2019] HCA 35**; (2019) 93 ALJR 1106. Appeal from NSW. Crown appeal allowed.

Female genital mutilation (FGM) – Whether open to CCA to quash conviction and decline to make further order – new trial?

FGM

A person who *"excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person*" commits an offence of FGM under s 45 *Crimes Act*.

The Respondents were each convicted by jury at trial. Each alleged offence involved ritualised circumcision by nicking or cutting the clitoris.

The High Court (by majority) allowed the Crown appeal against verdicts of acquittal by the NSW CCA (*A2 & Ors* [2018] NSWCCA 174). The High Court held "*otherwise mutilates*" includes a 'cut or nick to any extent'; and '*clitoris'* includes the clitoral hood and prepuce. Therefore the acts fell within s.45.

ss 6(2), 8(1) *Criminal Appeal Act* 1912 - No power to quash a conviction and make no further order

An appeal court has no power under ss 6(2), 8(1) to quash a conviction and make no further order. The court must either enter an acquittal or order a retrial: per Kiefel CJ and Keane J at [83]; Nettle and Gordon JJ at [148]; Edelman J at [175].

A new trial? - The test of sufficiency to support a conviction: per Kiefel CJ and Keane J at [84]; [88]-[91]

Having decided to allow the appeal, Kiefel CJ and Keane J considered whether there is sufficient evidence to warrant an order for a new trial: at [87].

The question of whether there is sufficient evidence to support a conviction is to be determined in accordance with the test in *Doney v The Queen* (1990) 171 CLR 207 at [214]-[215] – requiring assessment of the sufficiency of the evidence taking the evidence at its highest and drawing inferences most favourable to the Crown that are reasonable open. Their Honours said that the evidence would be capable of supporting the rational conclusion beyond reasonable doubt that the procedure performed on the complainants involved a cut or nick: see at [87]-[111].

In the CCA, Ground 2 which alleged unreasonable verdicts was allowed on the basis of the CCA's erroneous definition of "otherwise mutilates" and "clitoris". Given the High Court's view of these terms, it remains to determine whether the jury's verdict was, even so, unreasonable (*M v The Queen* (1994) 181 CLR 48) necessitating a full review of the evidence at trial. However, it is neither practical nor appropriate in the circumstances for this Court to undertake such a review: at [112]-[115].

The High Court ordered the matter be remitted to the CCA for determination of Ground 2 (that the verdict was unreasonable or unsupported by the evidence) according to law: at [116], [148], [175].

Note: The CCA has ordered a new trial in this matter in ***A2; Magennis; Vaziri*** [2020] NSWCCA 7.

6. *Fennell v The Queen* [2019] HCA 37*;* (2019) 93 ALJR 1219. Appeal from QLD. Appeal allowed.

Verdict unreasonable and not supported by evidence

The High Court quashed the appellant's murder conviction and entered a verdict of acquittal. It was not open to the jury to be satisfied of guilt beyond reasonable doubt: at [91]. The Court of Appeal properly considered the case as a whole, however, errors in reasoning infected its conclusion: at [82]-[83].

The circumstantial Crown case relied on extremely weak evidence of opportunity and motive. Evidence from two witnesses they lent the appellant a hammer which they identified as the likely murder weapon was the most significant of the "strands in a cable" supporting conviction, but of so little weight it was barely admissible (*Shepherd* (1990) 170 CLR 573) and was glaringly improbable: at [5]; [78]-[80].

- At [81]: Where a court of criminal appeal is to decide whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt of guilt, the court must not disregard that the jury is entrusted with determining guilt or had the benefit of seeing and hearing witnesses (*M* (1994) 181 CLR 487 at 493).

  At the same time, the court may take into account realities of human experience including: fallibility of memory, contamination of recollection, influence of internal biases on memory; and well-known scientific research on difficulties and inaccuracies in assessing credibility and reliability (*Fox v Percy* (2003) 214 CLR 118 at [31]) – especially, as here, where the jury was subject to seductive effects of a species of identification evidence that has in the past led to miscarriages of justice (*Clout* (1995) 41 NSWLR 312).

7. *HT v The Queen [2019] HCA 40*; (2019) 93 ALJR 1307. Appeal from NSW. Appeal allowed.

Denial of procedural fairness by CCA - applicant not allowed access to evidence of assistance

The High Court held the NSW CCA denied procedural fairness to the appellant (a police informer) by not permitting her access to an affidavit by police detailing her assistance to authorities ("Exhibit C"): at [27]; [57]; [66]–[67]. At the original sentence hearing, defence counsel had agreed not to see Exhibit C on an assurance it would be a longer document and more advantageous to the appellant.

Procedural Fairness: Courts are obliged to accord procedural fairness. The person charged must be given reasonable opportunity of being heard, presenting his/her case, knowing how the opposite party seeks to make its case, and can only put his/her case if able to test and respond to evidence: at [17]; [64]; *Condon v Pompano P/L* (2013) 252 CLR 38; *International Finance Trust v NSW Crime Commission* (2009) 240 CLR 319.

The appellant could not test the evidence or make submissions on s 23(2) on whether it was open to the judge to conclude the sentence was not unreasonably disproportionate, the discount was appropriate and the residual discretion should be exercised in her favour: at [21]-[23]. Counsel could not check instructions against Exhibit C: at [25].

Tailoring orders: Orders as to non-publication could have been tailored to meet police concerns. Consistent with the rule of fairness, the courts' concern is to avoid practical injustice: at [43]-[46].

Residual discretion: In the absence of an order tailored to ensure basic procedural fairness, the CCA should have declined to exercise its discretion on this basis alone: at [52].

It was appropriate to dismiss the Crown appeal in exercise of the residual discretion. Because of the existence of non-publication orders (in relation to the CCA appeal and District Court sentence) no guidance to sentencing judges on the Crown appeal could be provided by a court under s 5D(1) *Criminal Appeal Act* 1912: at [51].

8. ***State of NSW v Robinson [2019] HCA 46***. Appeal by State of NSW. Appeal dismissed.

Unlawful arrest - police officer had not formed intention to charge arrested person with offence at time of arrest - s 99 Law Enforcement (Powers and Responsibilities) Act 2002 ("LEPRA"),

On the facts, the police officer had no intention, at the time of the arrest, of bringing R before an authorised officer to be dealt with according to law unless it emerged there was sufficient reason to charge, depending on what R said in a police interview.

By majority (4:3), the High Court (Bell, Gageler, Gordon and Edelman JJ) held the arrest was unlawful: at [71], [116].

- A police officer does not have power to arrest a person without a warrant, under s 99 *LEPRA*, if at the time of the arrest the officer had not formed the intention to charge the arrested person with an offence (affirming *Robinson v State of NSW* [2018] NSWCA 231).
- Section 99(3) states an officer who makes an arrest under s 99 must intend, as soon as is reasonably practicable, to take the person before an authorised officer to be dealt with according to law to answer a charge for that offence. An arrest under s 99 can only be for the sole purpose as provided by s 99(3). *LEPRA* has not altered this single criterion for a lawful arrest that has been part of the common law in NSW (*Bales v Parmenter* [1935] NSWStRp 8): at [63], [109]-[111].
- The officer must have that intention without taking into account at the time of arrest the existence of the investigation period: at [114].

In dissent, Kiefel CJ, Keane and Nettle JJ (at [30]-[60]) said s 105 *LEPRA* permits a police officer to change their mind after arrest and release a person without charge, but the officer must still have had the intention to charge at the time of arrest. Section 99 and 105 mean the common law requirement that the arresting officer have made an unqualified decision to charge at time of arrest no longer applied. While the sole purpose for arrest remained to take the person arrested before an authorised officer, this includes where the officer intended at time of arrest to take a person before an authorised officer unless questioning / investigation showed his/her suspicion justifying arrest was not borne out.

9. ***De Silva v The Queen [2019] HCA 48***. Appeal from QLD. Appeal dismissed.

'Liberato" direction - Liberato v The Queen (1985) 159 CLR 507.

A *Liberato* direction is typically given where a case turns on the conflicting evidence of a prosecution witness and a defence witness, to the effect that even if the jury does not positively believe the defence witness and prefers the evidence of the prosecution witness, they should not convict unless satisfied that the prosecution has proved the defendant's guilt beyond reasonable doubt (*Liberato* (1985) 159 CLR 507 at 515, Brennan J in his dissenting judgment; Deane J agreeing).

The appellant appealed his rape conviction. The prosecution case depended upon the complainant's evidence. The appellant did not give, or call, evidence. He denied the offending in a recorded police interview. The trial judge was not asked to give, and did not give, a *Liberato* direction.

The High Court stated:

- In some cases it may be appropriate to give a *Liberato* direction, notwithstanding the accused's conflicting version of events is not before the jury on oath: at [4].
- A *Liberato* direction serves to clarify and reinforce directions on the onus and standard of proof in cases in which there is a risk that the jury may be left with the impression that the evidence upon which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt: at [10].

- A *Liberato* direction should be given in cases in which the trial judge perceives that there is a real risk that the jury might view their role in this way, whether or not the accused's version of events is on oath or in the form of answers given in a record of police interview: at [11].

The Court dismissed the appeal. A *Liberato* direction was not needed in this case. The trial judge gave repeated, correct directions as to the onus and standard of proof. Nothing in the summing-up suggested the jury might have been left with the impression its verdict turned on a choice between the complainant's evidence and the appellant's account in the interview: at [32], [36].

Note: The Judicial Commission Criminal Trials Bench Book at *'[3-605] The Liberato direction'* notes the direction has been sanctioned to varying degrees by the Court of Criminal Appeal: see cases there cited.

10. ***Kadir & Grech v The Queen [2020] HCA 1***. Appeal from NSW. Appeals allowed in part.

ss 138(1), (3)(h) Evidence Act – difficulty of obtaining evidence without impropriety or contravention of an Australian law.

Section 138(1) provides evidence obtained improperly or in contravention of an Australian law, or in consequence of, is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the *way* in which the evidence was obtained.

s 138(3)(h) requires the court to take into account the difficulty of obtaining the evidence without impropriety or contravention of an Australian law.

The appellants were charged with animal cruelty relating to alleged use of rabbits as "live bait" in training greyhounds. At trial, the Crown proposed to tender three categories of evidence obtained in, or as a consequence of, contravention of an Australian law: seven covert video-recordings by Animals Australia showing activities at K's property obtained in contravention of s 8(1) *Surveillance Devices Act 2007* (NSW); material obtained as a result of a search warrant by the RSPCA; and alleged admissions by K. The appellants allege the search warrant and admissions would not have occurred if not for the initial video-recordings.

The High Court held:

All surveillance evidence inadmissible:

Under s 138(3)(h) *Evidence Act*, demonstration of the difficulty of obtaining the evidence lawfully did not weigh in favour of admitting evidence obtained in deliberate defiance of the law. All of the surveillance evidence should be excluded: at [9], [37].

Search warrant evidence and admissions admissible:

The *causal link* - between the search warrant evidence and admissions and the contravening surveillance evidence - engages s 138, but the weighing of the competing public interests under s 138(1) involved considerations which are not the same as those applying to the admissibility of the surveillance evidence: at [40].

The undesirability of receiving the search warrant evidence and the admissions, in the way each was obtained, materially differed from the undesirability of receiving the surveillance evidence in the way it was obtained: at [38].

The search warrant evidence was obtained by a regulator (RSPCA) acting lawfully and without prior knowledge of the contravention, albeit procured on the strength of the surveillance evidence: at [41]. In circumstances where the RSPCA was not complicit in the contravention, s 138(3)(h) is neutral: at [47]. The desirability of admitting evidence important to the prosecution of these serious offences outweighs the undesirability of not admitting the evidence obtained in the way the search warrant evidence was obtained: s 138(1); at [48].

The causal link between the contravention and the admissions was tenuous, a consideration capable of affecting the weighing of the public interest in not giving curial approval or encouragement to the unlawful conduct. The undesirability of admitting evidence obtained in the way the admissions were, is outweighed by the desirability of admitting the evidence: at [41], [51].

B. SUPREME COURT CASES 2019-2020

Bradley v Senior Constable Chilby [2020] NSWSC 145 (Adamson J) - pre-trial disclosure - police prosecutors – summary proceedings – proceedings stayed until duty of disclosure complied with

Adamson J sets out in helpful detail the common law authorities on pre-trial disclosure by the prosecution - in this case, in summary proceedings by the police prosecutor.

Adamson J set aside the Magistrate's refusal to order the police prosecutor disclose certain documents, including NSW Police Facts Sheets relating to entries on the complainant's criminal history and pending criminal proceedings.

The case of the accused, charged with assault, was that he acted in self-defence. The complainant's credibility and whether she has a propensity for violence, drug-taking and falsehoods are important issues in determining the charge: at [65]. The basis on which the Magistrate found non-disclosure was that the Magistrate misapprehended the nature and extent of the duty of disclosure. The documents sought were relevant and required to be disclosed: at [66]-[76]; *Reardon* (No 2) (2004) 60 NSWLR 454; *Gould v DPP (Cth)* [2018] NSWCCA 109; (2018) 359 ALR 142.

Adamson J further ordered the matter be stayed until the prosecutor complies with their duty of disclosure; otherwise the matter to be remitted to the Local Court. The performance of the duty of disclosure is a matter for the Prosecutor, subject to this Court's supervision in granting or continuing a stay until the duty has been complied with in order to ensure that the hearing of the accused is fair: at [82]-[87]; ***Marwan v DPP*** [2019] NSWCCA 161 at [29] (Note: ***Marwan*** discussed above under Conviction Appeals – 3. Procedure).

JH [2019] NSWSC 192 (N Adams J) - unlawful arrest - s 99(1)(b)(iii) Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)

This was an appeal to the Supreme Court from a decision of the President of the Children's Court (being a "judge of the District Court") pursuant to 22A *Children's Court Act 1987*: see at [9]-[13]).

N Adams J held the appellant's arrest was unlawful on a charge of resist police in execution of duty and allowed the appeal.

Section 99(1) LEPRA relevantly provides:

> "A police officer may, without a warrant, arrest a person if:
> (a) the police officer suspects on *reasonable grounds* that the person is committing or has committed an offence, and
> (b) the police officer is satisfied that the arrest is *reasonably necessary* for any one or more of the following reasons:
>
> ……
>
> (iii) *to enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,*

Police approached the 16-year-old young person suspecting breach of bail conditions. The young person lit a cigarette contrary to Council signage. The officer said, "*You have committed an offence but if you give me some ID we will leave it at that*". The officer made no mention of issuing a court attendance notice for smoking. The young person presented fake identification. The officers arrested him and he struggled violently.

N Adams J found that after advising the young person he was not permitted to smoke, all questions were directed at ascertaining identity for the purpose of a bail check. N Adams J was not satisfied the officer was satisfied it is "reasonably necessary" to arrest the young person to obtain his identity in relation to that offence as opposed to for the purpose of checking his bail: at [79]; [82].

Note: Her Honour referred (at [56]-[58]) to *Robinson v State of NSW* [2018] NSWCA 231 which has been affirmed in *State of NSW v Robinson* [2019] HCA 46, see 'High Court Cases 2019'.

Thompson; Thompson [2019] NSWSC 1396 (Fagan J) manslaughter by gross criminal negligence - refusal to accept medical attention – breach of duty not proved – verdicts of not guilty

Fagan J (judge alone trial) acquitted each accused of manslaughter by gross criminal negligence. The Crown alleged the accused failed to exercise reasonable care for their elderly dependent mother who died of sepsis from infected bedsores, therefore breaching their duty of care to get medical help.

Fagan J held the alleged negligent breach of the duty of care was not sustained given the deceased adamantly opposed receiving nursing or medical attention and withheld consent treatment. Her oral refusal of consent to medical intervention, conveyed by a conscious patient with full legal capacity, was effective even if "unsupported by any discernible reason" (*Hunter & New England Area Health Service v A* (2009) 74 NSWLR 88 at [40]): at [87]-[90].

Due also to the limited period in which each accused knew of a sore on the deceased and their ignorance of its medical significance, it has not been shown they exhibited less than reasonable care in failing to procure medical assistance: see at [81]-[87].

Elzahed v Kaban [2019] NSWSC 670 (Harrison J) - disrespectful behaviour - s 200A(1) District Court Act 1973

Harrison J dismissed the plaintiff's appeal against conviction for nine counts of disrespectful behaviour in court under s 200A(1) *District Court Act* for failure to stand for a judge in court.

It is an offence under s 200A(1) if:
(a) an accused person or defendant in, or party to proceedings before the court,
(b) intentionally engages in behaviour in the court during proceedings, and
(c) the behaviour is disrespectful to the court or judge presiding over the proceedings (according to established court practice and convention).

A simple failure to stand for a judge is not an offence. The behaviour must be intentional (para 1(b)) and disrespectful (para 1(c)): at [37].

The only mental element of the offence is that the act or omission be intentional: at [43]. The assessment of the intentional behaviour in 1(b) is assessed by reference to established court practice, not by reference to an accused's knowledge or understanding of what the established court practice might be: at [45].

There is no mental element in 1(c) – the test is objective: at [45]. It is not whether the plaintiff's behaviour was perceived by the judge as disrespectful: at [89]. It is not concerned with whether the plaintiff had a subjective intention or motive that might have qualified the significance of the objectively disrespectful act: at [73]. The relevant disrespect in (1)(c) need not be serious: at [46].

There was opinion evidence (by Mr R Blanch AM QC) before the Magistrate describing what was disrespectful according to established court practice and convention, which was open to her Honour to accept or reject: at [73]-[74].

Elzahed v Kaban [2019] NSWSC 1466 (Harrison J) - sentence - disrespectful behaviour

Harrison J dismissed the plaintiff's appeal against sentence of 74 hours community service for nine counts of disrespectful behaviour in court under s 200A(1) *District Court Act* for failure to stand for a judge. The maximum penalty is 14 days imprisonment or 10 penalty units.

The plaintiff submitted a s 10 order should be imposed. Harrison J held the plaintiff was not entitled to a s 10 order. There were multiple offences and were not trivial given they were repeated offences directed to the maintenance of respect for the judicial process. The sentence ought to carry an element of general deterrence: at [82]–[83].

Dirani (No 7) [2018] NSWSC 945 (Johnson J) - Accused required to sit in dock, and stand during trial - s 34 Criminal Procedure Act 1986

The accused stood trial for a terrorism offence. Section 34 *Criminal Procedure Act 1986* states:

> *"34 Practice as to entering the dock*
> *The Judge may order the accused person to enter the dock or other place of arraignment or may allow him or her to remain on the floor of the court, and in either case to sit down, as the Judge considers appropriate."*

Requirement to sit in dock. Johnson J refused the accused's application made on prejudicial grounds to be permitted to sit in the body of the court instead of the dock. There is discretion under s.34, but the usual location for a trial accused is the dock, even if on bail. This is not prejudicial. The Judge will remind the jury of the presumption of innocence: at [34], [39]-[40]; authorities cited. Relevant to the discretion under s.34 are the nature of the charges, custodial classification and behaviour in custody: at [41]-[42].

Requirement to stand. Johnson J refused the application made on religious grounds to be excused from standing as required of an accused during a criminal trial. A proper and substantial basis must be demonstrated before a court would excuse compliance: at [81]. The evidence regarding religious beliefs by Muslims is that standing for judicial officers (and presumably juries) is not prohibited (2017 *"Explanatory Note on the Judicial Process and*

Participation of Muslims", Australian National Imams Council). There is no evidentiary foundation for the accused to be excused under s.34 from standing: at [72].

The 'disrespectful behaviour in court' offence provisions (s.131 *Supreme Act 1970* and corresponding provisions for District and Local Courts) may apply: at [72]-[73].

Doran; Brunton v DPP [2019] NSWSC 1191 (Simpson AJA) – s 418 Crimes Act - self-defence - intoxication

Simpson AJA acknowledged s 418 *Crimes Act* is difficult, requiring intellectual gymnastics: at [57].

Section 418(1) states a person is not criminally responsible for an offence if s/he carries out conduct constituting the offence in self-defence.

By s 418(2), a person carries out conduct in self-defence only if the person believes the conduct is necessary in certain identified circumstances, and that conduct is a reasonable response in the circumstances as s/he perceives them.

The plaintiffs were convicted of affray involving an altercation with another group. The plaintiffs were intoxicated.

Simpson AJA dismissed the appeal. The magistrate properly rejected self-defence; and was correct to not take intoxication in determining the second limb of self-defence, that is, the reasonableness of the appellants' response to the circumstances as they perceived them.

Where s 418 is raised, two questions arise for determination (at [3]):

(i) Has the prosecution proved beyond reasonable doubt the accused did not believe the conduct was necessary for one (or more) of the four purposes specified in s 418(2)(a)-(d)?

This first question is determined subjectively, having regard to all of the defendant's personal characteristics (including intoxication): at [47]; *R v Katarzynski* [2002] NSWSC 613.

(ii) Has the prosecution proved beyond reasonable doubt the conduct was not a reasonable response in the circumstances as perceived by the accused?

This second question is determined objectively by reference to the reasonableness of the defendant's conduct – although in light of the circumstances *as (subjectively) perceived by the defendant*, having regard to the defendant's personal characteristics (including intoxication): [47]–[50]; *R v Katarzynski.* However, intoxication does not enter into the assessment of the reasonableness of conduct in light of their perception at [50], [52]; *R v Katarzynski; McCullough v R* (1982) 6 A Crim R 274.

In this case, even if one concluded that in their intoxicated state the plaintiffs believed their conduct was necessary for a s 418(2) purpose, intoxication was not relevant in assessment of the reasonableness of their response.

Using a spear gun, shattering a car windscreen and threats to kill could not be a reasonable response to an intruding party in retreat: at [59]-[60].

Roads & Maritime Services v Noble-Hiblen [2019] NSWSC 1230 (Campbell J) – challenge speed camera- expert evidence required

Campbell J held that, unless supported by *expert evidence* which the magistrate accepts, an assertion that challenges the operation of a speed camera or accuracy of information is not sufficient to rebut prima facie evidence of matters on a speed camera photograph (ss 137, 138, 140, 141 R*oad Transport Act 2013*).

Campbell J allowed the RMS's appeal against the Magistrate's dismissal of a charge of exceed speed limit. The Magistrate erred by accepting the defendant's own assertion, not based on any expert evidence, that the speed camera must have been faulty as sufficient for acquittal.

DPP (NSW) v Merhi [2019] NSWSC 1068 (Johnson J) – prosecution denied procedural fairness - failure to make factual finding or provide reasons on prima facie case

Johnson J allowed the DPP's appeal against the Magistrate's dismissal of a charge of resist officer in execution of duty. The Magistrate erred by:

- making no findings of fact to provide an evidentiary foundation for determination as to whether there was a prima facie case: at [35]; *DPP v Evans* [2017] NSWSC 33. Elaborate reasons are not required for a prima facie case ruling, but there is need for some factual analysis.
- failing to give reasons for decision to acquit: at [36]-[39].

- denying the prosecutor procedural fairness. The Magistrate held there was a prima facie case then, without calling for further submissions, gave short reasons for dismissal. A two-stage process at the end of a prosecution case is a formal and important part of criminal proceedings in the Local Court. The Magistrate was required to announce a prima facie case, give the Defendant an opportunity to give or call evidence, then move to closing addresses where the prosecutor should have an opportunity to address the Court: at [40]-[44]; *DPP (NSW) v Wililo* (2012) 222 A Crim R 106; [2012] NSWSC 713; *DPP v Elskaf* [2012] NSWSC 21; *DPP v Kirby* [2017] NSWSC 1754 at [52].

Hayes v DPP (NSW) [2019] NSWSC 378 (Campbell J) –written plea of guilty – accused not present – duty to consider whether conviction should be recorded

H lodged a written plea of guilty (s 182 *Criminal Procedure Act*) for his drug matter, and was convicted in his absence without reasons.

Campbell J allowed the appeal. Even if a person has lodged a s 182 written plea to have the matter dealt with under s 182(3) [not required to attend court / taken to have attended], it is necessary the court consider whether a conviction should be recorded, that is, whether s 10 *Crimes (Sentencing Procedure) Act* is available. In the majority of cases s 10 will not arise. But when it does, any practice of not considering s 10 because the accused is not present (although taken to have attended) should no longer be followed: at [16].

The obligation to give reasons is an important judicial duty, even in small matters: at [12].

Jones v Booth [2019] NSWSC 1066 (Johnson J) - Application under s 32 Mental Health (Forensic Provisions) Act 1990 - psychologist reports may be received, not only psychiatric reports

Section 32 *MHFPA* allows a magistrate to deal with a person under the section "*if it appears*" the defendant is suffering from mental illness or condition or cognitive impairment.

Johnson J set out observations on s 32 to provide guidance to the Local Court:

. It would be an error to take a blanket approach so that only psychiatrist reports could be received under s.32. The type of appropriate report will depend on the particular case: [57].

. The Court should consider the author's qualifications, expertise and contents of the report to determine admissibility and weight: at [55].

. Areas a psychologist may report on and conduct testing include issues of *"cognitive impairment"* and *"mental condition"* which fall within s 32. There is no bright line test which delineates areas where a psychological report can or cannot be received: at [58]-[59].

. A number of cases which have considered s.32 have involved psychologist reports: at [62]; *DPP v El Mawas* (2006) 66 NSWLR 93*; R v HW* [2017] NSWLC 25; *DPP (NSW) v Saunders*; *Robertson v DPP (NSW)* [2017] NSWCA 180.

Hallaby v Local Court of NSW [2019] NSWSC 840 (Emmett AJA) - Costs in summary proceedings - ss 214(1)(b), (d) Criminal Procedure Act 1986

The Magistrate dismissed a charge of assault police officer in execution of duty after not allowing evidence leading up to the incident under s 138 *Evidence Act*. The Magistrate refused to award costs under s 212 *Criminal Procedure Act* 1986.

Emmett AJA dismissed the applicant's application for judicial review of the Magistrate's decision. Section 214 provides costs are not to be awarded to an accused in summary proceedings unless the *court is 'satisfied'* that:

> *(b) proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,*
> *...*
> *(d) because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.*

Magistrate not bound to find proceedings instituted without reasonable cause - s 214(1)(b): at [71]

If on the facts apparent to the prosecutor at the time of instituting proceedings, there was no substantial prospect of success, the proceeding will have been instituted without reasonable cause. On the other hand, if success depends on resolution in the prosecutor's favour of arguable points of law, it is not appropriate to characterise the institution of proceedings as being without reasonable cause: at [57].

"Satisfied" in s 214 means it is not a question of demonstrating existence or non-existence of a state of affairs, as distinct from whether the Court has reached the relevant degree of satisfaction (*Parisienne Basket Shoes P/L v Whyte* (1938) 59 CLR 369 at 391). Whether the decision to institute proceedings was unreasonable or without reasonable cause was for the judgment of the Magistrate: at [67]; *Min. Immigration v Teo* (1995) 57 FCR 194.

There was no jurisdictional or legal error. It could not be concluded the police constable, as prosecutor instituting the proceedings, knew or ought to have known of facts that would inevitably lead to rejection of the evidence under s 138 and dismissal - even with the knowledge as to actual events: at [71].

No error in finding " no exceptional circumstances" relating to the conduct of the proceedings - s 214(1)(d).

As the proceedings were not initiated without reasonable cause, there are no "other" circumstances to be considered. The 'exceptional conduct' of the police, which the Magistrate found was provocative and improper, occurred before initiating the proceedings: at [75].

Munshizada & Ors (No 2) [2019] NSWSC 834 (Fagan J) - inability to secure counsel at Legal Aid rates

Fagan J granted an application to vacate the joint trial of three accused, each charged with two counts of murder, when their solicitors were unable to engage legally-aided counsel. A trial of these charges and complexity, without counsel could not be regarded as fair according to law: at [37]; *Dietrich* (1992) 177 CLR 292.

The trial had an estimate of four months. Solicitors' enquiries showed that barristers acceptable to Legal Aid for a case of this difficulty and length are reluctant to make themselves available at Legal Aid fee scales: at [19], [41].

Legally-aided solicitors will be on notice to commence inquiries with the Bar much longer in advance of a trial date than three months: at [20].

Inability to secure counsel at Legal Aid rates on reasonable notice for a long trial requires urgent attention. Remedial measures might include increasing rates, expanding the number of public defenders or prioritising their work to cases difficult to place with the private Bar: at [40].

DPP (NSW) v Banks) [2019] NSWSC 363 (Ierace J) - s 289F Criminal Procedure Act not overridden by s 65 Evidence Act

In the Local Court, B was charged with a domestic violence offence. As the complainant did not attend the hearing, and was not available for cross-examination, her recorded statement was not admissible under Part 4B, Chapter 6, *Criminal Procedure Act* ('Giving of evidence by domestic violence complainants'). The Magistrate rejected the DPP's proposed tender of the complainant's statement under s 65(2) *Evidence Act* ('maker unavailable hearsay').

Ierace J allowed the DPP Appeal holding that s 289F(5) *CPA* does not override s 65 *EA*. It is apparent from s 289E that the *EA* provisions continue to apply, specifically the note to s 289E specifies s 65 as an example of a provision of the *EA* that is intended to continue to apply. The defendant may invoke ss 135, 137 as bases for exclusion. Section 289F is concerned only with the form of the evidence-of-chief of a complainant: [36]-[39], [43].

R v Mercury [2019] NSWSC 81 (RA Hulme J) - 13* Children *(Criminal Proceedings) Act 1986 applies to 1971 police interview

Section 13 *Children (Criminal Proceedings) Act* 1986 requires a parent / adult / lawyer be present at a police interview with a child as a precondition for admissibility, unless the judge finds exceptions in ss 13(1)(b)(i)-(ii) made out.

In 1971 the accused, then aged 17 and therefore a "child", had entered a police record of interview regarding a murder. No adult or lawyer were present at the interview. At that time, there was no legislative provision concerned with the admissibility of confessions (etc.) made by children.

In 2017 he was charged with the 1971 murder.

R A Hulme J ruled the 1971 interview inadmissible.The question of admissibility of the 1971 interview is governed by s 13. Statutes dealing with mere matters of procedure are an exception to the presumption against the retrospective operation of a statute: at [19]-[22]; *Rodway v The Queen* (1990) 169 CLR 517; *Aquilina* [1978] 1 NSWLR 35.

Applying s 13, there was "proper and sufficient reason for the absence of such adult" within s 13(1)(b)(i) - the fact the police were not, and could not be, aware this would in the future become a statutory requirement: at [104]-[105].

In the alternative, it would be unfair to admit the evidence under s 90 *Evidence Act*: at [101], [106].

In the judgment, His Honour provides a very useful discussion on the rationale and history of s 13.

C. LEGISLATION 2019 - 2020

1. *EVIDENCE AMENDMENT (TENDENCY AND COINCIDENCE) BILL* 2020

This Bill has been introduced and will commence on 1 May 2020 (s.2)

Briefly, amendments to *Evidence Act* as follows:

(1) Transitional (Sch 2, new Part 6 Cl 27, 28)

The amendments do "not apply in relation to proceedings the hearing of which began before the commencement of the amendment": cl 28(1).

The reforms will not apply:
(1) in summary proceedings - where court attendance notice was filed prior to commencement of the reforms;
(2) at trial - where indictment has been presented and accused has been arraigned prior to commencement of the reforms.

Reforms will apply where a court attendance notice has been filed for an offence that will be heard on indictment but where indictment not yet been presented and accused has not been arraigned (consistent with *GG v R* [2010] NSWCCA 230).

[Second Reading Speech p.7]

(2) New s 97A: Admissibility of tendency evidence in child sexual offence proceedings

Rebuttable presumption

s 97A(2) creates a presumption that tendency evidence:

> *(a) about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest), or*
> *(b) about the defendant acting on a sexual interest the defendant has or had in children*
> *is presumed to have significant probative value in proceedings relating to sexual offending against a child or children.*

s 97A(2) applies *whether or not the sexual interest or act was directed at a complainant in the proceeding, any other child or children generally*: **s 97A(3).**

[see Second RS pp. 3-4]

Judicial discretion / legislative guidance

The presumption is rebuttable. A court may determine the tendency evidence does not have significant probative value if satisfied there are "sufficient grounds": **s 97A(4).**

In determining whether there are sufficient grounds, **s 97A(5)** lists 7 factors that are *not* to be taken account unless the court considers there are exceptional circumstances. The factors are:

> *(a) the sexual interest or act to which the tendency evidence relates (the **tendency sexual interest or act**) is different from the sexual interest or act alleged in the proceeding (the **alleged sexual interest or act**),*
> *(b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred,*
> *(c) the personal characteristics of the subject of the tendency sexual interest or act (for example, the subject's age, sex or gender) are different to those of the subject of the alleged sexual interest or act,*
> *(d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act,*
> *(e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act,*
> *(f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features,*
> *(g) the level of generality of the tendency to which the tendency evidence relates.*

[see Second RS p.5 - regarding intended application of sub-sections (4)-(5)]

(3) New s 94(4) – common law rules preventing similar fact / propensity not relevant
s 94(4) states that, to avoid doubt, any principle or rule of common law or equity preventing or restricting the admissibility of evidence about similar fact or propensity is not relevant when applying part 3.6 *Evidence Act.*

[Second RS p 6 – Common law principles or rules that restrict admission of propensity or similar fact evidence should be explicitly abolished or excluded in relation to admissibility of tendency / coincidence evidence about the defendant in a child sexual offence matter]

(4) New s 94(5) – court not to have regard to collusion, concoction or contamination
s 94(5) states that when a court is determining the probative value of tendency or coincidence evidence it is not to have regard to the possibility that the evidence may be the result of collusion, concoction or contamination.

[Second RS p 6 - largely aligns with High Court about assessing the probative value of tendency and coincidence evidence but closes a gap in line with recommendation by Royal Commission (R v Bauer [2018] HCA 40)]

(5) s 98 coincidence evidence – new s 98(1A)
s 98(1A) states that, to avoid doubt, evidence from 2 or more witnesses claiming they are victims of offences committed by the defendant adduced to prove, on the basis of similarities in the claimed acts or circumstances, that the defendant did an act is a type of coincidence evidence.

[Second RS p.7 – consistent with current position in NSW but assists in providing clear basis for admissibility]

(6) s 101 Further restrictions on tendency evidence and coincidence evidence
s 101(2) is effectively amended as follows (new words in italics):

> **Tendency and coincidence** evidence about a defendant in a criminal proceeding is not admissible unless the probative value of the evidence ~~substantially~~ outweighs *the danger of unfair prejudice to* ~~any prejudicial effect it may have on~~ the defendant.

[Second RS pp. 5-6 – the proposed reform mirrors s 137]

2. *CRIMES LEGISLATION AMENDMENT (VICTIMS) ACT* 2018

The following provisions commenced 27 May 2019

The Act:
. substitutes and substantially re-enacts Victim Impact Statements (VIS) provisions
. inserts new VIS provisions for proceedings under *Mental Health (Forensic Proceedings) Act* 1999 ("*MHFPA*").

Crimes (Sentencing Procedure) Act 1999

- s. 26 Definition of "*primary victim's immediate family*" extended to include –
  - step-grandparent, step-grandchild, aunt, uncle, niece or nephew
  - In case of victim who is Aboriginal or Torres Strait Islander - a person who is /was part of the close family or kin according to the Indigenous kinship system of the victim
  - Any person who the prosecutor is satisfied is a member of the victim's extended family or culturally recognised family to whom the victim is / was close, or had a close relationship analogous to a family relationship, or whom the victim considered to be family.

- Offences in respect of which a VIS may be made extended:
  - Form 1 offences: s 27(6). Victims of offences on a Form 1 can now make a VIS. Previously, VIS provisions were only enlivened upon conviction for an offence.
  - Offences sexual or indecent in nature or involving violation of privacy, namely voyeurism or recording/distributing intimate images under ss 91H, 91J-L, 91P-R *Crimes Act*: s 27(2)(e), (4).

- Types of harm extended
  Previously, only actual bodily harm or psychological or psychiatric harm suffered by a primary victim could be included in a VIS. A VIS can now include these harms suffered by the victim or victim's immediate family:
  (a) actual bodily harm or psychological or psychiatric harm;
  (b) any emotional suffering or distress;
  (c) any harm to relationships with other persons;
  (d) any economic loss or harm that arises from matters (a)–(c): s 28(1).

- Court must receive and acknowledge VIS. (Previously, the legislation stated a court *may* receive and consider a VIS from a primary victim, but *must* receive, acknowledge and comment on a VIS from a family member of a victim who has died): ss 30E – F.

- Reading of VIS: support person, closed court, CCTV
  Previously, victims of prescribed sexual offences were able to read out a VIS in closed court and have a support person. Victims of prescribed sexual offences, children or cognitively impaired persons were entitled to read a VIS by CCTV.
  Support person
    - *All* victims when reading a VIS are now entitled to have a support person present: s 30H.

  Closed court and CCTV
    - Victims of prescribed sexual offences are still entitled to a closed court and CCTV when reading a VIS: ss 30I – 30J.
    - *All other* victims may, with leave of the court, now read a VIS in closed court or by CCTV: s 30K(1).

Mental Health (Forensic Proceedings) Act 1999

- Victim of offence by a forensic patient under *MHFPA* (Subdivision 5)

  A Court may accept a VIS after:
  - A verdict of not guilty by reason of mental illness under the *MHFPA*; or
  - A verdict in a special hearing under the *MHFPA* that, on the limited evidence available, an accused person committed an offence: s 30L(1).

  A Court:
  - must acknowledge receipt of the VIS: s 30L(2).
  - may consider a VIS when it considers conditions to be imposed on the release of the accused: s 30L(3)
  - must not consider a VIS when determining the limiting term to be imposed: s 30L(4)
  - may seek submissions by the designated carer or principal care provider after special hearing verdicts: s 30M.

3. JUSTICE LEGISLATION AMENDMENT ACT 2019 No.10

The following amendments commenced 26 September 2019.

Criminal Procedure Act 1986

- Case conference requirements: obligations of legal representative of the accused.
  New s.72(3): clarifies that the obligation on an accused's legal representative to explain the effect of the sentencing discount scheme for guilty pleas, and penalties, applies only to offences to which the discount scheme under Pt 3 Div 1A *Crimes (SP) Act* applies. Therefore the obligation does not apply to (see s 25A): offences dealt with summarily, Commonwealth offences, and an offence committed by a person under 18 and who is under 21 when charged before the court.
- Charge certificate : s 66(2) amended to clarify that the requirement to certify in a charge certificate that the prosecutor has received and considered a certificate under s 15A *Director of Public Prosecutions Act* 1986 does not apply to an offence prosecuted by a Commonwealth prosecutor.

Crimes Act 1900

Section 80AF provides that where there is uncertainty as to when during a period of time a sexual offence against a child occurred and the alleged conduct would have constituted more than one offence, a person may be prosecuted under whichever sexual offence has the lesser maximum penalty.
s 80AF(2) is amended to clarify where two potentially applicable offences have the same maximum penalty, the accused may be prosecuted under either of those offences. It will continue not to be possible to prosecute the accused for an offence that has a higher maximum penalty.

Crimes (Sentencing Procedure) Act 1999

- Increased SNPP for bushfire offence in s 203E *Crimes Act* 1900 from 5 years to 9 years. Applies to offences committed on or after 26 September 2019.

Children (Detention Centres) Act 1987

- Victims Register is established to enable victims to be provided with information about movements of juvenile offenders: s 100A
- Victims to be notified, and informed of right to make a submission to Children's Court or Review panel, when a serious young offender (defined in s 37N) is being considered for parole / leave or is eligible for parole: ss 100B-C**.** Victims may request certain information about the offender and movements, and be notified of certain matters in writing: ss 100D(2)-(3).

3. ABORTION LAW REFORM ACT 2019
(Note – This Act was introduced as the '*Reproductive Health Care Reform Bill* 2019')
Commenced 2.10.2019

Crimes Act 1900 amendments
- s 4 definition of 'grievous bodily harm' amended - so that a termination under the *Abortion Law Reform Act* is an exception to 'grievous bodily harm' occasioned by the destruction of the foetus of a pregnant woman.
- Repeals offences relating to procuring abortion – omits Pt. 3 Div. 12
- Inserts new s.82 Offence of 'Termination of pregnancy performed by unqualified person' – maximum penalty 7 years imprisonment.
  An 'unqualified person' is defined as someone who is not a medical practitioner or not authorised to assist in the performance of a termination within s.8 *Abortion Law Reform Act* (medical practitioner, nurse, midwife, pharmacist or Aboriginal and Torres Strait Islander health practitioner, or another registered health practitioner prescribed by the regulations).
- Clause 8, Schedule 3 amended so that any common law rule creating an offence in relation to procuring a person's miscarriage is abolished.
- s 545B(1) (Offence of intimidate or annoy by violence or otherwise): new subsection (1A) inserted to clarify that a person who uses intimidation to coerce another into having a termination or preventing them from doing so (including for sex selection purposes) commits an offence under that section.

Abortion Law Reform Act 2019. Main provisions include:
- ss.5-6: A medical practitioner may perform a termination of pregnancy at not more than 22 weeks, or after 22 weeks, in certain circumstances and where requirements are satisfied.
- s.9: Conscientious objection - A registered health practitioner may take a conscientious objection to giving advice or performing, a termination. The practitioner must disclose the objection and give information about or refer the patient to a practitioner who they reasonably believe does not have a conscientious objection.
- s.12: A person who consents to, assists in, or performs a termination on themselves does not commit an offence.
- s.17: The Minister must commence a review of the Act within 5 years.

4. JUSTICE LEGISLATION AMENDMENT ACT (NO 2) 2019
Commenced 22 November 2019 (unless otherwise noted)

Crimes Act 1900
- New s 93T(6) - clarifies person may commit an offence of participation in a criminal group whether or not a formal member of the criminal group.
- Part 4, Division 5A - extends certain offences relating to theft of motor vehicles and vessels to include trailers.
- Section 308B - amended to provide that when a law enforcement officer causes access to or modification of computer data, or impairment of electronic communications, this is not an offence if for certain law enforcement purposes.

Criminal Appeal Act 1912
- Section 5DB – amended to enable Attorney General or DPP to appeal to Court of Criminal Appeal against certain sentences imposed by Supreme or District Court in respect of summary back up offences in relation to indictable offences.
  Amendment applies to sentences imposed after 22 November 2019 even if proceedings before court of trial began before that commencement.

Criminal Procedure Act 1986
- Section 3 "prescribed sexual offences" amended to include:
  - female genital mutilation offences (*Crimes Act*, ss 45, 45A)
  - concealing a serious indictable offence (*Crimes Act*, s 316), if concealed offence is a prescribed sexual offence.
- Schedule 1, Table 1 amended - indictable offence of supply prohibited drug on ongoing basis (*DMTA*, s 25A(1)) to be dealt with summarily unless prosecutor or person charged elects offence be dealt with on indictment. *Uncommenced, commences on proclamation*.
- Section 59 - removes requirement that Magistrate give legally represented accused oral explanation of committal process in proceedings for indictable offences.
- Section 67(2)(b) – note added to clarify that "first return date" for a court attendance notice in committal proceedings includes appearance before registrar exercising jurisdiction of court and/or presiding over bail proceedings.

- New s 300 (Sexual assault communications privilege) - suitable person can be appointed to consent to disclosure of a protected confidence if principal protected confider is under 14 years. Grounds on which court may determine whether a person is a suitable person: s 300(1A).

Child Protection (Offenders Registration) Act 2000

- New s 17(2A) – Clarifies that onus of proving 'reasonable excuse' for not complying with reporting obligations is on registrable person to be proven on balance of probabilities.

Witness Protection Act 1995

- New Part 3B - A person who is or has been in a witness protection program entitled to give evidence by audio visual link (AVL), unless not in interests of justice: ss 31F, 31G, 31H.

Bail Act 2013 (*uncommenced; to commence on proclamation*)

- New s 43A - A police officer may make a bail decision on execution of a warrant under ss 229 or 308 *Criminal Procedure Act* (person subpoenaed or bailed to appear at court) if person unable to be brought before court immediately after arrest. The police officer may not impose bail conditions under *Bail Act*: s 43A(1).
- New s 77A - where person sentenced to imprisonment and execution of sentence has been stayed, if person fails to appear before court in accordance with bail, the court may issue a warrant to apprehend and bring before court.