CRIMINAL LAW UPDATE 2021-May 2022

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LEGAL AID NSW CRIMINAL LAW CONFERENCE 2022

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C. LEGISLATION 2021

1. Mental Health and Cognitive Impairment Forensic Provisions Act 2020 Commenced 21 March 2021.
2. Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021. Proclaimed to commence on 1 June 2022.
3. Crimes Legislation Amendment (Loss of Foetus) Act 2021 Commenced 29 March 2022.
4. Modern Slavery Act 2018 (NSW) Commenced 1 January 2022.
5. Stronger Communities Legislation Amendment (Domestic Violence) Act 2020 Commenced on dates indicated.
6. Crimes Legislation Amendment Act 2021 Commenced 8 December 2021, unless otherwise indicated.

COVID-19 OVERVIEW

> "As present circumstances clearly demonstrate, the impact of the COVID-19 pandemic on prisoners is far from over. It can be accepted that sentencing judges are entitled to consider those impacts and the potential imposition of restrictions in the future": ***R v Toller*** [2021] NSWCCA 204 (27 August 2021) per Beech-Jones J at [25].

Ill-health and age - COVID-19 - special circumstances

R v Macdonald; R v Obeid; R v Obeid (No 18) [2021] NSWSC 1343 (21 October 2021)

The offenders were each sentenced for conspiring to commit the offence of misconduct in public office.

The state of the COVID-19 outbreak in correctional facilities and institutional responses is outlined in detail at [107]ff.

The Court considered the relevance of COVID-19 and the comorbidities of the offenders, two aged in their 70s. Having determined full-time custody appropriate, the Court accepted that entering custody at this time will expose each to an increased risk of contracting COVID-19 than were they to serve their sentences in the community where they could manage exposure to risk of community transmission. However, insofar as the offenders urged the Court to take into account the impact of their comorbidities as increasing that risk, that position is not supported by the evidence or authorities: at [144].

A principled approach is to take account of those factors in consideration of special circumstances. The Court made a finding of special circumstances, taking into account ill health and the risk of contracting COVID-19 in custody. Additionally, that the impact of the pandemic renders full time custody more onerous, a situation which will prevail for the foreseeable future: at [149]-[150], [270]-[278].

Absence of evidence concerning impact of Covid-19 pandemic on applicant's particular case

Doudar v R [2021] NSWCCA 37 (18 March 2021)

The applicant submitted the judge erred in failing to take into account the effects of the COVID-19 pandemic because there was no evidence as to the effect the restrictions had upon the applicant.

The CCA dismissed this ground. There was no evidence as to any particular impact of the pandemic on the applicant compared to other cases (cf. *Scott v R* [2020] NSWCCA 81; *McKinnon v R* [2020] NSWCCA 106). However, the judge took judicial notice of restrictions for visits and reduction in rehabilitative programs, and was not obliged to expand upon his observations of the effect that the pandemic was known to have on custodial conditions for prisoners generally: at [72]-[74]**.**

Pandemic prison restrictions after offenders sentenced pre-pandemic as an appeal ground

R v Toller [2021] NSWCCA 204 (27 August 2021) and ***GAR v R*** [2021] NSWCCA 265 (10 November 2021)

The CCA stated that the Court's power to intervene in a sentence is generally not enlivened unless *House v R* error is established. It is not a basis for intervention where, after sentence, conditions of custody are more onerous because of restrictions by prison authorities in response to the pandemic: ***Toller*** at [23]-[25]; ***GAR*** at [83]-[87]; *Cabezuela v R* [2020] NSWCCA 107; *Borg; Gray v R* [2020] NSWCCA 67.

Review of a sentence in light of events subsequent to that sentence which affects harshness of prison conditions is a matter for the executive: ***Toller*** at [20]; *R v Munday* (1981) 2 NSWLR 177.

In ***Toller***, leave was refused where the sole appeal ground concerned the impact of the conditions of incarceration due to the pandemic. The applicant submitted he could not complete external leave programs necessary for rehabilitation and was cut off from family overseas and interstate.

In ***GAR,*** the CCA ruled inadmissible the applicant's affidavit concerning fresh evidence that he has not been released to parole due to the pandemic preventing him completing required external release programs, and this would have been relevant to the structuring of the sentence if known at the time of sentencing: at [83]-[87]; ***Toller***, applied.

Judge-alone trials - interests of justice - murder / substantial impairment

R v Warren Scott [2021] NSWSC 1004 (22 September 2021)

Section 365 *CP Act,* inserted in response to the pandemic, provides that a court may order a judge-alone trial where the accused consents and, if the prosecutor does not agree, it is in the interests of justice. Section 365 applies despite any other *CP Act* provision including s 132 (s 365(3)).

The Court ordered a trial by judge-alone pursuant to s 365 where the applicant was charged with murder and proposed to rely on substantial impairment. The 'interests of justice' is assessed taking into account *all* of the relevant considerations: here, a risk of up to three years on remand awaiting jury trial; limited scope of issues at trial; trial could be conducted by AVL; and that s 365 allows the Court to grant a judge-alone trial on its own motion without considering s 132(5): at [49], [57].

Parliament's intention in enacting s 365 was to facilitate more judge-alone trials during the emergency period: at [53]-[54]; *R v Jaghbir* (No 2) [2020] NSWSC 955.

Substantial impairment involves application of community standards ordinarily best suited for jury determination, but the rule is not absolute: at [47]; *R v Eyuboglu* [2019] NSWSC 181 at [13].

A judge-alone trial would not have been ordered but for the current suspension of jury trials and s 365: at [57].

COVID-19 considerations on bail application

DPP (Cth) v Saadieh [2021] NSWSC 1186 (Hamill J) (17 September 2021)

The Court rejected the prosecution's submission that the release application be approached on the basis that the pandemic, and its impact on prisoners, should be treated as "the new normal" or of little weight because all inmates are facing the same problems: at [46]-[47]; *authorities cited*.

The relevance of COVID-19 is multi-faceted and includes: onerous conditions of incarceration including restricted access to work, training, family visits; limits on lawyer visits; inability of Courts to conduct jury trials during lockdown will result in additional delay; and vulnerability due to medical condition: at [48].

The Court allowed bail for the applicant charged with being a member of a terrorist organisation, with no prior convictions. Factors amounting to exceptional circumstances included potential difficulties in the prosecution case, significant delay and present onerous conditions of incarceration: at [55].

Simpson v R [2021] NSWCCA 264 (10 November 2021)

The CCA granted bail to the self-represented applicant. The applicant was experiencing difficulties preparing the complex matter for trial. Amongst other matters, the Court considered that preparation is being impaired by the limitations of custody increased by the impact of the pandemic; and that a delay of at least two years between arrest and trial puts a very different complexion on the matter: at [5], [95]. It is also important that his custody during remand has been, and can be expected to continue to be, affected by pandemic restrictions. This is not an insubstantial additional burden: see ***DPP (Cth) v Saadieh*** **[2021] NSWSC 1186** at [48]; *Rakielbakhour v DPP* [2020] NSWSC 323 at [13]-[16].

SENTENCE APPEALS

1. GENERAL SENTENCING

Intensive Correction Orders (ICOs)

Section 66 *Crimes (Sentencing Procedure) Act* 1999 (*CSP Act*) provides:

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

ICO – judicial review - failure to consider s 66(1) or (2) CSP Act does not amount to jurisdictional error

Quinn v DPP (Cth) [2021] NSWCA 294: The applicant was sentenced to full-time imprisonment in the Local Court for use carriage service to menace or harass (s 474.17(1) *Criminal Code* 1995) and State domestic violence-related offences. His appeal to the District Court was allowed but the judge rejected his submission that his sentence be served by way of ICO.

He sought judicial review of the District Court decision. Section 176 *District Court Act 1973* (NSW) limits review to jurisdictional error.

The applicant submitted that in deciding whether to impose an ICO, the judge fell into jurisdictional error by: (a) failing to take into account community safety as the paramount consideration (s 66(1) *CSP Act*) (ground 1); or (b) failing to consider whether making an ICO was more likely to address risk of reoffending (s 66(2)) (grounds 2-3).

The Court of Appeal dismissed the summons (Leeming JA; Johnson J agreeing with additional reasons; Simpson AJA agreeing with separate reasons).

- *Wany v DPP* 2020) 103 NSWLR 620 at [67]–[68] was wrong to hold that the failure to consider the matter identified in s 66(2) was a jurisdictional error. Failure to consider s 66(1) or (2) does not amount to jurisdictional error: at [89], [131]; *Wany v DPP* at [67]-[68], *disapproved*.
- If a court imposed a ICO when it did not have the power to do so, then it would be committing jurisdictional error. Preconditions to the power in s 66 to impose an ICO mean an ICO is not available where the offending is not sufficiently serious (s 5(1)), too serious (s 67(1)), a domestic violence offence and victim will not be adequately protected (s 4B); or imprisonment exceeds 2 years or 3 years for all sentences: at [74]-[82].
- s 66(2) imposed an important obligation to assess whether making an ICO or full-time detention was more likely to address the risk of reoffending. Its importance is undiminished by the fact that this is an aspect of community safety which is (by s 66(1)) "the" "paramount" consideration: at [72], [107]. But mere failure to comply with a statutory obligation does not of itself mean the court commits jurisdictional error: at [109]-[120]. If the failure to comply with the statutory obligation is to lead to jurisdictional error, then the statute must require that consideration as a *condition of the court's jurisdiction*: at [99], [110]-[112], [124]; *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, applied.
- The obligation in s 66(1) and (2) to have regard to community safety is not a condition of jurisdiction. Sections 66(1) and (2) are different from provisions which are preconditions to the making of an ICO. The statute requires the court to have regard to many purposes when considering whether to impose an ICO, expressed at a high level of generality and in part conflict: at [126]-[130].
- The District Court paid no explicit attention to s 66(2). However, the reasons make plain that the judge rejected the submission that an ICO was appropriate because the offending was too serious, reflecting the fact that s 66(3) required the applicant was adequately punished: at [131]; Johnson J at [202]; Simpson AJA at [187].

Five-judge bench - ICO - judicial review - failure to conduct assessment contemplated by s 66(2) CSP Act did not amount to jurisdictional error - Quinn v DPP (Cth) [2021] NSWCA 294, ***applied***

***Stanley v DPP* (NSW)** [2021] NSWCA 337

*** Note: There will be a special leave to appeal hearing in the High Court in this matter.**

The applicant, an Aboriginal mother with a strong subjective case, was sentenced in the Local Court to imprisonment for firearm and other offences. On appeal against severity in the District Court, the applicant submitted that it was appropriate her sentence be served by way of ICO (s 7 *CSP Act*).

The District Court judge dismissed the appeal. The applicant applied for judicial review submitting that the judge did not conduct the assessment contemplated by s 66(2) *CSP Act*; and failure to do so amounted to jurisdictional error.

The Court dismissed the summons (Bell P, Basten, Leeming and Beech-Jones JJA agreeing; McCallum JA dissenting).

Assessment under s 66(2)

The judge did not undertake the assessment referred to in s 66(2): Beech-Jones JA; McCallum JA agreeing at [161]; [189]-[191].

Bell P, Basten JA and Leeming JA assumed the judge did not undertake the assessment but otherwise found it unnecessary to decide: at [26].

Jurisdictional error

Failure to undertake the assessment contemplated by s 66(2) did not amount to jurisdictional error – it was not a condition of the exercise of the judge's discretion to order that a sentence of imprisonment not be served by way of an ICO: at [60] (Bell P); [138]–[140] (Basten JA); [157] (Leeming JA); [193] (Beech-Jones JA); ***Quinn v Commonwealth DPP*** [2021] NSWCA 294; *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, *applied*; *Wany v DPP (NSW)*, *disapproved*.

The ultimate question is whether, in giving direction to the sentencing court as to how to address particular matters, Parliament intended to invalidate a sentence involving non-compliance with the statutory direction: [45] (Bell P); [78]-[81] (Basten JA). There is no express indication that Parliament intended a sentence is invalid unless the assessment in s 66(2) is undertaken. Such a conclusion cannot be inferred from the statute: [91] (Basten JA). The complex and difficult consequences of finding that a sentence is invalid demonstrate the unlikelihood that Parliament intended compliance with s 66(2) to be a jurisdictional requirement: at [136]–[137] (Basten JA); [59] (Bell P); [157] (Leeming JA).

The failure to undertake the assessment contemplated by s 66(2) did not mean that the judge fundamentally misconceived her function, which was to determine an appeal from a sentence by rehearing pursuant to s 17 *Crimes (Appeal and Review) Act 2001*: at [59]–[61] (Bell P); [150]–[155] (Leeming JA); [195] (Beech-Jones JA).

McCallum JA, dissenting

Failure to undertake the assessment contemplated by s 66(2) reveals a fundamental misconception of the function conferred by statute, which was to determine the manner in which a sentence of imprisonment was to be served after undertaking a real assessment as to which method of serving the sentence of imprisonment would best address the risk of reoffending. There was jurisdictional error: at [185]; *Wany v DPP (NSW)*; *Quinn v Commonwealth DPP*; *Craig v South Australia* (1995) 184 CLR 163; *Markarian* (2005) 228 CLR 357; *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, considered.

The sentencing function is to impose punishment, including the sternest available - imprisonment. The task of discerning Parliament's intention as to the consequence of non-compliance with a statutory command governing the sentencing function must be undertaken having regard to the solemn nature of the sentencing power and its institutional importance in the governance of the State: at [164].

Approach to application for an ICO

Elphick v R [2021] NSWCCA 167**;** ***Muniandy v R*** [2021] NSWCCA 305

In ***Quinn v DPP*** [2021] NSWCA 294 at [209] Johnson J acknowledged the increasing number of decisions in which the CCA and Court of Appeal have grappled with construction and operation of s 66; noting that assistance for sentencing courts may be found in what was said by Adamson J (Basten JA and Walton J agreeing) in ***Elphick v R*** [2021] NSWCCA 167 describing the sentencing Judge's (Lerve DCJ, ***R v Elphick*** [2021] NSWDC 1) *"summary of the applicable law and his application of it to the facts of the case"* as *"model"*: at [209].

In ***Muniandy v R*** [2021] NSWCCA 305**,** the judge correctly followed the three-stage sentencing process in considering whether an ICO should be imposed and determining an ICO was not appropriate.

First, the judge determined in accordance with s 5 *CSP Act* whether no penalty other than imprisonment was appropriate.

Secondly, determination of length of sentence.

Thirdly, the judge was required to determine whether that sentence should be served by way of an ICO.

In accordance with s 66(1) and (2), the judge expressly considered community safety as the paramount consideration and assessed whether making the ICO or serving the sentence by full-time detention would be more likely to address the applicant's risk of reoffending. The judge's conclusion was that he could not be satisfied that full-time detention was more likely to address the risk of reoffending in light of the relatively low risk of reoffending and previous good character. As observed in ***Elphick v R*** [2021] NSWCCA 167 at [26], where the judge assessed an offender's risk of reoffending as low (whether the sentence was served in custody or by way of ICO), the consideration in s 66(2) becomes neutral and the judge is left to assess the matter by reference to the purposes of sentencing in s 3A *CSP Act*, as required by s 66(3).

The judge had regard to a sentencing assessment report (s 69). He was entitled to take into account that the report indicated that community service work was not available because of the nature of the offending. His observation that there appeared to be 'no additional conditions that might reasonably be imposed to serve as punishment for the offence' was correct in the circumstances given the contents of that report and the available additional conditions in s 73A(2).

The judge then applied s 66(3) *CSP Act*, concluding that although objective seriousness was relatively low, the need for punishment, denunciation, general deterrence and recognition of harm to the victim would not be sufficiently recognised by way of an ICO.

There was no error in the judge's reasoning or his conclusion that an ICO was not appropriate. (The appeal was allowed on the basis the sentence was manifestly excessive).

ICO - judge considered whether an ICO should be imposed but did not expressly mention s 66 CSP Act – power to impose ICO for a federal offence

Mourtada v R [2021] NSWCCA 211

The applicant was sentenced for import tobacco products with intent to defraud (*Customs Act* 1901 (Cth), s 233BABAD).

After the judge imposed sentence, counsel for the applicant asked whether the judge had considered s 66(2). The judge said he had and that "objective seriousness of the offences meant full-time imprisonment was needed for general and specific deterrence."

On appeal, the applicant submitted the judge erred in declining to impose an ICO and failed to consider the requirements of s 66 when deciding whether to make an ICO. Further, that the 'purposes of general and specific deterrence' are relevant to the decision as to whether a sentence of imprisonment is required and to base a decision not to impose an ICO on the same considerations is to "double-count."

The CCA dismissed the appeal (Basten JA; Adamson and Campbell JJ substantially agreeing but each with additional reasoning).

There is a factual question as to whether the judge had regard to the considerations in s 66. Although the judge made no express reference to the language of s 66, the relevant matters were all addressed and no relevant error identified: at [20], [26]-[28], [41].

Adamson J: Section 66 requires a judge to have regard to: community safety; whether making the order or serving the sentence by way of full-time detention is more likely to address the risk of re-offending; the purposes of sentencing in s 3A; and "any relevant common law sentencing principles".

Each of these matters is a mandatory relevant consideration. However, it does not follow from the requirement that those matters be *considered*, that each must be specifically *addressed* in the reasons. The reasons must address the submissions made by the parties and indicate that the judge has applied the law correctly: at [36]-[37].

Power to impose an ICO for a federal offence

The CCA observed that the power to impose an ICO is in State legislation. However, it was assumed – and not challenged by the Crown - that s 20AB *Crimes Act* 1914 (Cth) empowers a State Court to impose an ICO for a federal offence, and also picks up the procedural steps governing the operation of the State provision. [Followed in ***Ali v R*** [2021] NSWCCA 281 at [22]-[23]].

ICO - error in failing to address specific sentence submission regarding ICO and rehabilitation

Ali v R [2021] NSWCCA 281 and ***Elzein; Elzein; Doughan v R*** [2021] NSWCCA 246

These appeals were allowed on the basis that despite specific submissions being made to impose an ICO, the judge made no reference to that in remarks. A specific submission having been made, the judge was obliged to engage with that submission, consider it and express a conclusion in relation to it, which necessarily required a consideration of s 66. The obligation to consider making an ICO may be enlivened where cogent argument is advanced: ***Ali v R*** at [24]-[26]; ***Elzein; Elzein; Doughan v R*** at [325]-[328]; *Wany v DPP* (2020) 103 NSWLR 620 at [112]; *Blanch v R* [2019] NSWCCA 304 at [311].

Error was similarly found in respect of co-accused ***Elzein*** for whom detailed submissions were made regarding very good prospects of rehabilitation and on which the judge made no finding: at [234]-[236].

ICO - term of ICO may be reduced for pre-sentence custody – ss 70, 71 CSP Act

Mandranis v R [2021] NSWCCA 97

The CCA allowed the appellant's appeal against imprisonment for drug supply and determined an ICO to be appropriate.

The difficulty was that the appellant had served 8 months in custody – and the legislation does not permit making of an ICO where a sentence is fixed to commence at an earlier time than the date on which it is imposed.

Section 70 *CSP Act* states: the term of an ICO is the same as the term(s) of imprisonment in respect of which it is made.

Section 71(1) states: an ICO commences on the date on which it is made.

This means an offender who has served substantial pre-sentence custody may be forced to choose between seeking an ICO and having the sentence backdated, an unjust result: at [56]-[58].

The CCA held that provided that the appropriate term of the sentence is determined before consideration is given to an ICO, it would be acceptable for that term to be adjusted by the deduction of a period equivalent to the pre-sentence custody so that the ICO commences on the day it is made (s 71) and is co-extensive with the term of imprisonment (s 70). The sentence actually recorded and imposed would be less (by the length of the pre-sentence custody) than the sentence found to be appropriate: at [61].

This might possibly open more sentences to being served by ICO. For example, a 4- year aggregate sentence, reduced to 3 years by reason of 12 months presentence custody, would not be precluded by s 68(2) from being served by way of ICO. Whether that would be a legitimate exercise of the sentencing discretion does not arise here: at [63].

This may distort JIRS sentence statistics. However, problems as a consequence of ss 70, 71 are a matter for the legislature: at [62].

Crimes (High Risk Offenders) Act 2006, s 12 - breaches of extended supervision order

Monteiro v R [2022] NSWCCA 37

The applicant was sentenced for failing to comply with the requirements of an extended supervision order (ESO) and an interim supervision order contrary to s 12 *Crimes (High Risk Offenders) Act* 2006.

The extended and interim supervision orders included restrictions on use of social media accounts and/or aliases. The applicant's offences involved using unregistered phones, laptop and false names and sending and receiving emails and text messages.

The CCA held the sentencing judge may have implicitly considered the seriousness of the index offences which gave rise to the supervision orders, instead of only considering the breach of the supervision order itself. The judge erred in assessment of the breaches as mid-range or just below mid-range. The offending was not at the lowest level but well below mid-range: at [41],

Allowing the appeal, the CCA held the applicant's aggregate sentence of 2 years, 8 months imprisonment with NPP 2 years to be manifestly excessive and resentenced to a fixed term of imprisonment of 1 year, 6 months: at [45].

The CCA noted that:

- There is an important distinction between ESO breaches pointing to planning or commission of serious sexual or violence offences - which the applicant's offences were not - and other types of breaches. There may be occasions where the breach of a supervisory condition discloses an increased risk of serious offending such as to give rise to additional factors affecting seriousness of the breach. This is not that case: at [36].
- Here, the breaches are breaches of conditions that facilitate supervision (use of different name, electronic equipment etc). Compliance with conditions is important, but where breaches were not related to nor increase risk of serious offending, the breach may be assessed as mid-range, but that will be uncommon: at [39]-[40].
- If the breach gave rise to an increased risk of the commission of a serious offence of the kind for which the ESO was imposed, that would impact upon objective seriousness. In this case, none of the offences are in that category: at [42].

- Sentences for a breach of an ESO range from fines to imprisonment. As the applicant is subject of an ESO, a Community Services Order or an Intensive Corrections Order is not appropriate as it may not result in any punishment. A fine may be far more effective than a non-full-time prison sentence. However, because the offences in question go to the heart of the supervision process, no penalty other than imprisonment is appropriate (s 5 *CSP Act)*: at [43]-[44].
- Further, manifest excess arises, in part, from a breach of the principle of totality. Given the similarity in offending, nature of offending and motivation of offending, there is, in effect, one course of offending and the aggregate sentence is unreasonable or plainly unjust: at [46].

Applicant in custody serving parole period at time of assault offences – sentence wholly consecutive with non-parole period for existing sentence - Crimes (Sentencing Procedure) Act 1999, s 56

Tammer-Spence v R [2021] NSWCCA 90

The applicant committed three violence offences against a cellmate whilst serving his balance of parole in custody for armed robberies.

The CCA held the judge did not err in imposing an aggregate sentence for those three offences to commence at the expiry of the parole period for the robberies (23 November 2017) and not on the date the applicant was charged (16 January 2017).

Section 56 *CSP Act* applies to a '*sentence of imprisonment*' for an assault by an inmate. A 'sentence of imprisonment' is the non-parole period of a sentence (s 56(5)).

Section 56(2) provides:

> s 56(2) In the absence of a direction under this section, a *sentence of imprisonment* imposed on an offender—
>
> (a) who, when being sentenced, is subject to another *sentence of imprisonment* that is yet to expire, or
>
> (b) in respect of whom another *sentence of imprisonment* has been imposed in the same proceedings,
>
> *is to be served consecutively* with the other *sentence of imprisonment* or, if there is a further *sentence of imprisonment* yet to commence, with that further sentence.
>
> (emphasis added)

The Crown could not invoke s 56(2)(a) as the applicant was not serving the non-parole period at the time of the offences, therefore relied on s 56(2)(b). This would have permitted the judge to accumulate one offence upon the sentences imposed for the other two offences. Instead, the judge ultimately imposed an aggregate sentence for all three counts: at [42].

The sentence commencement date is a discretionary matter. Whilst it was *open* to commence the sentence on the date the applicant was charged, there was no error in not doing so: at [34], [48].

The judge found the applicant's unprovoked act of violence warranted a significant additional term to what he was already serving. The judge had regard to the principle that general deterrence is needed to maintain discipline in the custodial environment, and the totality principle given the assault was "different from and unconnected with the circumstances of the prior offences": at [43]-[47]; *R v Jeremiah* [2016] NSWCCA 241.

Applicant on remand at time of assault offences - sentence wholly consecutive with non-parole period for existing sentence - Crimes (Sentencing Procedure) Act 1999, ss 47, 56

Kuruppu v R [2021] NSWCCA 261

The applicant committed an assault whilst on remand for domestic violence offences. The CCA held the judge did not err in making the sentence for the assault wholly consecutive to commence at the expiry of the non-parole period for the unrelated domestic violence offences.

Section 47(2)(b) *CSP Act* provides a discretion to post-date commencement of a sentence if served consecutively or part consecutively with another sentence of imprisonment. The judge complied with s 47 and was consistent with authority regarding offences committed on remand: at [178], [184].

Section 56 applies to a "sentence of imprisonment" for an assault by an inmate. The applicant was not a "convicted inmate" for the purposes of s 56. Nonetheless, the policy reflected in s 56, and in particular s 56(2) that the sentence for an offence committed while a convicted inmate should be served consecutively with the earlier sentence of imprisonment, applies to a sentence for an offence against the person committed on remand: at [181], [230] *R v Jeremiah* [2016] NSWCCA 241 at [11-[12].

Where an offence has been committed in prison, accumulation will usually be required. A sentence concurrent with a sentence being served, or with a period of remand to which a later-imposed sentence is backdated, will have the substantive effect of no additional punishment. That is usually an unacceptable outcome because of the need for deterrence: at [230] (Fagan J).

De Simoni principle – offences carrying same maximum penalty – possess shortened firearm – shortening firearm – Firearms Act 1996, ss 62(1)(a), (b)

Weaver v R [2021] NSWCCA 215

The applicant was sentenced for offences including 'possession of shortened firearm' under s 62(1)(b) *Firearms Act* 1996 which has a maximum penalty of 14 years. There is another offence of 'shortening a firearm' under s 62(1)(a) with the same maximum penalty. Neither has a standard non-parole period.

The applicant submitted that, notwithstanding the identical maximum penalty, the judge breached *R v De Simoni* (1981) 147 CLR 383 by having regard to evidence the applicant had shortened the shotgun himself and that this made the matter more serious because the act of shortening involves turning one's mind to the act of creating the shortened firearm compared to mere possession.

The CCA dismissed the appeal.

The *De Simoni* principle was not applicable - the two offences carried the same maximum penalty and neither had a standard non-parole period (cf. *Cassidy v R* [2012] NSWCCA 68). They were entirely equivalent, neither more serious than the other: at [115]; *Environment Protection Authority v Wollondilly Abattoirs P/L & Davis* [2019] NSWCCA 312 at [66]; *Cassidy v R*.

The fact found by the judge - that the applicant had himself shortened the firearm - was relevant to objective seriousness. The applicant knew he was in possession of a shortened firearm and aware his conduct was unlawful. If he had not realised or known the shotgun had been shortened, the judge may have regarded that as less serious criminality: at [117]-[118].

Form 1 – judge did not directly ask offender if she wanted further offences taken into account – Form 1 not signed by DPP - failed to identify 'principal offence' – appeal dismissed

Dale v R [2021] NSWCCA 320

The CCA dismissed the appeal where the applicant submitted the following errors in respect of Form 1 procedure:

(i) The Judge failed to comply with s 33(1) *CSP Act* which provides the court "*is to* ask the offender whether the offender wants the court to take any further offences into account".

The CCA said formalities should be attended to but failure to comply with a formality will not be a basis for an appeal where there is no evidence that the applicant did not consent or did not wish the further offences to be taken into account. No element of prejudice has been demonstrated (*Kabir v R* [2020] NSWCCA 139; *Pham v R* [2021] NSWCCA 234, discussed). To say that the court "is to" take some step does not demonstrate any clear intention as to the consequence of failure - each provision must be read in context. The judge expressly stated in reasons that the applicant indicated her wish to have matters taken into account. In that circumstance, to find error in failing to comply with a requirement to ask a question would be to identify an aspect of non-compliance which had no practical consequence: at [25]-[39].

(ii) The Director of Public Prosecutions did not sign the Form 1 as required by s 34(2)(c).

This was of no practical consequence. A DPP solicitor signed the agreed facts on the Director's behalf and identified the sequences on the Form 1. There was no suggestion the Director did not consent to matters being taken into account: at [14].

(iii) The Form 1 failed to identify the 'principal offence' (sequence 3) to which the additional offences were attached.

Ambiguity in the Form 1 was resolved by agreement and was of no practical consequence. The judge expressly dealt with the matters on the Form 1 in relation to the correct sequence 3: at [17].

Form 1 – doubt whether applicant understood procedure – matter remitted to District Court

Pham v R [2021] NSWCCA 234: The CCA allowed the applicant's appeal based on errors regarding Form 1 procedure where there was doubt the applicant understood what the judge was being asked to do.

The incorrect offence was placed on the Form 1, there was issue regarding the applicant's signature on the Form 1 (which appeared to have been signed by the applicant but was dated the date of the sentence hearing when the applicant actually appeared via AVL), and English is not his first language. There is doubt as to whether the applicant himself understood what the judge was being asked to do: at [24]-[30].

It is necessary to ensure transparency about Form 1 procedure. There should be strict compliance with the statutory requirements: at [25]; *Woodward v R* [2017] NSWCCA 44 at [25]. The matter was remitted to the District Court for resentencing.

Procedural fairness - confidential information detailing applicant's assistance not provided to defence

Jones (a pseudonym) v R [2021] NSWCCA 225: The CCA held there was denial of procedural fairness where defence counsel did not have the opportunity to view material regarding the applicant's assistance to authorities. The matter was remitted to the District Court.

The Crown had provided the material to the sentencing judge. The judge proceeded to offer defence counsel the opportunity to view it, however, the Crown objected until further instructions were obtained from the authorities. The judge thereupon indicated the material was favourable upon which defence counsel indicated it was not necessary to see it. The judge gave a 10% discount for the assistance.

On appeal, the Crown submitted the applicant, through Counsel, was given a choice as to whether he wished to see the material which he elected not to and was therefore not denied procedural fairness.

The CCA said defence counsel was not faced with a real choice based on a full understanding of the material. A party can only be in a position to put his case if able to test and respond to evidence on which an order is sought. He was thus denied procedural fairness. The discount was on the lower end. In the circumstances the judge received no submission from either party about the significance of the assistance material: at [65]-[68]; *HT v The Queen* (2019) 93 ALJR 1307.

Unsworn material and post-hearing correspondence discouraged

Lai v R [2021] NSWCCA 217: Bellew J said the practice of an offender tendering a statement to the judge in the absence of sworn evidence appears to be increasingly adopted in sentence proceedings in the District Court and should be strongly discouraged. The principle that untested assertions by an offender to third parties should be given little or no weight applies. Where the Crown objects to tender or makes it clear that little or no weight should be placed upon it, the court would be entitled to do so in an appropriate case: [80]; *R v Elfar* [2003] NSWCCA 358 at [25]; *R v McGourty* [2002] NSWCCA 335.

Kuruppu v R [2021] NSWCCA 261: After his sentence hearing, the applicant personally sent an eight-page letter to the judge, without leave, despite having had legal representation. The judge would have been entitled to not accept and to disregard that correspondence. Only in very exceptional circumstances will leave be given to a party to supplement submissions once a hearing concludes: at [223]–[224]; *Eastman v DPP* (2003) 214 CLR 318 at [29]–[31]. Unsworn evidence by way of such letters is a practice strongly discouraged, especially where of little or no weight: at [222]; ***Lai,*** above.

2. MITIGATING FACTORS

Five judge bench - Crimes Act 1914 (Cth), s 16A(2)(p) - hardship to family and dependants must be taken into account - previous authorities stating hardship be "exceptional" are plainly wrong

Totaan v R [2022] NSWCCA 75

Section 16A(2)(p) *Crimes Act* 1914 (Cth) provides that, in determining the sentence to be imposed, the court "must" take into account "the probable effect … any sentence … would have on any of the person's family or dependants."

On sentence for fraud, the applicant gave evidence that her mother and children would suffer hardship if she were imprisoned. The sentencing judge found that any hardship would be "no different to that which would normally be expected".

Allowing the appeal, a five-judge bench held that the judge erred by failing to take the hardship to third parties into account at all because it was not of an 'exceptional' kind: at [36]-[38], [93].

The CCA stated:

- Previous authority (*R v Sinclair* (1990) 51 A Crim R 418; *R v Togias* [2001] NSWCCA 522; *R v Hinton* [2002] NSWCCA 405) that any such hardship had to be "exceptional" before it could be taken into account was "plainly wrong" and should not be followed: at [77].
- s 16A(2)(p) should be applied according to its terms. The gloss placed on the interpretation of s 16A(2)(p) should be removed. There is no textual support for 'exceptional circumstances' to be shown before hardship may be taken into account in s 16A or the *Crimes Act* generally: at [78], [82], [93]; *DPP v Ip* [2005] ACTCA 24, *R v Zerafa* [2013] NSWCCA 222 at [139]–[141]; *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194 at [49]–[60] approved.
- s 16A(2)(p) provides that the probable effect of the sentence on family members and dependants "must" be taken into account so long as "relevant and known to the court": at [83]; *Hili v The Queen* (2010) 242 CLR 520 at [49].

Bugmy v The Queen applied - given psychiatric evidence, error in not reducing moral culpability in accordance with Muldrock v The Queen and DPP (Cth) v De La Rosa

Williams v R [2022] NSWCCA 15

On sentence for robbery in company, psychological evidence established the applicant's exposure to trauma, alcoholism and domestic and other violence during childhood, and his diagnosis for post-traumatic stress disorder (PTSD) and major depressive disorder.

Allowing the appeal, the CCA held the sentencing judge erred in failing to determine how the applicant's mental condition should be reflected in his sentence. The judge properly applied *Bugmy* principles but - given the uncontested evidence of psychiatric disorders - erred by rejecting any diminution in moral culpability or reduction in sentence by the principles in *Muldrock* and *De La Rosa*: at [130]; *Muldrock* (2011) 244 CLR 120; *DPP v De La Rosa* (2010) 79 NSWLR 1. Even if the psychiatric conditions were not causative of offending, they were relevant to reducing the sentence (*Benitez v R* (2006) 160 A Crim R 166): at [131].

It is necessary to ensure that there is no double counting for the same factor. Often childhood deprivation will be the cause of the psychiatric disorder, but not always, and usually not wholly. Nevertheless, the deprivation to which *Bugmy* refers does not require or necessarily involve psychiatric disorder: at [131].

Bugmy v The Queen (2013) 249 CLR 571 - background not one of profound deprivation

Newman v R [2021] NSWCCA 101**:** The applicant, aged 22, was sentenced for aggravated break and enter and damage property by fire. He contended on appeal that the sentencing judge erred in finding that his background "falls short" of profound deprivation and moral culpability not reduced based on *Bugmy* principles. He pointed to a background of childhood family violence and submitted expert evidence showed a link between offending and early childhood sexual abuse and that drug use and ADHD may have increased impulsivity and further impaired compromised decision-making capabilities.

CCA (Hoeben CJ at CL; N Adams J and Hidden AJ agreeing with additional comments) dismissed the appeal.

Hoeben CJ at CL:

The judge did not err in finding background was not one of "profound deprivation". The applicant did not grow up in an environment of "extreme violence and alcohol abuse": at [50]-[53]; [56]; [73]; *Bugmy v The Queen*; *Kliendienst v R* [2020] NSWCCA 98 at [60].

The effects of childhood deprivation are to be given full weight in every sentencing decision, however, that does not mean that moral culpability must be reduced in every case. Full weight can be given to such a childhood as part of the process of instinctive synthesis: at [46]-[47]; [56]; [73]; *Dungay v R* [2020] NSWCCA 209 at [140]-[141].

N Adams J:

A finding of whether an offender had a childhood of "profound deprivation" is a question of fact: at [62].

This Court will not review findings of fact by the judge unless they were "not open" on the facts or unreasonable. Although it would have been *open* to the judge make such a finding, there is no error disclosed that he did not: at [62], [68]. *R v O'Donoghue* (1988) 34 A Crim R 397; cf. *Hordern v R* [2019] NSWCCA 138; *Gibson v Regina* [2019] NSWCCA 221.

Even when there is no finding of "profound" childhood deprivation, an offender's subjective case is always relevant in mitigation. The judge had regard to childhood as part of the subjective case: at [69]-[71]; Hidden AJ at [73].

Bugmy v The Queen - not necessary to characterise an offender's childhood as one of 'profound deprivation' before Bugmy principle is engaged - stable childhood but social disadvantage during adolescence - judge erred by finding "no evidence" of social disadvantage

Hoskins v R [2021] NSWCCA 169: The CCA held the judge erred in finding there was no evidence that the applicant's offences reflected the environment in which he was raised and failed to apply the principles *Bugmy v The Queen* (2013) 249 CLR 571 and *R v Fernando* (1992) 76 A Crim R 58.

The applicant, of Aboriginal background, was sentenced for violence offences. He had a stable upbringing with an aunt and uncle he believed were his parents. At 13 he found his biological mother and resided with her in an environment of normalised substance abuse and criminality. From 15 he acquired a criminal history, including violence.

Brereton JA (Basten JA and Beech-Jones J each agreeing with additional comments):

- The High Court used the term "profound childhood deprivation." What requires consideration is "an offender's deprived background". There is no magic in the word "profound". It is not necessary to characterise an offender's childhood as one of "profound deprivation" before the *Bugmy* principle is engaged. The principle is that social disadvantage may reduce moral culpability, especially where offending is impulsive or learned responses to situations, arising from circumstances of social disadvantage: at [57]

- A causative link between the circumstances of deprivation and the offending is not necessary to engage the principle. The absence of such a link does not mean that the Court does not give full weight to a childhood of profound deprivation if that is established on the evidence: at [57]; citing *Dungay v R* [2020] NSWCCA 209 at [153]; *Kliendienst v R* [2020] NSWCCA 98; *Ingrey v R* [2016] NSWCCA 31

- The judge focused on the applicant's stable childhood but an upbringing does not end at 12 years old. At 13 the applicant adopted the lifestyle of his biological family amounting to social disadvantage bearing on assessment of moral culpability. Exposure as a child to the influence of extended family involved in a criminal milieu is relevant, because it can warp a child's moral compass and create conditions in which anti-social behaviour becomes normalised, if not more at ages 13 to 16 as the years of adolescence are formative: at [61]-[62].

Beech-Jones J: In concluding that there was "no evidence" to support application of *Bugmy* principles, the judge either treated *Bugmy* as confined to dysfunctional social environments that are a consequence of endemic alcohol-related violence or that a *Bugmy* submission should only be considered if supported by evidence from the offender (or both). On either view, the judge acted "upon a wrong principle" and did not take into account "some material consideration": at [80]; *House v The King* (1936) 55 CLR 499 at 505.

Bugmy v The Queen – boundaries of Bugmy principles not clearly delimited

Nasrallah v R [2021] NSWCCA 207: The female applicant submitted the judge failed to give full weight to deprived background. The CCA dismissed her appeal by majority (Bell P and Price J; Hamill J dissenting).

The applicant, aged 20 with no prior convictions, was sentenced for armed robbery and damage property (imprisonment 2 years 9 months, NPP 1 year 4 months).

At sentence, a psychologist report stated that when aged 13-14, an uncle attempted to sexually assault her, and a man kidnapped and physically assaulted her. The psychologist said the childhood trauma and PTSD led to suicidal ideation, drug abuse and the offending.

Bell P; Price J agreeing with additional comments:

It was open to find there was not a "history of profound deprivation" attracting *Bugmy*. Even so, the judge had regard to the matters as mitigatory factors in the overall sentencing synthesis and the sentencing discretion did not miscarry: Bell P at [6], [18]–[20], [25]; Price J at [48], [50]–[52].

There may be a conceptual difference between the upbringing in *Bugmy* of "an environment of childhood deprivation in which abuse of alcohol and alcohol-fuelled violence are endemic," and an environment in which a child has been subject to a traumatic event such as sexual assault, physical or mental abuse. Evidence of the applicant's disadvantage did not "disclose an environment of systemic or endemic abuse", as in other cases where *Bugmy* has applied: Bell P at [11], [14]; Price J at [53].

The boundaries of *Bugmy* have not been clearly delimited. Whether a single traumatic event strictly falls within the scope of *Bugmy* may be debated: Bell P at [11]; Price J at [53].

It was neither necessary nor desirable to consider the precise boundaries of the *Bugmy* principles in this appeal: Bell P at [21]; Price J at [53].

Price J:

The judge's decision that background was not a history of profound deprivation was a finding of fact: at [31]-[38]; ***Newman v R* [2021] NSWCCA 101 at [62]** *applied*.

The material did not mandate a finding the *Bugmy* principles were engaged. It would have been *open* to make a finding. As in many aspects of the difficult task of judges, reasonable minds might differ: at [50].

Hamill J, dissenting:

A judge's determination of whether background amounts to "profound deprivation" is not a finding of fact by which this Court is bound, but 'an exercise in evaluation, quantification or categorisation': at [114]; ***Newman v R*** at [62] *not followed*.

There is no magic in the word "profound". Emphasis on "profound" distracts from the question of the extent to which traumatic teenage years reduced moral culpability: at [86], [97]; ***Hoskins v R* [2021] NSWCCA 169 at [57]**, *applied*.

The judge failed to take into account reduction of moral culpability arising from traumatic childhood experiences and psychological impact on development and choices: at [107]. This is not to extend or 'to consider the boundaries of the *Bugmy* principles but recognises the analogous situation of an offender whose life was shaped by childhood trauma: at [111]; *R v Henry* (1999) 46 NSWLR 346; *Bugmy* at [43]; *Dungay v R* at [153].

Bugmy v The Queen - prosocial behaviour - error in finding absence of evidence that upbringing had role in commission of offences

Donovan [2021] NSWCCA 323: The CCA allowed the applicant's sentence appeal for inflict GBH in company and affray.

The sentencing judge rejected application of *Bugmy* principles because when the applicant committed the offences at age 19, his prosocial behaviour and social achievements was evidence of an absence of lasting damage from his "*disadvantaged upbringing*". His background therefore did not materially contribute to offending to reduce moral culpability.

The Crown conceded that the judge erred in finding there was an "*absence of evidence*" that the applicant's deprived upbringing "*had a role to play in the offences he committed*" : at [81]-[82], [89].

Uncontradicted expert evidence identified a link between childhood exposure to abuse and the offences, namely, that poor decision-making and reaction resulted from learned behaviours from childhood and adolescence. Violence impacted on development through to the present day in spite of prosocial family support. There was a nexus between childhood trauma and current mental health, immaturity, interpersonal relating and self-esteem. The applicant was re-sentenced: at [83]-[89].

***Bugmy v The Queen – principles of broad application* - FASD a mitigating factor decreasing moral blameworthiness**

Hiemstra v The State of Western Australia [2021] WASCA 96

The principles in *Bugmy* do not apply solely to an offender whose upbringing has resulted in suffering from alcohol addiction and mental illness. The principles are of broader application They are relevant to an offender who, for whatever reason(s), has experienced very significant childhood deprivation of a kind and to a degree which leaves its mark throughout their life, such as to impair capacity to mature and learn from experience, and reform: at [106]. The Court allowed the appeal on the ground that the judge failed to give 'full weight' to the mitigation arising from the applicant's traumatic childhood (*Bugmy v The Queen*) for reasons including:

- The judge's statement that weight given to the applicant's traumatic childhood "must be necessarily reduced" because of the offending's seriousness and previous offending, mirrors substantially the statement held to be erroneous in *Bugmy.*
- The mitigation requiring 'full weight' included the appellant's FASD deficits which decreased moral blameworthiness for the offending. The judge incorrectly regarded it as relevant only to prospects of rehabilitation: at [113]-[118].

Sentencing judge accepted Bugmy principles enlivened on evidence but failed to give proper consideration

Lloyd v R [2022] NSWCCA 18

The CCA allowed the applicant's appeal where the sentencing judge found the *Bugmy* principles were enlivened thereby accepting that a background of childhood deprivation was established on the evidence, but then failed to consider whether the applicant's deprived upbringing contributed to the cause of his offending or otherwise reduced moral culpability: at [48]. The judge did not discuss the effects of childhood deprivation, nor moral culpability for the offence or whether it was lessened on account of the disadvantages of upbringing. The judge further made no reference to the relevant parts of the expert report of a mental health professional regarding impact of background. That report was not challenged by the prosecutor and had been accepted by the judge: at [36]-[48].

Aboriginal juvenile offender with significant childhood disadvantage – 'Significance of culture to wellbeing, healing and rehabilitation Report' - R v BS-X [2021] ACTSC 160

The report *Significance of culture to wellbeing, healing and rehabilitation*[1] was published in August 2021 by the *Bugmy* Bar Book with support by the Australian Bar Association. The report concludes that, "for First Nations offenders, rehabilitation approaches that are culturally appropriate, trauma-informed and connected to family and community are more effective in building both individual and community resilience and, over time, can reduce recidivism." [2] In ***R v BS-X*** [2021] ACTSC 160 the Court, in sentencing proceedings regarding a 15-year-old Wiradjuri male with diagnosis of complex developmental trauma, summarises important aspects of the report relevant to sentencing determinations and found it significant in the context of the psychologist's report and as underlining the principles that should be applied, particularly the *Bugmy* principles: at [81]-[85]. See also ***R v Levvell*** [2021] NSWDC 518 at [50].

Good character - sexual intercourse with young person under special care - school teacher - not an offender who sought to use good character to obtain trusted position for purpose of committing offences

Fenner v R [2022] NSWCCA 48: This was a case under Sexual intercourse with young person under special care (s 73 *Crimes Act*). The applicant was a teacher of the student-victim aged 17.

[1] By Vanessa Edwidge, senior psychologist, and Dr Paul Gray, Associate Professor, UTS Jumbunna Institute for Indigenous Education and Research. Available at the Bugmy Bar Book - https://www.publicdefenders.nsw.gov.au/barbook

[2] The Hon Judge Sophie Beckett, 'The significance of culture to wellbeing, healing and rehabilitation' (2021) 33(9) *Judicial Officers Bulletin*

Note that as s 73 is not a 'child sexual offence' under s 21A(6) *CSPA*, that s 21A(5A) does not operate to prevent good character being taken into account.

The CCA held the sentencing judge erred in not taking the applicant's good character into account.

On the appeal, the Crown sought to rely on *Stanton v R* [2017] NSWCCA 250 at [118]:

> "...The fact that good character was a condition precedent to him holding the position of a school teacher with access to young children makes it difficult for the Applicant to rely in any meaningful way upon evidence of what is said to be his otherwise good character."

The CCA distinguished the present case from *Stanton* on the basis that good character was put forward at the sentence hearing and 25 references showed that for 10 years the applicant had been a school teacher who demonstrated actual good character (*Ryan v The Queen* (2001) 206 CLR 267). This was **not** an offender who deliberately set out to use the benefits of his apparent good character to obtain a trusted position with the specific purpose of committing the offences: at [49]-[50].

'Good character' ought to have been taken into account under s 21A(3) *CSPA* and by reason of *Ryan v The Queen* at [36] which held that a judge is always bound to consider the 'otherwise good character' of the offender. In so doing the judge does not take into account the offences for which the offender is being sentenced, although weight given to good character will vary according to circumstances of the case: at [47]-[48]; *SD v R* (2013) 39 VR 487; *Wakim v R* [2016] VSCA 301.

The CCA reduced the applicant's term of imprisonment.

ss 21A(2)(g), (3)(a) CSP Act - wound with intent to cause GBH - Crown concession that injuries did not amount to "really serious harm", meaning they were 'not substantial'

Chemaissem v R [2021] NSWCCA 66

It is an aggravating factor where the injury was substantial: s 21A(2)(g).

It is a mitigating factor if the injury was not substantial: 21A(3)(a).

The CCA (Bellew J; Campbell J agreeing; Brereton JA dissenting) allowed the applicant's sentence appeal for wound with intent to cause GBH (s 33(1)(a) *Crimes Act*). The judge erred by finding the injuries aggravated the offence under s 21A(2)(g). The judge failed to take into account as a mitigating factor under s 21A(3)(a) that the injuries were not substantial.

The medical report, to which the judge made no reference, found the injuries did not constitute "really serious bodily injury", that is, GBH. While the fact that an injury does not constitute GBH does not, of itself, mean that it is not substantial, the judge made no reference to the report: at [66].

Further, counsel was entitled to proceed on the basis that the Crown's concession - that the injuries did not amount to "really serious harm", that is, were 'not substantial'- had been accepted and that the injuries were a mitigating factor. But for the Crown's concession, it may well have been open to the judge to find that the injuries were substantial and aggravated the offending: at [67]-[76].

Brereton JA (dissenting) said that "substantial" in the present context means "having substance, other than trivial". Injuries can be substantial without being "really serious". If saying that an injury does not amount to "really serious harm" is regarded as equivalent to saying that it is insubstantial, then every injury that falls short of GBH would be insubstantial. Every case of actual bodily harm, falling short of GBH, would involve an injury that is not substantial, and would therefore attract the mitigating factor in s 21A(3)(a). It is unlikely this was intended by the legislature: at [12]-[13].

ss 21A(3)(g), (h) CSP Act - judge considered prospects of rehabilitation - not asked to make a finding about likelihood or unlikelihood of re-offending

Meoli v R [2021] NSWCCA 213**:** Mitigating factors include where the offender is unlikely to re-offend (ss 21A(3)(g)) and the offender has good prospects of rehabilitation (ss 21A(3)(h)).

The applicant submitted that the sentencing judge erred in paying significant attention to prospects of rehabilitation but did not take into account unlikelihood (or otherwise) of re-offending.

The CCA dismissed the appeal. The two concepts, although having much in common, are separate and distinct: at [29]; *TL v R* [2020] NSWCCA 265 at [369].

The judge was not asked to make a finding about likelihood or unlikelihood of re-offending, and no such issue was raised. There is no error in the absence of reference to a sentencing consideration that is not

raised. Not every one of the mitigating factors in s 21A(3) calls for a specific finding; it is those that arise in the circumstances of the case: at [42]; *Taylor v R* [2018] NSWCCA 255 at [51]-[52].

While accepting the two factors are 'separate' issues, in many cases, evidence will overlap and conclusions on each may be expected to be consistent. Inherent in the judge's expressed doubt about prospects of rehabilitation are equivalent doubts of being unable to avoid re-offending: at [43].

Youth – motor-vehicle manslaughter

Byrne & Cahill v R [2021] NSWCCA 185

In this case of motor-vehicle manslaughter by two provisional licensed drivers, the CCA held that the principles that apply to issues of culpability and youth in *BP* (2010) 201 A Crim R 379 gave way to the need for significant general deterrence: at [102]-[103].

B killed the innocent driver of another vehicle during a 'street race' with C. The applicants pleaded guilty and were each sentenced to 10 years 6 months imprisonment, NPP 7 years.

The CCA dismissed their appeals. The principles regarding youth must be seen in context. General deterrence becomes more significant for an offence prevalent amongst young persons who may see themselves as "bullet proof". The two issues may balance each other out in some cases or, in other cases a degree of leniency may be shown. In a third class of case the need for general deterrence substantially outweighs leniency on the basis of youth and immaturity. This does not dispense with principles regarding youth but involves balancing against greater need and significance of general deterrence to deter persons in that class from such conduct: at [102]-[103].

This was a most serious example of this kind of offence. Factors affecting seriousness were the number of vehicles, a joint criminal enterprise increasing danger to others, driving in a built-up area, excessive speed and reckless disregard for safety of others: at [112]-[120].

Delay a relevant consideration to Commonwealth offenders – s 16A(2) Crimes Act 1914 (Cth)

Aboud v R [2021] NSWCCA 77

Bellew J stated that in sentencing for a federal offence, delay is a relevant consideration despite not being a matter listed in s 16A(2) *Crimes Act* 1914 and notwithstanding that it is not a factor picked up by any other federal law.

The terms of s 16A(2) (*"[i]n addition to any other matters*") make clear that the matters to be taken into account under ss16A(2)(a)-(p) is not an exhaustive list and allows a Court to have regard to common law sentencing principles: at at [86]-[88], [92]; cf. *Pratten v R* (2017) 94 NSWLR 194 at [72].

Mental health - De La Rosa (2010) 79 NSWLR 1 principles not absolute - discretionary evaluation

R v Blake [2021] NSWCCA 258

The sentencing judge found the applicant's moral culpability to be "reduced somewhat" due to major depressive illness and the significance of general deterrence diminished "to some extent" but that it remained important. The applicant submitted on appeal that the judge failed to properly consider mental illness.

The CCA refused leave. The principles in *De La Rosa* per McClellan CJ at CL are not expressed in mandatory or unqualified terms but described in respect of each principle how it *may* have a certain affect upon assessment of sentence. Where a principle does apply, it is a matter for the judge to make a discretionary evaluation as to the extent of its significance: at [42]; *Aslan v R* [2014] NSWCCA 114 at [33].

General deterrence should often be given very little weight in a case of mental disorder or abnormality as the offender is not an appropriate medium for making an example to others - "But, if the offender acts with knowledge of what he is doing and with knowledge of the gravity of his actions, the moderation need not be great": at [43] citing *R v Wright* (1997) 93 A Crim R 48 at 50-51 per Hunt CJ at CL.

The judge's remarks were evaluative findings that accorded with principle and open on the evidence: at [48].

3. AGGRAVATING FACTORS

Victim of offence a child – error to find offence aggravated because it occurred in 'presence of child' - s 21A(2)(ea) CSPA

Arvinthan v R [2022] NSWCCA 44

It is an aggravating factor if the offence was committed in the 'presence of a child' under 18: s 21A(2)(ea) *CSPA*.

The applicant was sentenced for aggravated break, enter and commit serious indictable offence, namely, sexual touching (s 112(2) *Crimes Act* 1900). The victim of the sexual touching was 17.

The judge erred in finding the offence aggravated by the circumstance that it was committed in the 'presence of a child.' The purpose of s 21A(2)(ea) is to protect against the deleterious effects upon a child who is a witness to the crime, rather than the victim. That a person is a child may be a factor that increases moral culpability and, accordingly, objective seriousness, forming part of the assessment of the objective circumstances of the offending: at [36]-[39].

s 21A(2)(g) – 'substantial' harm – child sex offences - use of Victim Impact Statements

Culbert v R [2021] NSWCCA 38: The judge properly had regard to Victim Impact Statements to find that the harm suffered by the victims of child sexual assault offences was "substantial" within s 21A(2)(g): at [120]. Although the judge did not identify the two matters relied on by the Crown for a finding of substantial harm - hypervigilance and guilt - these circumstances were apt to elevate the harm suffered from the usual harm expected from such offences to the level of "substantial": at [120].

The adverse psychological effects of child sexual abuse tend to be long-lasting, so care must be taken to avoid double-counting by finding 'substantial harm' when the harm suffered is no more than the consequences that typically flow from such offending such as difficulties with intimate relationships, self-loathing, guilt, self-harm and self-medication. The judge was required to have regard to these matters (*R v Gavel* (2014) 239 A Crim R 469 at [106]; *Corliss v R* [2020] NSWCCA 65 at [73]-[97]).

Considerable caution must also be exercised before a Victim Impact Statement can be used to establish an aggravating factor to the requisite standard: at [119]; *Gagan (a pseudonym) v R* [2020] NSWCA 47 at [80]-[81].

4. DISCOUNTS – PLEA OF GUILTY

The mandatory fixed discounts in the Early Appropriate Guilty Plea scheme (EAGP) in Part 3, Div 1A *Crimes (Sentencing Procedure) Act* 1999 applies to offences on indictment in proceedings that commenced on or after 30 April 2018.

The provisions, relevantly, provide:

s 25D Sentencing discounts for guilty plea for offences dealt with on indictment

……

(2) **Amounts of sentencing discounts** The discount for a guilty plea by an offender (other than an offender referred to in subsection (3) or (5) or s.25E) is—

(a) 25% if the plea was accepted by the Magistrate in committal proceedings,

(b) 10% if the offender was committed for trial and—

(i) pleaded guilty at least 14 days before the first day of trial, or

(ii) complied with the pre-trial notice requirements and pleaded guilty at the first available opportunity,

(c) 5% if paragraph (a) or (b) does not apply.

(3) **Discount variations—new count offences** The discount for a guilty plea for a new count offence—

(a) 25% if offer made by the offender and recorded in a negotiations document as soon as practicable after the ex officio indictment was filed or the indictment was amended to include the new count,

(a1) ….

(b) 10% if paragraph (a) or (a1) does not apply and the offender—

(i) pleaded guilty at least 14 days before the first day of trial, or

(ii) complied with pre-trial notice requirements and pleaded guilty to the offence at first available opportunity,

(c) 5% if paragraph (a), (a1) or (b) does not apply.

(4) However, the discount in subsection (3) (a) does not apply if—
(a) the facts or evidence that establish the elements of the new count offence are substantially the same as those contained in the brief of evidence or other material served by the prosecutor in committal proceedings relating to the original indictment and the penalty for the new count offence is the same as, or less than, the offence in the original indictment, or
(b) the offender refused an offer to plead guilty to the new count offence made by the prosecutor in the committal proceedings relating to the original indictment and the offer was recorded in a negotiations document.

s 25E Sentencing discounts where guilty plea offer made for different offences and refused when made

(1) **Discount where offer not accepted** The court is to apply a discount in accordance with this section if—
(a) the offender made an offer recorded in a negotiations document to plead guilty to an offence, and
(b) that offence (the ***different offence***) was not the offence the subject of the proceedings when the offer was made, and
(c) the offer was not accepted by the prosecutor, and
(d) the offer was not subsequently withdrawn, and
(e) the offender was found guilty of the different offence or an offence that is reasonably equivalent to the different offence.

For the purposes of this subsection, an ***offence is reasonably equivalent to a different offence*** if—
(a) the facts of the offence are capable of constituting the different offence, and
(b) the maximum penalty for the offence is the same or less than the different offence.

(2) **Discount where offer later accepted** The court is to apply a discount in accordance with this section if—
(a) the offender made an offer recorded in a negotiations document to plead guilty to an offence, and
(b) that offence (the ***different offence***) was not the offence the subject of the proceedings when the offer was made, and
(c) the offer was refused but accepted by the prosecutor after the offender was committed for trial, and
(d) the offender pleaded guilty to the different offence at the first available opportunity

(3) **Discount variation—offer to plead guilty to different offence** The discount is—
(a) 25% if offer made before offender committed for trial,
(b) 10% if offer made after committed for trial and at least 14 days before first day of the trial,
(c) 5% if offer made less than 14 days before, on or after the first day of trial.

s 25D CSP Act incorporates utilitarian value of plea - remorse (s 21A(3)(i)) and willingness to facilitate the course of justice (s 22A) require separate consideration as part of instinctive synthesis

Doyle v R [2022] NSWCCA 81

Section 25D provides for a mandatory sentencing discount for utilitarian value of a guilty plea.

> **"**25D Sentencing discounts for guilty plea for offences dealt with on indictment
>
> (1) Mandatory nature of sentencing discount - In determining the sentence for an offence, the court is to apply a sentencing discount *for the utilitarian value of a guilty plea* in accordance with this section if the offender pleaded guilty to the offence at any time before being sentenced. [Emphasis added].

The CCA held the sentencing judge erred by dealing in a "rolled up way" the triple considerations of utilitarian value, remorse and willingness to facilitate the course of justice. The judge erred in attributing the s 25D discount in part to the applicant's "acceptance of responsibility and… willingness to facilitate the course of justice". Rather, the utilitarian value of the applicant's guilty plea alone entitled him to a discount of 25%, and acceptance of responsibility and willingness to facilitate the course of justice ought to have formed part of the process of instinctive synthesis: at [18].

The *CSP Act* now explicitly differentiates between the utilitarian value of a guilty plea (s 25D), remorse (a mitigating factor under 21A(3)(i)) and/or a willingness to facilitate the administration of justice (s 22A).

The two latter considerations are to be taken into account separately from the utilitarian value of an early guilty plea: at [16]-[17].

Offer to plead guilty to manslaughter as alternative to murder – a different offence not the subject of proceedings – 25% discount applied – ss 25E(2)(b), (3) CSP Act

Black v R [2022] NSWCCA 17: The charge certificate and case conference certificate showed the applicant's offences as murder and, in the alternative, manslaughter. The applicant twice offered (prior to committal and at arraignment) to plead guilty to manslaughter – both offers were rejected. At trial, the prosecution accepted an offer to plead guilty to manslaughter.

The sentencing judge applied a 10% discount in accordance with s 25D(2)(b)(ii) because the applicant had complied with pre-trial notice requirements and pleaded guilty at the first available opportunity.

The applicant appealed on the sole ground that the judge erroneously found the case came within s 25D(2)(b)(ii); when it properly came within s 25E(2) and he was entitled to the 25% discount prescribed in s 25E(3)(a).

The CCA allowed the applicant's appeal.

Section 25E(2), relevantly, provides:

> s 25E(2) **Discount where offer later accepted** The court is to apply a discount in accordance with this section if—
>
> ……..
>
> (b) that offence (the ***different offence***) was not the offence the subject of the proceedings when the offer was made, and…..

The critical question was, and is, whether par (b) of s 25E(2) was satisfied - whether manslaughter was a "different offence" – that is, not "the offence the subject of the proceedings when the offer was made". The judge erred in concluding that, because manslaughter was identified in the charge certificate and the case conference certificate as an alternative to murder, it was "the subject of the proceedings when the offer was made" and that therefore par (b) was not satisfied and s 25E(2) did not apply: at [26]-[27].

The question for determination is, whether, *for the purposes of s 25E(2)(b)*, manslaughter was "the offence the subject of the proceedings": at [29].

What must be construed is not the phrase "the subject of the proceedings"; it is the phrase (in ss 25E(1) and (2)) "*the offence* [singular] the subject of the proceedings" (emphasis added). Use of the definite article in ss 25E(1) and (2) is clear indication that the legislature contemplated only one offence – the principal offence – is "the offence the subject of the proceedings." "The offence the subject of the proceedings" was murder: at [31]-[36]; ***R v Holmes (No 7)*** [2021] NSWSC 570, *followed*.

The discounts in s 25E(3) are intended to operate as an incentive to offenders to offer realistic pleas of guilty. To deny a reduction because the alternative charge is specified in the charge certificate or case conference certificate would undermine that purpose and be potentially unfair. The legislation does not require alternatives be so specified. It is unlikely that the legislature intended that a prescribed reduction be dependent on whether the Crown chooses to so specify the alternatives: at [41]-[42].

Two further issues raised by the Crown

(1) whether, where an accused pleads guilty to an alternative offence, but not guilty to the primary offence, the Magistrate may accept the guilty plea and commit the accused for sentence on the alternative offence at the same time as committing the accused for trial on the primary offence.

To the extent that it arises in this application, this question is answered in the negative: at [49].

(2) whether the Crown should list alternative offences, whether common law (e.g. murder/manslaughter), statutory (e.g. aggravated sexual assault/sexual assault), or other alternatives (e.g. break and enter and commit serious indictable offence/the serious indictable offence alleged to have been committed therein) on a charge certificate under s 66 *CP Act*.

This question does not arise in these proceedings. There are many circumstances in which alternative offences may call for consideration. It will depend on circumstances of each case. What is clear is that entitlement to a specific discount does not and should not depend upon identification of potential alternative counts on those documents: at [51].

'new count offence' – 'substantially the same' as original charges, s 25D(4)(a) – recognising potential offences to offer a plea of guilty

R v French [2021] NSWSC 153

The offender was charged with, and committed for trial, on murder. More than 14 days before trial, he pleaded guilty to a new indictment containing manslaughter (count 1) and the common law offence of wilful disposal of body (count 2). It was accepted that the applicable discount for the plea to manslaughter was 10% (s 25D(2)(b)(i).

The issue concerned the discount for Count 2. It was accepted that count 2 was a "new count offence" (s 25B). The defence contended the applicable discount was 25% within s 25D(3)(a).

The Court held s 25D(4)(a) applied and therefore the applicable discount was 10% as prescribed by s 25D(3)(b).

Section 25D relevantly provides:

> s 25D
>
> (3) **Discount variations—new count offences** The discount for a guilty plea for a new count offence—
>
> (a) 25% if offer made by the offender and recorded in a negotiations document as soon as practicable after the ex officio indictment was filed or the indictment was amended to include the new count,
>
> (b) 10% if paragraph (a) or (a1) does not apply and the offender—
>
> (i) pleaded guilty at least 14 days before the first day of trial, or
>
> (ii) complied with pre-trial notice requirements and pleaded guilty to the offence at first available opportunity,
>
> ……
>
> (4) However, the discount in subsection (3) (a) does not apply if—
>
> (a) the facts or evidence that establish the elements of the new count offence are substantially the same as those contained in the brief of evidence or other material served by the prosecutor in committal proceedings relating to the original indictment and the penalty for the new count offence is the same as, or less than, the offence in the original indictment, or

The applicant argued that s 25D(4)(a) did not apply because the elements of count 2 were entirely new so that "the facts or evidence" which go to establishing that offence are not "substantially the same" as those in the brief of evidence.

The Court rejected this argument. The issue is concerned with the substantial similarity (or not) of the 'facts or evidence that establish the elements', not the elements themselves": at [78]-[79]; *R v Doudar* [2020] NSWSC 1262.

The issue requires a finding of fact as to the relationship between the brief of evidence or other relevant material and the elements of the new offence. The inference to be drawn from the evidence in the brief was that whoever killed the deceased also disposed of the body. As the brief was directed to proving the offender killed the deceased, it follows that the "facts or evidence that establish" count 2 are substantially the same as those contained in the brief of evidence. Section 25D(4)(a) therefore applied: at [80]; *R v Doudar.*

Recognising potential offences

The Court made the observation that an offender being in a position to offer a plea to an offence prior to committal is dependent on the capacity to recognise potential offences revealed in the brief of evidence. Here, there may be a degree of unfairness given that 'wilful disposal of a body' is a common law offence of 'relative obscurity'. However, the provisions of Div 1A *CSP Act* are prescriptive: at [77], [81].

In ***R v Lister*** [2021] NSWDC 132 the accused was arrested and charged with s 86(3) *Crimes Act*. A s 86(2)(a) offence was also included on the charge certificate. Just days before trial (i.e within 14 days), a fresh indictment was prepared and a plea of guilty was accepted to s 86(2)(a), in the alternative to s 86(3). No offer to plead was made until days before the trial date.

The Court applied a 5% discount under ss 25D(4)(a) and 25D(3)(c). The substantive facts for sentence and the 'new count' are substantially the same if not identical to facts put at Local Court and support the original indictment. The only difference is an assessment of how and when the joint criminal

enterprise was formed. The prosecution are not now pressing that the joint criminal enterprise started with the original detention of the victim. Rather, they accept it commenced when she joined the joint criminal enterprise *after* the violence had been inflicted. The essential facts have not changed since arrest, only their interpretation: at [19]-[20].

"An offer recorded" in s 25E means "an offer recorded or which ought to have been recorded"

Ke v R [2021] NSWCCA 177

Section 25E(2) provides for a discount where an offer is made and ultimately accepted (see s 25E above). In particular, the court is to apply a discount in accordance with this section if—

(a) the offender made *an offer recorded in a negotiations document* …..

The CCA held "an offer recorded" means "an offer which was recorded *or which ought to have been recorded*" where the parties had omitted to record in the case conference certificate the offender's offer, prior to committal, to plead guilty to recklessly deal with proceeds of crime (s 193B(3)). The Crown ultimately accepted the plea in the alternative to the more serious offence in s 193B(2), however, the sentencing judge was not made aware the offer had been made and imposed a 10% discount on the basis the plea was entered after committal.

The CCA held a 25% discount should have been imposed within s 25E(3)(a). The interpretation avoids a plainly unjust outcome for the applicant: at [340].

A literal interpretation would bring about a result not intended by Parliament that an offender be deprived of a significant discount where both parties simply overlooked a requirement to record an offer to plead guilty. Parliament's clear intention, reflected in s 75(1)(b) *Criminal Procedure Act* 1986, was that any offer to plead guilty to (inter alia) a different offence is to be recorded in the case conference certificate: at [337]-[342].

Utilitarian value of guilty plea eroded by disputed facts - s 25F(4) - where charge laid before commencement of EAGP scheme – s 25E(1)

Richey v R [2021] NSWCCA 93

The applicant was charged with AOABH (s 59(1) *Crimes Act*) by Court Attendance Notice (CAN) dated 29 September 2017.

After the EAGP scheme commenced on 30 April 2018, he was charged with seven further offences. The case conference certificate noted that the applicant made an offer to plead guilty to the AOABH offence on "*different facts to those alleged"* and the offer was rejected.

The applicant was convicted at trial of AOABH and acquitted of the other offences. The applicant submitted his case came within s 25E(1) (discount where offer not accepted) and that because his offer was made prior to committal he was entitled to the 25% discount under s 25E(3). However, the judge declined to apply a discount because the utilitarian value of the plea was eroded by disputed facts not determined in the applicant's favour pursuant to s 25F(4) *CSP Act*.

Section 25F(4) provides, relevantly:

> (4) **Exception to application of discount—disputed facts** The court may not apply the discount, or apply a reduced discount, if the utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender.

On appeal, the applicant submitted the judge erred in not applying the correct discount.

There was also the issue of whether the AOABH offence, laid before the EAGP scheme commenced, was the subject of "the proceedings" within s 25E. Section 25E provides for a discount where an offender offered to plead guilty to an offence, the offence (the "*different offence*") was not the offence the subject of "*the proceedings*", the offer was rejected, and the offender was found guilty of the different offence.

The CCA (Ierace J; RA Hulme J with separate reasons; Harrison J agreeing with Ierace J's orders) dismissed the appeal. There was no error by the judge in not applying a discount.

Ierace J

There were simultaneous proceedings on foot at the committal stage that became one proceeding on the indictment. Thus it was open to the applicant to make an offer of a "*different offence*" at the case conference in relation to the offences in the charge certificate. That the terms of the offer coincided with

the CAN charge did not disentitle him to make that offer. "*Proceedings*" in s 25E does not refer to committal proceedings generally, but to committal proceedings pursuant to the EAGP scheme: at [58]; s 55 *Criminal Procedure Act*.

s 25F(4)

There were two conditions to the offer: that the proposed factual basis of the plea be accepted; and that all other charges be withdrawn.

Although the judge was unable to make specific findings as to the circumstances in which the applicant inflicted injuries on the victim, he expressly rejected the applicant's version and concluded that he was a "*very tall, powerfully built man*" who had given the defenceless victim a "*thrashing.*"

These findings were contrary to the first condition, that the proposed factual basis of the plea be accepted. The applicant's submission that differences between the factual basis of an offer by an accused and facts found by the sentencing judge is not a material consideration, and inconsistent with a textual and purposive analysis of the legislation.

The judge's findings in relation to the disputed accounts of the applicant and victim at trial entirely eliminated the subjective considerations and utilitarian value of the plea. The judge acted within his discretion pursuant to s 25F(4) to not apply at all the discount.

RA Hulme J

The applicant would not have been entitled to a discount for the AOABH charge within the EAGP scheme: at [7]. Applying common law principles, the pre-committal offer to plead guilty was in most respects an offer to plead to a different offence and it was thus well within the discretion of the judge to withhold any discount: at [4], [12]-[13]; *R v Borkowski* (2009) 195 A Crim R 1.

Disputed facts, s 25F(4) – discount not reduced – care in exercise of discretion

R v Burns (No 2) [2022] NSWSC 140

The Court did not consider it appropriate to reduce the discount in accordance with s 25F(4).

In the contested fact hearing, the applicant failed to establish he stabbed the victim accidentally but did establish he armed himself with a smaller pocketknife and not a large hunting knife.

The Court observed that while there will be cases in which s 25F(4) has work to do, care must be taken not to exercise the discretion it confers so as to introduce unfairness or subvert the object of the EAGP scheme to reduce delays. A contested fact hearing will often produce a small delay compared with a trial. If all contested fact hearings were taken too readily to erode utilitarian value of a plea of guilty, there would be a risk of eliminating incentive for some to plead guilty at all: at [38].

Commonwealth matters - discount for guilty plea

Lu v R; Huang v R [2021] NSWCCA 68: The sentencing judge gave a discount of 25% for early guilty pleas to Commonwealth drug offences on the basis of overlapping considerations including remorse and "sparing the community the expense of a contested trial". The judge took into account the utilitarian value of the pleas by consideration of "sparing the community the expense of a contested trial": at [33]; *DPP (Cth) v Gow* [2015] NSWCCA 208; *Weber v R* [2020] NSWCCA 103 at [12].

The Court found the judge erred by calculating the 25% discount by reference to a mix of objective and subjective factors. Identification of the utilitarian value involves an objective assessment under s.16A(2)(g) Crimes Act 1914 (Cth) and is preferably quantified. The subjective side involving demonstration of contrition is an unquantified factor assisting the offender as part of the process of instinctive synthesis under s.16A(2)(f): at [36]-[38]; Bae v R [2020] NSWCCA 35. The Court dismissed the appeal as no lesser sentences were warranted.

***Commonwealth matters - Xiao* error even where correct discount may have been given**

Hong v R [2020] NSWCCA 225

The applicant was sentenced before *Xiao v R* (2018) 96 NSWLR 1 which held that Commonwealth offenders were entitled to a discount to reflect the utilitarian benefit of a plea of guilty. The Court held *Xiao* error was demonstrated, and it was of no matter that the discount for the applicant's guilty plea may have been quantitatively correct, albeit given for the wrong reason (facilitating the administration of justice). The appeal was allowed and the applicant re-sentenced: at [8]-[12]; *Diaz v R* [2019] NSWCCA 216.

5. DISCOUNTS – ASSISTANCE TO AUTHORITIES

Assistance to authorities – Ellis discount – insufficient discount applied

McKinley v R [2022] NSWCCA 14

Section 23 *CSPA* 1999 provides for the power to reduce penalties for assistance to authorities. *R v Ellis* (1986) 6 NSWLR 603 (the *Ellis* discount) recognised that voluntary disclosure of unknown guilt merits "a significant added element of leniency", and falls within the scope of s 23 (see *CMB v The Attorney General of NSW* (2015) 256 CLR 346.

The applicant pleaded guilty to armed robbery and four other offences. When arrested for unrelated matters, the applicant disclosed his involvement in the four out the five offences in an interview with police. Police had been investigating the offence but where unaware that the applicant had been involved.

The CCA held the judge erred in applying a 40% combined discount for the early pleas of guilty and assistance relating to four offences and a 35% combined discount for the remaining offence.

Allowing the appeal, the CCA applied a 55% combined discount.

The judge applied a reduction or discount for the plea of guilty and assistance to authorities that is more in line with the usual assistance that may be provided from time to time and not in line with the rare circumstances associated with the application of the principles in *Ellis* (1986) 6 NSWLR 603 and the discount for the *Ellis* factor. Insufficient discount has been provided in the particular circumstances of the assistance provided, particularly in light of the assessment of the law enforcement agencies in relation to the assistance. That assistance was of high value; it was provided in relation to offences of which the law enforcement agencies were aware and for which they had begun an investigation; but it was done at a time when the law enforcement agencies were unaware of the involvement of the applicant in those offences: at [61]-[62].

In the past, when a more arithmetic and prescriptive approach was taken to the sentencing discretion, it had been held that certain percentages should be allowed for the plea of guilty and assistance, which, in ordinary circumstances, ought not to exceed 40%; and it would be a rare case where a discount of more than 60% would not result in a manifestly inadequate sentence (*SZ v R* [2007] NSWCCA 19; *FS v R* [2009] NSWCCA 301.) The foregoing arithmetic view probably does not withstand later authority criticising an arithmetic approach to sentencing (*Hili & Jones v The Queen* (2010) 242 CLR 520). This is not intended to suggest that too great a discount for assistance, regardless of the kind of assistance, should be given such that the sentence is unreasonably disproportionate to the nature and circumstances of the offence and the offender. The determination of the reduction for assistance pursuant to the terms of s 23 *CSPA* depends on assessment of the mandatory considerations prescribed by s 23(2): at [48]-[50].

Assistance to authorities - relatively weak Crown case – discount applicable - mandatory to consider s 23(2) CSPA

Ahmad v R [2021] NSWCCA 30: The sentencing judge erred in declining to impose a discount for assistance to authorities where the CCA described the Crown case as "relatively weak" and one that would have been very difficult to prove if facts admitted for the purpose of sentencing had been contested at trial. The applicant's assistance was not so negligible as to be disregarded. His evidence was truthful, complete and reliable: at [25]-[26]; [40]-[45], [67].

The CCA noted this case was not the paradigm example of confessing to offending entirely unknown to authorities (*R v Ellis* (1986) 6 NSWLR 603); nor had the applicant provided a statement of assistance or the police a letter identifying the assistance or its value: at [25]-[26]; [40]-[45], [67].

Further that:

- voluntary disclosure may constitute assistance under s 23 *CSP Act* even if the Crown is already aware of the offence and the offender has been charged: at [33].
- if a court is to reduce the sentence for assistance, regard must be paid to the mandatory considerations in s 23(2), and the court must specify the discount. If a court chooses *not* to impose a lesser penalty for assistance given, it remains necessary to have regard to the matters identified in s 23(2) – which the judge did not do: at [41]; *R v AA* [2017] NSWCCA 84 at [45].

Assistance to authorities – misunderstanding of R v Ellis (1986) 6 NSWLR 603

R v SS [2021] NSWCCA 30: The respondent injured a four week old baby causing permanent brain damage (recklessly cause GBH). He first denied any knowledge of the victim's injuries but later made admissions to police resulting in being charged.

Allowing the Crown appeal, the CCA held the judge erred in granting a discount for assistance to authorities. The judge erred in taking into account, in the absence of evidence, that police had no case against the respondent without his admissions.

The respondent did not voluntarily disclose "otherwise unknown guilt" *(R v Ellis*). His guilt was discoverable and could be established by the available circumstantial evidence independently from his admissions. Similarly, his admissions did not disclose additional criminality of which the police would not otherwise have been aware (*Windle v R* [2012] NSWCCA 222): at [83]. Without the respondent's admissions there was evidence that the victim was healthy until alone with the respondent and immediately exhibited extreme distress obviously related to sustaining the injuries: at [82].

Even if the matter was within *R v Ellis*, it was mandatory to consider s 23(2) *Crimes (Sentencing Procedure) Act* 1999 before allowing any reduction of sentence, which the judge did not do: at [85].

Crown received utilitarian benefit despite failure to fulfil undertaking to give evidence for prosecution

CC v R; R v CC [2021] NSWCCA 71

The Court dismissed the Crown appeal brought on the basis that C had not given evidence in accordance with an undertaking to give evidence for the prosecution (s 5DA *Criminal Appeal Act* 1912).

The CCA held the Crown had still obtained the utilitarian benefit of the undertaking.

C, who received a sentence discount for murder on the basis of an undertaking to give evidence for the prosecution in accordance with statements signed by him, did not give evidence in accordance with his undertaking at AM's judge-alone trial.

Where the utilitarian benefit is not achieved due to failure to fulfil the undertaking then ordinarily an appellate court will remove the discount. However, the Court retains a discretion whether or not to intervene.

Here, the trial judge was satisfied beyond reasonable doubt C's earlier statements were true. The Crown thus obtained the utilitarian benefit notwithstanding C breached his undertaking. The purpose of an appeal pursuant to s 5DA is not punitive, but is to enable the Court to adjust or correct a sentence where seen to have miscarried by reason of the circumstances set out in the section: at [67]-[71].

6. PARTICULAR OFFENCES

Commonwealth child sex offender rehabilitation – failure to refer to mandatory considerations in s 16A(2AAA), Crimes Act 1914 (Cth)

Darke v R [2022] NSWCCA 52

Section 16A(2AAA) *Crimes Act* (Cth) provides that in determining the sentence for a Commonwealth child sex offence the court *must* have regard to the objective of rehabilitating the person considering:

> (a) when making an order – to impose any conditions about rehabilitation or treatment options;
>
> (b) in determining the length of any sentence or non-parole period – to include sufficient time to undertake a rehabilitation program.

The CCA allowed the applicant's sentence appeal for procuring a child to engage in sexual activity outside Australia (*Criminal Code* (Cth), s 272.14(1)). The judge erred in failing to take into account the mandatory consideration in s 16A(2AAA), making no reference to s 16A(2AAA) and there being nothing in remarks on sentence to suggest rehabilitation and such conditions was considered: at [35].

The applicant's original sentence was 3 years imprisonment, with conditional release after 2 years, to be of good behaviour for 3 years.

The CCA resentenced to 3 years imprisonment with release on 1 year recognisance after 2 years. Given the applicant was not provided with any custody-based programs, and lack of clarity as to success of past counselling in terms of rehabilitation, rehabilitation is furthered by conditions

to undertake programs to assist in addressing offending behaviour and alcohol misuse. Conditions included to undertake treatment or rehabilitation including psychological counselling, EQUIPS (Addiction) or similar program and specific sex offender treatment programs: at [70]–[73].

Accessory after fact to murder - error in finding failure to go to police at early stage and provide assistance constituted an offending act - silence - active assistance - Crimes Act 1900, s 347

Ah Keni v R [2021] NSWCCA 263

The applicant pleaded guilty to accessory after the fact to murder (s 347 *Crimes Act*). By a number of offending acts over five months, the applicant concealed her husband and his co-offender's role in the murder.

The CCA held the sentencing judge erred in finding that *failure to provide assistance to the police at an early stage* constituted an offending act for the purposes of s 347.

Section 347 reflects the offence at common law. The offence as stated in the indictment was to receive, harbour, maintain and assist the principals. A mere failure to report the offence does not fit within that description. The difference between the offence of 'accessory after the fact' and 'misprision or compounding a felony' (now s 316 - conceal serious offence) is that the former involves active assistance, whilst the latter involve failing to inform the authorities of the offence: [72]-[74]; [76]-[86]; *Ewan v R* [2020] NSWCCA 85; *The King v Levy* [1912] 1 KB 158; *Sykes v DPP* [1962] AC 528.

That is not to say that silence, when associated with acts of active assistance, could never be taken into account in assessing objective seriousness. Further, silence when it has the propensity to mislead the investigator may constitute the offence, provided that the other elements are made out (for example, in *R v Farroukh*, NSWCCA, 29 March 1996). But a mere failure to report, which does not occur in the context of giving such assistance, does not make out the offence: at [78]-[80], [86].

The appeal was allowed and the applicant re-sentenced.

Common law offence of concealing corpse — failure to disclose body's location reduced benefit of remorse – fact location is unknown increases objective seriousness, not failure to disclose

Bentley v R; Davies v R; Thomas v R; Tilley v R [2021] NSWCCA 18

The applicants were sentenced for manslaughter and the common law offence of concealing a corpse.

The CCA held that, in circumstances where the applicants' knew of the body's location and failed to disclose it, the sentencing judge was correct to find that the extent to which each applicant was entitled to the benefit of the remorse was reduced. The finding of a factual matter tending to demonstrate a lack of such remorse is an adverse finding required to be established beyond reasonable doubt. It was open to the judge to be satisfied beyond reasonable doubt that the applicants knew the whereabouts of the body: at [122]-[123].

The judge properly treated the fact that the location of the body was unknown, as distinct from the failure by the applicants to disclose its whereabouts, as the matter which increased the objective seriousness of the conceal corpse offence: at [119]-[121]; *R v Davis* (1942) 42 SR (NSW) 263 at 265-267.

Retrospectivity of new offence - maintaining sexual relationship with child - s 66EA Crimes Act

Xerri v R [2021] NSWCCA 268

The new s 66EA (Maintaining sexual relationship with child under 16) commenced on 1 December 2018 with a maximum penalty of Life. It replaced the old s 66EA (Persistent sexual abuse of child) which had a maximum penalty of 25 years.

A majority of the Court (Bell P and Price J; Hamill J dissenting) held that the new s.66EA is a '*new*' offence with retrospective effect, including its maximum penalty of Life imprisonment. Therefore, the sentencing judge did not err in sentencing on the basis that the maximum penalty is Life when the maximum penalty applicable at the time of the applicant's offending (November 2016 - July 2018) was 25 years' imprisonment.

The presumption against retrospectivity of a penal statute and the principle of perceived fairness are subject to legislative intention: at [79]–[80]; *R v MJR* (2002) 54 NSWLR 368 at [26].

Section 19 *CSP Act* provides that if an Act increases the maximum penalty for an offence, the increased penalty applies only to offences committed after the provision increasing the penalty commenced.

However s 19 has no role to play when a *new* offence is created: at [84], [111] *Siganto v The Queen* (1998) 194 CLR 656.

The current s.66EA is a *new* offence based on marked differences from its predecessor, in particular:

- application of new s.66EA of "persistent sexual abuse of a child" to a child under 16 and to an unlawful sexual relationship that existed wholly or partly before the commencement of the predecessor offence in January 1999: at [91]–[92], [98].
- reduction of the offending to minimum of two unlawful sexual acts.
- the jury must be satisfied beyond reasonable doubt that "an unlawful sexual relationship existed". The prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act was charged as a separate offence, thus need not identify "ingredient offences" and uncharged acts (as required under the predecessor offence). The whole of the evidence of the relationship may be put before the jury to establish the unlawful sexual relationship existed and for an offender to be sentenced for all sexual misconduct whilst maintaining that unlawful sexual relationship: at [94]- [97].

s 66EA(7) is clear regarding retrospective legislative intent as it includes an unlawful sexual relationship which may have existed wholly before the predecessor offence commenced: at [98].

s 66EA(8) requires a court to take into account the maximum penalty for the offending during the period the unlawful sexual relationship existed. This acknowledges the principle of perceived fairness in the exercise of the sentencing discretion: at [99].

Persistent sexual abuse of child – where some offences occur outside of NSW with lower maximum penalties - s 66EA Crimes Act 1900 (repealed)

Hillman v R [2021] NSWCCA 43: The applicant committed offences against his step-daughter in New Zealand as well as NSW.

Under then s 66EA (since repealed and substituted), conduct on any of the occasions constituting s 66EA can have occurred outside NSW, so long as one occasion occurred in NSW (then s 66EA(1), (3)). [Note: This is the same under current s 66EA].

The judge did not err in assessing objective criminality of the indicative sentences which informed the aggregate sentence by not having regard to the NZ penalties which in some cases carried lower maximum penalties than those in NSW. The sentencing yardstick of s 66EA is the 25 years' maximum penalty [now Life imprisonment]. The penalties for the ingredient offences assist only as a guide: [47]-[49]; ***Burr v R*** [2020] NSWCCA 282**.**

'Sexual offence' is defined so that an offence committed outside of NSW is encompassed by the equivalent NSW provision. The judge referred to the equivalent NSW offences when setting out ingredient offences, taking their maximum penalties into account in a limited way so as to inform overall objective seriousness and of how serious such offences would be considered if dealt with separately: at [46]; [50]; *Langbein v R* [2008] NSWCCA 38.

Sexual intercourse without consent - error taking into account self-induced intoxication - Crimes (Sentencing Procedure) Act 1999, s 21A(5AA)

Fisher v R; R v Fisher [2021] NSWCCA 91

The CCA (Adamson J; Fullerton J agreeing with additional reasons; Brereton JA dissenting) allowed the Crown appeal against the respondent's Community Correction Order for sexual intercourse without consent (s 61I *Crimes Act* 1900).

The judge erred by taking into account the respondent's self-induced intoxication which cannot be considered either on the question of the respondent's knowledge of whether the complainant consented or as a mitigating factor: at [225]; see s 21A(5AA) *CSPA* and ss 61HA(3)(e) (now s 61HE(4(b)), s 428B, and s 428D(a)) *Crimes Act* 1900.

The Crown case was that the respondent deceived the complainant into believing she was having intercourse with her boyfriend whilst she was sleeping. The judge stated that he had not taken self-induced intoxication into account as a mitigating factor. However, it is clear the judge took it into account (favourably to the respondent) by way of "explanation" for his conduct, with the effect of minimising moral culpability. Taking intoxication into account led to rejection of the Crown case that the respondent had deliberately deceived the complainant. It also led to finding that the respondent honestly, but

unreasonably, believed that the complainant was consenting in accordance with the least serious of the three alternatives as to his state of mind: at [73], [225], [229]-[231].

Fullerton J stated the judge was obliged to disregard the respondent's intoxication entirely when enquiring into his state of mind, awareness or perception at the time of the offending, where that enquiry was undertaken for the purposes of assessing the objective seriousness: at [74].

Community Corrections Order: The original sentence was plainly unjust and unreasonable. The sentence imposed must indicate to the community at large the seriousness of sexual assault on a sleeping woman who is a stranger to her assailant. A full-time custodial sentence was imposed to reflect objective seriousness: [238]-[258].

Sexual intercourse with person under special care aged 17-18 years - where victim fell in age range of little significance - s 73 Crimes Act

Gale v R [2021] NSWCCA 16**:** For an offence of sexual intercourse with a person under special care aged 17 to 18 under s 73 *Crimes Act*, there is no sliding scale of seriousness of offences committed against 17-year-olds from most serious to least serious as the victims approach their 18th birthday.

The fact that it is an element of the offence that a child was within a specified age range does not prevent the actual age being taken into account in an assessment of the seriousness of the offence and is not double counting (*Shannon v R* [2006] NSWCCA 39 at [28]; *RJA v R* [2008] NSWCCA 137; 185 A Crim R 178 at [13]).

However, these cases involve offences which include broader age ranges. Similar reasoning does not apply where the statutory provision specifies a range of age as narrow as 12 months: at [49].

There was no evidence about the actual level of maturity or agency of the victim in this case and so this issue is left to be considered as a general proposition. The sentencing judge was correct to regard where the victim fell in the age range covered by the offence as being of "very little significance": at [50].

Dishonestly obtaining financial advantage by deception - misdirection regarding mental element of dishonesty – knowledge, not mere recklessness, required

Bazouni v R [2021] NSWCCA 256

The appellant was convicted of five counts of dishonestly obtaining a financial advantage by deception (ss 192E(1)(b) *Crimes Act 1900*).

The appellant, a bank loans manager, took part in a joint criminal enterprise to defraud the bank by accepting fraudulent loan documents.

The single ground of appeal was that the trial judge erred by directing the jury on an element of the offence, being that they could be satisfied that the alleged dishonesty could be proved by *mere recklessness.*

Section 192E(1)(b) provides that "[a] person who, by any deception, dishonestly obtains any financial advantage or causes any financial disadvantage, is guilty of the offence of fraud".

Section 4B defines dishonesty as "… dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people".

Section 192B(2) provides: "A person does not commit an offence under this Part by a deception unless the deception was intentional or reckless".

The CCA held (and it was conceded by the Crown) that the judge erred by directing the jury that they "must not only find beyond reasonable doubt that the accused acted dishonestly in deceiving the bank, but also that he knew *or was reckless* that his conduct was dishonest according to the standards of ordinary people".

However, the accused must be proven to *know* - and not merely be reckless as to - whether his or her conduct was dishonest according to the standards of ordinary people: at [80].

By majority (Bell P and Button J; Rothman J dissenting), however, the appeal was dismissed. The legal error was significant and constituted a miscarriage of justice because it was a necessary mental element of the offence, however, did not preclude application of the proviso where evidence at trial compels satisfaction beyond reasonable doubt that the appellant must have known that his conduct was dishonest according to the standards of ordinary people: at [223]-[224]; *Kalbasi v Western Australia* (2018) 264 CLR 62.

Commonwealth counterfeit currency and identity fraud offences

Hayward v R [2021] NSWCCA 63

The applicant was sentenced for possessing and uttering counterfeit money and producing false documents (*Crimes (Currency) Act 1981 (Cth)* and *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)*). The applicant opened false bank accounts, depositing counterfeit Euros to obtain Australian currency. The counterfeit Euros uttered or found in possession was over $306k.

Johnson J discusses relevant sentencing principles, including that such offences undermine community confidence in currency and the banking system; the quantity and quality of counterfeit notes uttered and value of the proceeds derived are significant factors; and general deterrence is important for counterfeit and identity crime: at [65]-[67]; *R v Institoris* [2002] NSWCCA 8.

7. APPEALS

Kentwell v The Queen principles - independent exercise of sentencing discretion - s 6(3) Criminal Appeal Act 1912

Young (a pseudonym) v R [2021] NSWCCA 163

The Crown conceded error on the applicant's sentence appeal. However, the Crown relied on the following passage from *R v Simpson* (2001) 53 NSWLR 704 at [100] to argue that the Court's discretion to re-sentence under s 6(3) *Criminal Appeal Act* 1912 was not enlivened because the Court:

> "must be persuaded, not only that error has been shown… but that some other sentence is warranted in law":

The CCA allowed the appeal and re-sentenced the applicant (Beech-Jones J; Basten JA agreeing; Brereton JA dissenting as to outcome).

Beech-Jones J said that in light of the argument on appeal and recent decisions citing the passage from *R v Simpson* (e.g ***Sigalla v R*** [2021] NSWCCA 22 at [150]), it is appropriate to note three related matters about s 6(3) and the independent exercise of the sentencing discretion:

(1) The passage in *R v Simpson* is inconsistent with *Kentwell* (2014) 252 CLR 60 which requires the independent sentencing discretion be re-exercised. The passage was relied upon by the respondent in *Kentwell* for the proposition that a finding of "specific error [by the sentencing judge] does not enliven the CCA's discretion to re-sentence; first it must form "a positive opinion" that some other sentence is warranted in law." *Kentwell* rejected this proposition. On finding that a judge acted upon wrong principle, allowed extraneous or irrelevant matters to affect their determination, mistook the facts or did not take into account some material consideration (i.e. the first four categories of *House* error) then it is the CCA's duty to exercise the sentencing discretion afresh: at [88]–[91]; *Kentwell* at [42].

(2) The Court's duty is not discharged merely by adopting the sentence imposed at first instance and concluding "no lesser sentence is warranted in law". The Court must take into account relevant sentencing requirements, facts, criminality, and personal and post-sentencing factors. It is appropriate to adopt findings of disputed fact by the judge and assessments not subject of challenge*:* at [92]; *Turnbull v R* [2019] NSWCCA 97; *RO v R* [2019] NSWCCA 183.

(3) The Court is not bound by indicative sentences and might conclude a greater indicative sentence appropriate: at [94]–[95]; *Kentwell* at [43].

Brereton JA: *Kentwell* at [43] made clear that if, in the exercise of independent discretion, the CCA determines that the same, or a greater, sentence is appropriate, then it is not required to resentence and may dismiss the appeal because the result of the independent exercise of discretion is that no lesser sentence is warranted in law: at [4]-[5].

Role of appellate court – Re-exercising sentencing discretion – Adopting findings of primary judge – Kentwell v The Queen

Sigalla v R (No 2) [2021] NSWCCA 151

The applicant's earlier appeal was allowed (*Sigalla v R* [2021] NSWCCA 22). Pursuant to s 50C *Criminal Appeal Rules*, the self-represented applicant sought to re-open his appeal and set aside or vary the orders made. He submitted the earlier Court erred by merely adjusting his sentence to reverse error instead of considering all matters and re-exercising the sentencing discretion afresh in accordance with *Kentwell v The Queen* (2014) 252 CLR 601.

The CCA (Hoeben CJ at CL, Brereton JA and Cavanagh J) refused leave. No arguable material slip, oversight, or misapprehension to engage r 50C has been raised: at [49].

- *Kentwell* at [42] held that where the sentencing discretion miscarried, it is not for the CCA to assess whether, and to what degree, the error influenced the outcome, but must proceed to re-exercise the sentencing discretion independently and afresh: at [37].
- However, there is a distinction between "re-exercising the sentencing discretion" (which is a decision-making process), and "resentencing" (pronouncement of a new sentence as a result of that process): at 38].
- If in the exercise of its independent discretion, after taking into account all relevant matters, the CCA determines that the same or greater sentence is appropriate, then it is not required to resentence and may dismiss the appeal - because the result of the Court's independent exercise of discretion is that no lesser sentence is warranted in law: at [38]-[39]; *Kentwell* at [43].
- *Kentwell* does not establish that, where specific error is found, the CCA must redetermine the sentence by reconsidering afresh each and every factual matter and evaluation that informed the sentence by the primary judge, including those in respect of which no complaint was made: at [40]-[41]; *Turnbull v R* [2019] NSWCCA 97 at [44]; approved in *RO v R* [2019] NSWCCA 183 at [81]-[82] .

The CCA held that, consistently with *Kentwell* and *Turnbull*, the earlier Court found the judge's approach, but for errors, was correct, and that approach commended itself to that Court in the independent exercise of its own discretion. If that approach by that Court is inconsistent with *Kentwell*, that would not be a slip etc. attracting r 50C, but an error for which remedy is application for special leave to the High Court: at [44].

"and should have been passed" – s 6(3) Criminal Appeal Act 1912

Aboud v R [2021] NSWCCA 77

Simpson J observed that a commonly advanced Crown submission that "no lesser sentence is warranted in law" should not be accepted (*Davis v R* [2015] NSWCCA 90).

The test in s 6(3) *Criminal Appeal Act* 1912 is in two parts, the most important is the second - "and should have been passed". Any sentence that lies within the available range is "warranted in law". A lesser sentence than that imposed at first instance may be "warranted in law". It does not follow that the lesser sentence "should have been passed"; that depends upon a range of circumstances and factors: at [1]-[6].

DPP sentence appeal from Local Court to District Court – error required – District Court has 'residual discretion' to dismiss appeal notwithstanding error – s 23(1) Crimes (Appeal and Review) Act

DK v DPP [2021] NSWCA 134

The applicant received a 15 months suspended control order in the Children's Court for sexual intercourse without consent.

The DPP's sentence appeal to the District Court under s 23(1) *CAR Act* was allowed. Applying the 'principle of restraint', the judge did not increase the term of the control order even though he would have imposed a longer term had he sentenced at first instance. The judge imposed a 15 months control order, with a non-parole period of eight months. He did not suspend the order. The applicant sought judicial review.

The Court of Appeal dismissed the summons. Two matters were raised on the appeal, which the Court held as follows:

(1) In a sentence appeal by the DPP under s 23(1), the District Court's jurisdiction is error based.

The prosecution must establish error to enliven the Court's power under s 27 to vary the sentence: at [32], [1], [73].

A fundamental consideration is that successful Crown appeal can visit injustice or unfairness on an offender, even where the sentence at first instance was erroneously lenient: at [29]. There is no clear language which provides for an increase of sentence without need to show error by the magistrate: at [31]; *Lacey v Attorney General of Queensland* (2011) 242 CLR 573.

(2) In a DPP appeal against sentence under s 23, the District Court has a "residual discretion" to dismiss the appeal notwithstanding error (akin to the discretion of the CCA in a Crown sentence appeal under s 5D *Criminal Appeal Act 1912*): at [43]–[44].

The fairness considerations that apply under s 5D *Criminal Appeal Act* apply no less to an appeal by the Director under s 23. The strongest textual indication of a residual discretion is that such a discretion was assumed as the premise of s 68A *CAR Act* which provides that an appeal court must not dismiss a prosecution appeal or impose a less severe sentence because of any element of double jeopardy: at [40].There remains work for the residual discretion following the introduction of s 68A (*R v JW* (2010) 77 NSWLR 7). Section 68A clearly contemplates that every criminal appeal court has a discretion to dismiss a prosecution appeal against sentence, the scope of which is qualified by the section: at [41]-[44].

Whether the residual discretion was exercised in the present case

The judge turned his mind to the question of the residual discretion. He made a choice not to exercise that discretion but instead to exercise restraint in resentencing: at [45], [69].

The judge understood there were three issues to determine: whether error was established; if so, whether the Court would exercise the residual discretion to [dismiss] the appeal even if error were established; and, if not, what sentence to impose: at [63].

CONVICTION AND OTHER APPEALS

1. EVIDENCE

s 97A Evidence Act 1995 – presumption tendency evidence has significant probative value

Section 97A *Evidence Act* commenced on 1 July 2020.[3]

Section 97A(2) creates a presumption that the following tendency evidence about the defendant will have significant probative value for the purposes of sections 97(1)(b) and 101(2)—

(a) tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest),

(b) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.

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 *not* to be taken account unless the court considers there are "exceptional circumstances":

(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.

R v Young (a pseudonym) [2021] NSWDC 622

The accused was charged with sexual offences involving two child complainants.

The accused made a s 97A application, submitting three matters in combination create 'exceptional circumstances' such that the proposed tendency evidence should be excluded: a gap of over 20 years

[3] Inserted by the *Evidence Amendment (Tendency and Coincidence) Act* 2020). See Tendency Evidence in 2020, by Nicholas Broadbent and Derek Buchanan

between the alleged offences against the two complainants; considerable delay between alleged occurrence of offences and when reported to police (40 years for Complainant 1 and 18 years for Complainant 2); and the allegations are vague and general and other proposed evidence contains significant generalisations.

The Court refused the application.

The Court observed that the legislative changes have removed most of the Court's discretion to exclude tendency evidence in order to facilitate the greater admissibility of such evidence: at [13]. Importantly, the defence's capacity to rebut any presumption about tendency evidence is reduced by s 97A(5). The threshold chosen has set a "high bar": at [16]; *Second Reading Speech* cited.

The Court accepted the Crown submissions, including that the time gap between the alleged event and its reporting may make the prosecution case more difficult to prove; and that whilst it may also create disadvantages for the accused these matters are best cured by direction pursuant to s 165B *Evidence Act* (*The Queen* v *Bauer* (2018) 92 ALJR 846 at [79]): at [18]-[21].

Section 97A(5) directs the Court to not have regard to the very matters the accused pointed to: level of generality, period of time between events and delay. Delays, of 40 years and 18 years, are unusual but far from extraordinary in this jurisdiction. The circumstances do not fit within an exceptional category which would enable the Court to go behind the legislative direction in 97A: at [21]-[22].

In ***R v Brookman*** [2021] NSWDC 110 the Court rejected the s 97A application to exclude tendency evidence. The Court noted observations made in the Second Reading Speech to assist in the construction of s 97A including that the matters in s 97A(5) are "myths and misconceptions" that have historically prevented tendency evidence from being seen to have probative value in child sexual offence matters: at [22]-[24].

Tendency - evidence of offences in two institutions admissible – no direction required on standard of proof necessary for uncharged acts used as tendency evidence

Greenaway v R [2021] NSWCCA 253**:** The applicant was convicted of multiple historical sexual assault offences against five female complainants at two juvenile justice institutions. The last alleged act at Parramatta School was in 1967 and the first at Ormand School was in 1971.

The CCA held there was no error in admitting evidence regarding the two institutions as cross-admissible tendency evidence. Nor was there failure to direct the jury on the standard of proof for uncharged acts used as tendency evidence.

The tendency evidence was admitted to show sexual interest in teen girls in institutions where the applicant worked and use of his position of authority to obtain access and act on that sexual interest. The charged and uncharged sexual acts had sufficient similarities to have "significant probative value" in proving the alleged tendencies, including alleged acts at the two schools: at [76]. The case is different to *McPhillamy v The Queen* [2018] HCA 52: the acts were committed in state-run institutions on girls by the applicant in a position of authority; his continuing sexual interest in young female inmates under his supervision and a tendency to act on that interest by committing progressively more serious conduct; the character of his supervisory role was the same at different schools and nature of the vulnerability of the complainants was the same; the four year time gap was explicable by the fact he had responsibility for only *male* inmates: at [72]-[74]. In *McPhillamy* the ten year gap was unexplained and consistent with a diminution of the applicant's tendencies during that time: at [75].

There was no requirement to direct the jury on the standard of proof necessary when using uncharged acts as tendency evidence. *The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56 at [86] stated that a direction to the jury that, before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt, is not necessary or desirable unless there is a significant possibility the jury will treat the uncharged acts as an indispensable link in their chain of reasoning to guilt). This applies to multiple complainant cases as it does to single complainant cases: at [62]-[67].

'opinion' evidence - conclusions drawn from research by others - ss 79, 109C Evidence Act 1995

Aziz (a pseudonym) v R [2022] NSWCCA 76

The applicant was convicted of child sexual assault offences. The CCA (Simpson AJA; Lonergan J agreeing; Adamson J declining to express a view and refusing leave to appeal) held there was no miscarriage of justice by the admission at trial of expert evidence led by the Crown, without objection,

from Dr Rita Shackel (Professor of Law and Ethics, University of Sydney) regarding behavioural responses of child sexual abuse victims: at [26]-[27].

Dr Shackel's evidence was based on her written report containing her assertions supported by footnotes referencing various articles or research by others. The applicant submitted the evidence did not constitute 'opinion evidence' for the purposes of s 79(1) and s 108(1) *Evidence Act*. The CCA held that in the circumstances of this case, Dr Shackel's evidence met the requirements of ss 79(1) and 108C(1) as opinion evidence based wholly or substantially on her specialised knowledge based on her training, study or experience: at [79].

An 'opinion' is "inferences from observed and communicable data" or "conclusions reasoned from facts": at [64]–[70]; *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 5)* (1996) 64 FCR 73; *R W Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd* (1994) NSWLR 129. In Dr Shackel's report, each assertion is a conclusion or an inference drawn from "observed and communicable data". It is no answer that the "data" is not the product of Dr Shackel's own clinical research. The essence of "specialised knowledge based on … training, study or experience" is that it draws on accumulated sources of information and the product of research of others recorded in professional publications. Each point she made was drawn from her report which, in turn, was drawn from the data identified in the footnotes. That is sufficient to establish that each point made represented an opinion: at [71]-[72].

This does not mean Dr Shackel's evidence will meet the admissibility test in every case. Much will depend on issues in individual trials: at [93]. Seeking a ruling on admissibility of evidence by reference to a 57-page report places a trial judge in an impossible position. If not done by the parties, it would be wise for a judge to require the Crown to identify parts of the report for which it seeks to adduce oral evidence. A determination can then be made as to the fact(s) in issue with respect to which the evidence is tendered: at [94].

ss 66(2)-(2A), 137 Evidence Act 1995 - Eye Movement Desensitisation Reprocessing (EMDR) therapy undertaken after giving statement to police and not video-recorded admissible

Kassab (a pseudonym) v R [2021] NSWCCA 46

The CCA held the judge did not err by refusing to exclude the sexual complainant's evidence under s 137 on the basis she had EMDR therapy.

The complainant had hypnosis; then, after giving her statement to police but before the trial, had EMDR therapy which was not video-recorded.

This case is different to the hypnosis or EMDR cases where treatment was used to *revive* memory (see cases reviewed at [300]-[310]). There has not been a case like this where the EMDR is *after* police statements *and* there is no evidence of *any* apparent change in the witness's recollection after the treatment: at [300]-[310].

The probative value of the complainant's evidence was very high as the charges relating to her could not have been established without her evidence. However, there was no 'danger of unfair prejudice'. The applicant did not suggest that there was any risk the evidence could be misused by the jury in some unfair way logically unconnected with the issues in the case (*Papakosmas* (1999) 196 CLR 297 at [91]-[92] per McHugh J]. The applicant relied upon *forensic* disadvantage but, even if suffering a forensic disadvantage could be equated with a risk of unfair prejudice, has not identified any such disadvantage at trial. It was open to the applicant to test whether there were any *revived* memories following the EMDR therapy by comparing the complainant's police statements with her evidence at trial. There was no attempt to do so on appeal: at [311]-[314].

s 135 Evidence Act 1995 – review of trial judge's decision to exclude evidence involves evaluative judgment, not an exercise of judicial discretion - "a party" includes a co-accused

Rogerson v R; McNamara v R [2021] NSWCCA 160

At their joint trial, the accused were each convicted of murder and supply drugs as part of a joint criminal enterprise to steal the drugs from the deceased and kill him.

M challenged the correctness of the trial judge's decision to exclude under s 135 evidence of two conversations between M and R in which R admitted having participated in several homicides and other criminal violence.

Section 135 *Evidence Act* provides:

"The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

(a) be unfairly prejudicial *to a party,* or

(b) be misleading or confusing, or

(c) cause or result in undue waste of time." (emphasis added)

M argued:

(1) there was no power to exclude the evidence under s 135(a) because R was not "a party" to M's trial for the purposes of s 135; and

(2) even if there was power under s 135 to exclude the evidence, it should not have been excluded.

Construction of s 135: R was a "party" for the purposes of s 135

The CCA held a co-accused is a "party" to a criminal proceeding against an accused. This is supported by factors, including: (a) s 29(2) *Criminal Procedure Act 1986* expressly permits joint trials; (b) it is consistent with other provisions in the *Evidence Act 1995*; (c) the word "party" is apt to describe a co-accused in a criminal trial; and (d) a similar position existed at common law: at [514]-[523], [540].

Appropriate standard of review

The Crown argued that review of the judge's decision is by reference to the standard in *House v The King* (1936) 55 CLR 499. M contended, by analogy with *R v Bauer* (2018) 266 CLR 56 at [61], that it was for this Court itself to determine whether probative value of the excluded evidence was substantially outweighed by the danger it might be unfairly prejudicial to R, and not simply to consider whether it was open to the judge to conclude it was: at [542].

The CCA held that s 135(a) involves an evaluative judgment, rather than the exercise of a judicial discretion.

Therefore, the appropriate standard of review is the "correctness" standard, not the standard in *House v The King.* The appellate court is to decide for itself whether the evidence should have been excluded, subject to "natural limitations": at [544], [547]-[548]; authorities cited.

Earlier decisions that *House v The King* supplied the appropriate standard for review of an evidentiary ruling under s 135(a) or that such a ruling involved the exercise of a discretion must no longer be regarded as good law: at [545]; authorities cited.

Conclusion

The judge's decision to exclude the evidence was correct. The evidence had limited probative value in proving that the reason M helped cover up the murder was that he was under duress by R, as there was other stronger evidence supporting M's duress argument. The limited probative value was substantially outweighed by the highly prejudicial nature of the evidence to R in the context of a joint murder trial: at [549], [552], [554]-[558].

2. DEFENCES

Crown appeal against acquittals - sexual touching - respondent suffering from "sexsomnia" - volition - "mental health impairment" - s 4 Mental Health (Forensic Provisions) Act 2020 – whether Act codifies or alters common law concerning the mental illness defence - relevance of common law defence of non-insane automatism - whether sexsomnia is a mental health impairment - question of correctness of construction and application of Act at trial

R v DB [2022] NSWCCA 87

The Crown appealed against the respondent's acquittals at a judge-alone trial of two counts of sexual touching of his daughter because he was asleep and therefore acting involuntarily.

The issue was whether the respondent ought instead have been the subject of a special verdict of "act proven but not criminally responsible" under s 30 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW). The larger question arising was whether the effect of the 2020 Act is effectively to abolish the "defence" of "sane automatism", by providing that a person who lacks volition by reason of being asleep at the time of the charged act has a mental health impairment.

The Crown appealed on grounds that the trial judge erred:

1. in failing to find that the respondent's sexsomnia was a 'mental health impairment' pursuant to s 4 of the 2020 Act;

2. in finding that "disturbance of … volition" in s 4(1) does not include an absence of volition; and

3. in finding, if at the time of carrying out the act constituting the offence the person had a mental health impairment pursuant to s 4(1), that unconscious and/or involuntary acts cannot fall within s 28 of the Act.

The Crown appeal was dismissed by majority (Brereton JA, Ierace J agreeing; Wilson J dissenting).

The trial judge was right to hold that the respondent did not have a mental health impairment, because his lack of volition while asleep was not a disturbance of volition within s 4(1)(a), and was of no clinical significance for the purposes of s 4(1)(b). The respondent was entitled to the outright acquittal. Ground 3 could not result in a different outcome: at [71].

Per Brereton J:

> "*Conclusion – no mental health impairment*
>
> [64] No "disturbance" of volition is involved in the absence of volition that is a universal incident of being asleep. In the context of this case, the judge did not err in finding that a somnambulist's absence of volition is not a "disturbance of … volition" within s 4(1). It follows that his Honour was right to hold that the respondent did not have a mental health impairment, because he did not have a disturbance of volition within s 4(1)(a), and his lack of volition while asleep was of no clinical significance for the purposes of s 4(1)(b). Grounds 1 and 2 fail.
>
> [65] I do not regard this outcome as inconsistent with the purposes of the 2020 Act, which were to contemporise and codify the law relating to the defence of mental illness, but did not include resolving any questions about the "defence" of sane automatism. Nor do I consider that the interpretation of s 4, contained in Part 1 (Preliminary) is informed by the objects of Part 5 (Forensic patients and correctional patients) stated in s 69."

Partial defence of extreme provocation – ordinary person test - s 23(2) Crimes Act 1900

Rogers v R [2021] NSWCCA 61

Section 23(2) *Crimes Act* 1900 provides that an act is done in response to extreme provocation if:

> (a) the accused's act causing death was in response to the deceased's conduct towards or affecting the accused, and
> (b) the deceased's conduct was a serious indictable offence, and
> (c) the deceased's conduct caused the accused to lose self-control, and
> (d) the deceased's conduct could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.

The applicant, convicted of murder, smothered his wife with a pillow after discovering she had continued a relationship with another man. The applicant claimed the deceased had kicked him a number of times.

The CCA held there was no miscarriage of justice by the judge not leaving extreme provocation to the jury: at [162]-[163].

- "Intimate partner homicide motivated by relationship separation or infidelity" is not caught by s 23(2): at [61].
- The ordinary person test s 23(2)(d) is purely objective. It departs from the operation of the former s 23(2)(b) and the common law: at [55], [99]-[103]. Section 23(2)(d) assumes a calm ordinary person.
- Matters that are not relevant are: that the applicant was particularly sensitive to the situation; and his personal circumstances, such as love for the deceased and his depressive disorder: at [102]-[104], [149]–[154].
- The 'ordinary person' under s 23(2)(d) may act in unreasonable ways, however, the reaction must still be within the range of possible reactions of an ordinary person: at [161]; *Stingel v The Queen* (1990) 171 CLR 312 at 334.
- There was evidence the deceased's conduct in kicking the applicant constituted a serious indictable offence (AOABH - s 23(2)(b)), so that it may have been left to the jury: at [134]. Taking

the version of events most favourable to the applicant, there was some prima facie evidence capable of satisfying ss 23(2)(a), (c): at [139]–[140].

- In assessing s 23(2)(d) it is necessary to take into account the context of the conduct. Even if the deceased's 'conduct' is understood in the context of an argument and physical altercation following the applicant's discovery of her resumed contact with the other man, such conduct could not be seen as giving rise to a reasonable possibility of an ordinary person losing self-control to that extent: at [157]-[158], [162].
- The same "conduct" of the deceased is relevant for the purposes of each subsection in s 23(2) (confirmed by use of the definite article "the" in ss 23(2)(b), (c) and (d): at [53], [94]-[95]; Second Reading Speech, *Crimes Amendment (Provocation) Bill* 2014, NSW Legislative Assembly, 8 May 2014.

3. DIRECTIONS

Written directions with no subsequent oral directions – miscarriage of justice – s 55B Jury Act 1977

Trevascus v R [2021] NSWCCA 104**:** The CCA held the trial judge erred in providing written directions to the jury regarding the elements of each offence in the form of question trails without oral directions. Failure to provide proper oral directions resulted in a miscarriage of justice.

Section 55B *Jury Act* 1977 allows the provision of documents setting out directions of law as to the elements of the offence(s) but does not abrogate the clear common law obligation to give oral directions**.** That obligation requires, at the very least, that such directions be read and explained to the jury; and likely the necessity to differentiate between elements in issue from those which are not. The judge will generally be required to identify the evidence relevant to element(s) in issue: at [64]-[66].

Importantly, it will be necessary to emphasise that written directions are not a substitute for oral directions; and prudent to reiterate this in any written document provided to the jury: at [67].

The practice of allowing the jury to retire in the course of the summing-up and read written directions in the jury room is not encouraged. It runs contrary to the judge's fundamental obligation to assist the jury, deprives a judge of assessing whether jury members comprehend the directions, and lacks transparency: at [68]-[72]; authorities cited.

Warnings - vulnerable witnesses - statute does not specify <u>when</u> warnings ought to be given - timing of warnings and how often repeated within judge's discretion - ss 306X, 306ZI Criminal Procedure Act 1986

Long (a pseudonym) v R [2021] NSWCCA 212

Where a 'vulnerable person' gives evidence via pre-recorded interview and audio-visual link, the trial judge is required to warn the jury not to draw any adverse inference against the accused or give the evidence any greater or lesser weight: ss 306S, 306X *Criminal Procedure Act* 1986.

The judge gave the warnings in opening remarks to the jury and in summing-up.

The appellant argued the judge failed to warn the jury when the complainants gave their evidence.

The CCA dismissed the appeal.

The provisions do not specify *when* the warning should be given: at [73]. The timing of the warnings and whether, and how often, they are to be repeated, is within the judge's discretion. It is preferable the warnings are given immediately before or after the giving of that evidence rather than the summing-up but this is not a rule and depends on each case: at [7]; *R v DBG* (2002) 133 A Crim R 227.

A warning only in summing-up could be too late since the jury may already have given the evidence greater or lesser weight. But this concern does not arise when given in opening remarks. Here, time between the warnings in opening remarks and the complainant's evidence was short. To repeat a warning every time a vulnerable witness gives evidence risks giving jurors the impression that they need not listen carefully to the judge because any important direction will be repeated and also highlights the different form of the evidence. The substance of the warning was repeated immediately prior to replaying the recorded evidence. That no inference adverse to the accused should be drawn from the nature of the procedure was not repeated, but making too much of that warning invites the jury to consider why they would think the procedure implied something adverse to the accused: at [74].

The trial judge complied with the statutory provisions in a way which highlighted their import: at [75].

Warnings - vulnerable witnesses – directions not required before pre-recorded evidence replayed during jury deliberations - ss 306X, 306Z Criminal Procedure Act 1986

JT v R [2021] NSWCCA 223: The CCA dismissed the applicant's appeal against convictions for aggravated sexual assault of his son.

The complainant was a "vulnerable person" (s 306X) therefore part of his evidence was given by recorded interview. Section 306X requires the trial judge to warn the jury not to give the evidence any greater or lesser weight because of the way it was given. Section 306Z provides that a transcript of the interview may be provided to the jury.

A s 306X warning was given before the complainant gave evidence. During deliberations, at the jury's request, the recorded interview was replayed for the jury in court. No direction was sought that the recording should not be given undue weight. However, the judge made remarks to the jury that the video would be replayed in open court or they might give undue weight to it replayed in the jury room. The jury were permitted to take a transcript of the interview into the jury room: at [51].

The applicant submitted the judge failed to direct and warn the jury at the time the recording was replayed.

The CCA refused leave to appeal this ground (r 4.15 *Criminal Appeal Rules*). A warning was given immediately before the complainant gave evidence, which is the suggested most appropriate time: *RELC v R* (2006) 167 A Crim R 484 at [44]. The question is whether non-compliance with the preferred approach gave rise to a miscarriage of justice: at [82]; *R v NZ* at [209]; *Gately v The Queen* (2007) 232 CLR 208.

No miscarriage of justice occurred. First, a s 306X warning was given immediately before the complainant gave evidence. As only six days had elapsed since the warning, there is no reason to assume the jury had forgotten it. Second, the judge's remarks at the time the jury requested the video be replayed did reinforce the earlier direction that undue weight should not be given. Third, while cross-examination was not included in the recording, the jury had the whole of the transcript in the jury room as an aide memoire.

Sexual intercourse without consent - reversal of burden of proof in jury question

Gage v R [2021] NSWCCA 222

The CCA by majority (Beech-Jones J; Bathurst CJ agreeing with separate reasons; Fagan J dissenting) allowed the applicant's appeal against convictions for multiple counts of sexual intercourse without consent; quashed the convictions and ordered a new trial.

During deliberations, the judge received a jury note:

> "… We believe there is uncertainty about counts 4 to 9. We are having trouble on consent. There is vast disagreement in the room about whether consent has been granted by [the complainant]. Some in the group are not satisfied beyond reasonable doubt that consent was granted."

The judge told the jury they had "the written document outlining the law of consent" and he would not be giving any further legal direction about consent. A *Black* direction was then given. The jury retired and returned guilty verdicts on counts 4 to 9.

Beech-Jones J said that the plain meaning of the words in the note's last sentence went to the heart of the issue on counts 4 to 9, namely, consent. The note was read in open Court three times, read back to the jury and not the subject of comment. This revealed a sufficiently serious risk that some jurors had a fundamental misapprehension as to the onus of proof on a critical issue to amount to a miscarriage of justice: at [30]-[34]; *TKWJ v The Queen* (2002) 212 CLR 124.

Bathurst CJ at CL, agreeing, said failure to give a further direction gave rise to the risk of a substantial miscarriage of justice. Although there was no inconsistency in the verdicts, the fact verdicts of "not guilty" were reached for counts 1 to 3 demonstrates the importance of the question of onus where verdicts of "guilty" were reached for counts 4 to 9: at [10]-[15].

4. PARTICULAR OFFENCES

"Intentionally chokes" - Crimes Act 1900, s 37(1A)

GS v R; DPP (NSW) v GS [2022] NSWCCA 65

The CCA declared that "intentionally chokes" within the meaning of s 37(1A) *Crimes Act* means "intentionally apply pressure to the neck so as to be capable of affecting the breath or the flow of blood to or from the head".

The CCA allowed the Crown appeal against a directed acquittal for an offence under s 37(1A). The trial judge erred by defining "choking" to mean application of pressure that "at least, result[ed] in a restriction in the victim's breathing".

Section 37(1A) facilitates prosecution of offences of choking, suffocation and strangulation in the context of domestic violence where the victim was not rendered unconscious, insensible or incapable of resistance, as required by the more serious offences in ss 37(1) and (2): at [49]-[50].

Despite the "broad range of conduct" intended to be prohibited by s 37(1A), the CCA did not accept the Crown's contention that any manual pressure on the neck, no matter how slight, and no matter where on the neck applied, may amount to "intentional choking": at [63].

"Intentionally chokes" should not be ascribed a narrow meaning. Section 37(1A) does not require proof of injury or other outcome as a result of the choking. Nevertheless, the conduct prohibited must still be capable of being described as "intentional choking". The requirement to prove conduct capable of affecting the breath or blood flow to or from the head while the "choking" is taking place is consistent with the language used in its statutory context: at [60]-[63].

In a case involving s 37(1A), it would be prudent for the Crown to call medical evidence addressing this question: at [64].

The CCA declined to remit the matter for re-trial where the period of time served on remand by the respondent was longer than the head sentence imposed on him.

Breaking and entering - accused a tenant under residential tenancy agreement but no longer an occupant – s 112(2) Crimes Act

R v BA [2021] NSWCCA 191

This case concerned the meaning of '*breaking'* where the accused, a tenant under a residential tenancy agreement but no longer an occupant, broke into his old apartment where the complainant still lived.

The accused was indicted on a charge of aggravated break and enter and intimidate (s 112 (2) *Crimes Act*). The trial judge directed a verdict of not guilty on the basis the accused had a right to enter as a lessee so could not be guilty of 'breaking' in.

The CCA quashed the respondent's acquittal and ordered a retrial. The judge erred in holding that, as a pre-condition to proof of 'breaking', the prosecution was required to establish that the respondent did not have a pre-existing right to enter. Rather, the prosecution was obliged to establish that entry occurred without consent of the complainant. Liability would be no different if she had been absent or if entry was by forcible or non-forcible means (such as trick, threat or inducement): at [30]; [39]-[41].

Brereton J stated at [28]:

(1) the basis on which a person permitted to enter premises may do so without committing a "break" is the consent of the occupant, not proprietary or contractual rights derived from third parties;
(2) whether a forcible entry pursuant to a consent is a break depends on the scope of the consent. A person who, with the occupant's consent, enters the property in a manner within the scope of the consent commits no "break"; and
(3) an entry effected pursuant to a proprietary or contractual right can nonetheless involve a break, if it is made otherwise than in compliance with the consent of the occupant.

Fullerton J at [44]-[45] agreed but said that each case needs to be determined on the evidence particularly where there is a proprietary right to enter the premises.

s 193B(3) Crimes Act – recklessly deal with proceeds of crime – actual knowledge not required

Ke v R [2021] NSWCCA 177

The applicant asserted that the circumstances in which she entered a plea of guilty to recklessly deal with proceeds of crime under s 193B(3) *Crimes Act* gave rise to a miscarriage of justice because her counsel had erroneously explained the charge as being aware of the "possibility" that the property was stolen and proceeded nonetheless.

The CCA dismissed this ground. Her counsel was correct. It is not an element of s 193B(3) that the accused *knows* that the subject matter are proceeds of crime; that is the very distinction between s 193B(2) (knowingly dealing with) and the lesser offence in s 193B(3). While it is an element of both offences that the subject matter is in fact proceeds of crime, s 193B(3) requires only that the accused be aware of the *possibility* that the goods were stolen and decided to deal with them notwithstanding this possibility: at [4]–[14]; [187].

s 193C Crimes Act – dealing with property suspected of being proceeds of crime – not necessary to particularise serious offence(s) from which funds derived

Xue v R [2021] NSWCCA 270

The appellant was convicted by judge-alone of five counts of deal with property suspected of being proceeds of crime, contrary to s 193C(1) *Crimes Act* 1900.

Section 193C(1) provides a person is guilty of an offence if:

(a) the person deals with property; and
(b) there are reasonable grounds to suspect that the property is proceeds of crime; and
(c) at the time of the dealing, the value of the property is $100,000 or more.

The appellant submitted that the judge erred by finding that s 193C(1)(b) could be satisfied by the Crown proving that the property (approximately $2.25 million dollars) was derived from a non-specific serious offence(s) and by failing to identify an offence(s) from which the property was derived.

The appeal was dismissed. Section 193C(1) is analogous to the federal 'deal with proceeds of crime' offence in s 400.9(1) *Criminal Code* (Cth). The approach in *Lin v R* [2015] NSWCCA 204; (2015) 253 A Crim R 1 - that s 400.9 did not require proof of a predicate offence/s - is applicable to s 193C(1). Therefore, under s 193C(1), it is unnecessary for the Crown to prove the offence/s from which suspect property is derived: at [188]-[197].

Use carriage service to 'access' / 'possess' child abuse material – charges not duplicitous – ss 474.19, 474.22, 47422A Criminal Code (Cth)

Allison (a pseudonym) v The Queen [2021] VSCA 308

The applicant was charged with-

Charge 1 - accessing child pornography using a carriage service, s 474.19(1) *Criminal Code*

Charge 2 - accessing child abuse material using a carriage service, s 474.22(1); and

Charge 3 - possessing child abuse material obtained or accessed using a carriage service, s 474.22A(1)

In this interlocutory appeal, the applicant indicated an intention to plead guilty to charge 3. He sought a permanent stay on charges 1 and 2 on the basis they were duplicitous with charge 3 and would render him liable to double punishment because the conduct of accessing child pornography or abuse material using a carriage service (charges 1 and 2) is an element of, and therefore subsumed by, charge 3.

The Court of Appeal dismissed the appeal. There was distinct and separate criminality involved in the intentional possession of the child abuse material and the intentional accessing of that material: at [42]; *Pearce v The Queen* (1998) 194 CLR 610 and *R v Fulop* [2009] VSCA 296, discussed.

The access offences are directed at the activity of intentionally searching for, locating, and viewing child abuse material: at [44].

The possession offence involves an additional step, of 'keeping' the material accessed for ongoing or future use, which can include viewing, distribution, sharing or sale. The critical hallmark of the possession offence is that the accused has possession or control of the medium (computer, data storage device or document) in which the material is captured. Unless the medium is one that the accused has or takes possession or control of, the offence does not pass beyond the access offence: at [44]-[45].

The two offences are aimed at different behaviours and that is reflected in their different elements. This is not a case where there would be nothing left to be punished once the applicant is convicted and sentenced for the possession offence: at [46]; Cf *R v Langdon* (2004) 11 VR 18 at [117].

ss 61HE Consent - 61KC Sexual touching - Fail to apply statutory provisions governing the issue of consent

DPP v Wright and the Local Court of NSW [2021] NSWSC 1086: Bellew J allowed the DPP's appeal against the magistrate's dismissal of proceedings for sexual touching without consent under s 61KC(a) *Crimes Act* 1900.

The defendant placed his hand on the victim's breast for 30 seconds. The magistrate found consent an issue - there being a factual dispute about "*whether it happened and there was … an immediate, 'No', or whether his hand was there for a longer period, which may have [been] interpreted as … some sort of permission to continue until that permission was withdrawn."*

Failed to give adequate reasons

The magistrate failed to give adequate reasons by appearing to reject the victim's unequivocal evidence she had not consented but not articulating factual finding(s) in respect of consent nor the reasons for ultimate conclusions: at [67]-[68]; *Beale v GIO of NSW* (1997) 48 NSWLR 430 at [60]; *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110.

Error as to the necessity for the victim to communicate lack of consent

The magistrate's reference to "some sort of permission to continue until that permission was withdrawn" erroneously suggests the victim was required to communicate lack of consent. By s 61HE(9), a person who does not offer actual physical resistance to a sexual activity is not, by reason only of that fact, to be regarded as consenting: at [69]-[70].

Error as to recklessness

The magistrate made reference to "flirting" and that the defendant had been "trying his luck". If a defendant is aware of a real possibility of non-consent, he acts recklessly if he decides to proceed (*R v Banditt* [2004] NSWCCA 208 at [92]). The victim's evidence is that she made clear she did not consent. This part of the reasons erroneously suggest that the defendant was entitled to be reckless as to consent, contrary to s 61HE(3)(b): at [71]-[73].

Error in failing to consider the steps taken by the defendant as to consent

The Magistrate failed to refer to or consider s 61HE(4)(a), requiring him to have regard to all circumstances, including steps taken by the defendant to ascertain whether the victim was consenting, for the purpose of making a finding about knowledge concerning consent (*R v Lazarus* [2017] NSWCCA 279 at [142]): at [78].

5. PROCEDURE

Impermissible tendency reasoning - cross-examination on applicant's prior conviction

Glenn (a pseudonym) v R [2020] NSWCCA 308: The applicant was convicted of aggravated BE and attempt sexual intercourse and sexual intercourse without consent.

The complainant said she did not consent but submitted out of fear because, 17 years earlier in 1998, the applicant had kidnapped her at gunpoint.

In a pre-trial ruling by a different judge, evidence of the 1998 incident was ruled admissible as context evidence.

The CCA held the prosecutor's cross-examination of the applicant and closing address regarding the 1998 incident occasioned a miscarriage of justice.

The Crown repeatedly put to the applicant that as he scared the complainant during the 1998 incident he scared her during the present offences too. It was imperative that cross-examination not invoke impermissible lines of reasoning by the jury when confronted with prior extremely serious offending: at [247]–[250]. Cross-examination went far beyond the limited purpose for which the evidence was admitted. Evidence of prior bad character played a disproportionately significant part of the Crown case. No directions could have cured the risk it would be used as tendency or coincidence evidence. The applicant's credit was undermined by the significant time on the 1998 incident during the complainant's evidence in chief, applicant's cross-examination and Crown's closing address. The facts of the 1998 incident were at times inaccurately put making the event more prejudicial: at [243]-[245], [250].

The Court further discussed language and conduct of the Crown: at [262]-[269]. The conviction was quashed and a new trial ordered.

Error to discharge jury where prosecutor raised tendency and coincidence reasoning in closing address without notice – matter remitted for trial to continue

Libdy v R [2021] NSWCCA 34 **:** The trial judge erred in discharging the jury after the prosecution in closing address invited the jury to engage in tendency and coincidence reasoning when required notice had not been given under ss 97(1)(a), 98(1)(a) *Evidence Act* 1995. The judge made the order without reasons nor application or submissions from either party.

The CCA allowed the appeal and remitted the matter to the District Court for the trial to continue (s 5G *Criminal Appeal Act* 1912).

The decision to discharge the jury was unreasonable or plainly unjust. The trial Judge allowed extraneous or irrelevant matters to guide his decision, namely the desire to allow the Prosecutor to put a tendency or coincidence case in circumstances where no notice was previously given: at [22].

An intermediate appellate Court is cautious in interfering with a judge's decision to discharge a jury: at [19]; *R v Lamb* [2016] NSWCCA 135 at [39]-[40]. However, in the unusual circumstances of this case, this Court should intervene. First, the trial had nearly concluded. Second, neither party made an application. Third, a Crown application to dispense with notice requirements was opposed by the applicant. Fourth, Senior Counsel's solution (to invite the Prosecutor to withdraw the submissions concerning methodology and modus operandi and to provide the jury with directions that they must not engage in tendency or coincidence reasoning) was a sensible one. Fifth, clear directions are available to ensure the jury does not use the evidence in an impermissible way. Finally, the applicant is entitled to have the proceedings conclude: at [21].

Indictment not a nullity where signed by unauthorised DPP officer

Ozgen v R [2021] NSWCCA 252

The appellant was convicted of two Federal drug offences. In regard to one State drug offence on the same indictment, the judge directed the jury to not return a verdict as the officer who signed the indictment was authorised to sign only on behalf of the Commonwealth DPP, not the NSW DPP (*Criminal Procedure Act* 1986*, s* 126(1)(b)(iii)).

The applicant appealed his convictions on the basis the entire indictment was a nullity. The CCA dismissed the appeal. The indictment was not wholly bad due to inclusion of the State count: at [41]; *R v Cockrell* [2015] QCA 73; *Bounds v R* [2006] HCA 39 at [11].

The indictment was signed by an *acting* Assistant Director not authorised by the State DPP. It was noted that this Court's decision is not authority for the proposition that the *acting* Assistant Director was not authorised pursuant to s 126(1)(b)(iii) to sign the indictment. It is unclear on what basis the conclusion of want of authority was reached. The Court noted s 49(8) *Interpretation Act 1987* (NSW), which deems the person for the time being acting in an office to be the delegate in certain cases; and authorities where a 'personal signature' is not indispensable (e.g. *DPP v Currie; Daniels (a pseudonym)* [2021] VSCA 272; *Christie v Permewan, Wright & Co Ltd* (1904) 1 CLR 693 at 701; [1904] HCA 35): at [11]-[14].

<u>More fundamental reasons</u>

Although not argued on appeal, the CCA noted other fundamental reasons why the indictment was not bad:

- Under s 21 *Criminal Procedure Act 1986*, it was prima facie open to the Court to amend the indictment by deleting the State count as late as summing up, subject to prejudice regarding evidence adduced relevant to that count: at [47]-[48].

  s 21(1) *CP Act* provides: "If of the opinion that an indictment is defective but, having regard to the merits of the case, can be amended without injustice, the court may make such order for the amendment of the indictment as it thinks necessary to meet the circumstances of the case."

  s 21(4) confirms that an order could be made either before trial or at any stage during the trial.
- The District Court was exercising federal jurisdiction. A non-compliance with State law could only invalidate an indictment authorised by federal law if *some other federal law* treated the non-compliance as vitiating: at [56]; *Judiciary Act* 1903 (Cth), s 68(2).

Prosecution duty to call witnesses - defence did not respond to Crown's written notice advising of intention not to call potential witnesses - tactical decision by defence - no miscarriage

VP v R [2021] NSWCCA 11

The applicant was sentenced for sexual assault of his adopted daughter. The applicant lived with his wife, the complainant, and five other children.

The defence did not respond to the Crown's written notice advising it would only be calling the complainant and two sisters; and not any other family members.

The CCA dismissed the applicant's appeal. No miscarriage of justice resulted from the Crown's alleged failure to call the other family members.

On appeal, the applicant was granted leave to call evidence from two of the family members to assess impact of the failure to call the witnesses at trial: *Geitonia P/L v Inner West Council* [2016] NSWCCA 186 at [90]; [163].

The complainant said some family members walked out of a bedroom during a sexual assault in the lounge room. The prosecutor had no basis for knowing if their evidence would assist the accused. However, being witnesses who (as it transpired) could say no more than that they saw nothing, thus rendering the offences not impossible but arguably less likely, the accused's desire to have them called was an important consideration: at [45], [53]–[57].

The CCA concluded that defence counsel made a tactical decision to rely on the forensic benefit of their absence when (as established by the evidence in the appeal) he knew they were available to give evidence that they had not seen any sexual misconduct. Further, the Crown case implicitly accepted that nobody had witnessed the offences. It was not incumbent upon the Crown to call the witnesses "regardless of whether or not the accused asked for them": at [60]-[61], [66]-[69]; *R v Kneebone* (1999) 47 NSWLR 450.

Campbell J, dissenting: Defence counsel made the most of the forensic advantage but that did not detract from the prosecutor's obligation. The prosecutor's "duty" cannot be delegated to defence counsel: at [127].

Closing address by accused - raising defence for first time during closing – s 160 Criminal Procedure Act 1986

Rummukainen v R [2021] NSWCCA 188

Section 160(2) *Criminal Procedure Act* 1986 provides that if, in the accused's closing address, facts are asserted that are not supported by any evidence, the Crown may make a supplementary jury address.

The applicant was convicted of dangerous driving causing death (s 52A(1)(c) *Crimes Act* 1900). The Crown case was he drove onto the wrong side of the road, and the only issue was whether driving was 'dangerous'. In closing address, defence counsel raised for the first time the defence of honest and reasonable mistake of fact as the applicant may have fallen asleep. The trial judge declined to put to the jury this possibility and directed they disregard that submission as there was no evidence of falling asleep.

The CCA dismissed the appeal. The trial judge was correct: at [59].

Simpson J said late introduction of the defence was apt to create unfairness to the Crown, who could not have been permitted to give a supplementary address within s 160(2) because defence counsel's address did not "assert facts" but raised the possibility of an interpretation of facts of which there was some indirect evidence. It invited the jury to speculate on a subject of which there was insufficient supporting evidence: at [162]; *R v O'Donoghue* (1988) 34 A Crim R 397 at 404.

If the issue not been removed, the judge would have to advance argument in response to counsel's submission and risk becoming involved to an undesirable degree: at [63]; *O'Donoghue*.

Prior sexual experience or sexual activity - s 293(4)(c) Criminal Procedure Act 1986 - evidence of complainant's pregnancy test admissible - failure of trial counsel to seek to have evidence admitted of possibility that complainant had been raped by another male

WS [2022] NSWCCA 77

Section 293(4)(c) *CPA* 1986 provides that the rule against admitting evidence relating to a complainant's sexual experience or sexual activity does not apply if

(i) the accused does not concede the alleged sexual intercourse occurred, and

(ii) the evidence is relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged;

and the probative value of the evidence outweighs any distress, humiliation or embarrassment the complainant might suffer.

Evidence the complainant underwent a pregnancy test was admitted at trial. Evidence that she had been raped by another man at a similar time was not admitted.

The CCA quashed the applicant's convictions for sexual intercourse without consent and indecent assault and entered verdicts of acquittal.

The Crown case asserted the pregnancy test corroborated the complainant's evidence that she had been sexually assaulted by the applicant. In light of the central role of the pregnancy test in the Crown case, a miscarriage of justice occurred by reason of the applicant's counsel not seeking to rely at trial on s 293(4)(c) and the material concerning the complainant's rape by the other man. Presence of semen may be inferred from Medicare records indicating the complainant had undergone a pregnancy test: at [80], [96]. Evidence regarding rape by another man, depending on when it occurred, gave an alternative explanation for the pregnancy test. The evidence was of significant probative value sufficient to outweigh "distress, humiliation and embarrassment" to the complainant: at [63], [84]-[87], [92]-[94].

It follows the trial judge did not err in declining to exclude evidence of the pregnancy test (s 137 *Evidence Act* 1995) because the applicant should have been permitted to explore in cross-examination the possibility that the complainant had the pregnancy test because of her rape by the other male and there would not therefore have been any unfair prejudice to the applicant: at [92].

Prior sexual experience - ***Criminal Procedure Act 1986, s 293***

Decision Restricted **[2021] NSWCCA 51:** The appellant was convicted of sexual intercourse without consent. In his ERISP, the appellant stated sexual intercourse was consensual and the complainant had told him *"it's not her first encounter"* and she *"started very young".*

The CCA (Leeming JA; Walton J agreeing; Adamson J dissenting) held the trial judge erred in ruling the appellant's answers regarding the complainant's prior sexual experience were inadmissible under s 293(3) *Criminal Procedure Act* 1986. The convictions were quashed and retrial ordered.

The prohibition in s 293(3) against admitting evidence of sexual experience did not apply as the evidence fell within the exclusions in s 293(4)(a)(i) and (ii): at [54], [66].

- The complainant told the appellant that she had had sexual relations in previous years. In context, they are statements about her sexual experience as it was in the hours or minutes preceding the allegations, that is, "evidence of … sexual experience… at or about the time of the commission of the alleged prescribed sexual offence" (s 293(4)(a)(i)): at [58].
- Further, they are statements made by the complainant as part of the circumstances commencing with their meeting, walking to the hotel and checking in before sexual intercourse took place (s 293(4)(a)(ii))): at [59].

The Crown submitted the conversation occurred in the hours before intercourse and concerned sexual activity years earlier. However it is the timing of the conversation, not the events relayed, which matters. It falls within "at or about the time of the commission" of the alleged offence, as well as being part of a connected series of circumstances: at [59].

The words connote something about the complainant's sexual conduct years before but also something about her sexual experience as it was at the time of the alleged offences (*GEH* [2012] NSWCCA 150; 228 A Crim R 32 at [64]. The question on s 293(4)(a) is whether the evidence answers subparagraphs (i) and (ii). It is not to the point it also connotes something outside those subparagraphs: at [60]-[61].

The exclusions in s 293(4) are construed liberally to reflect the width of the prohibition in s 293(3): at [55].

The CCA further found the probative value of the evidence high and outweighed distress, humiliation or embarrassment of the complainant (s 293(4)): see at [62]-[66].

Jury – application to discharge juror - "misconduct" within s 53A Jury Act - court must determine on balance of probabilities that juror in fact engaged in alleged conduct

Zheng v R; Li v R; Pan v R [2021] NSWCCA 78

Section 53A(1)(c) provides that a judge must discharge a juror who has engaged in "misconduct": [61]-[87], [100]. Section 53A(2) defines "misconduct" either as:

(a) conduct that constitutes an offence against the *Jury Act*; or

(b) any other conduct that, in the opinion of the court, gives rise to the risk of a substantial miscarriage of justice.

The applicants submitted juror G2W ought to have been discharged under s 53A(1)(c) for alleged misconduct of lying to the trial judge that he had not 'discussed' a particular matter with another juror.

The CCA held the trial judge did not err in not discharging Juror 'G2W'.

s 53A is engaged where the court finds *on the balance of probabilities* that the juror has *in fact engaged in* misconduct. It is not enough to find a 'reasonable apprehension' or 'possibility' of a risk that such misconduct has been engaged in: at [65]–[66]; *Briginshaw* (1938) 60 CLR 336 at 360-361.

s 53A(1)(c) involves a two stage process: (i) a finding certain conduct occurred; and (ii) an analysis of its character, whether it amounts to an offence against the Act or as *giving rise to* the risk of a substantial miscarriage of justice. Regarding s 53A(2)(b), the relationship to be examined is that between the established conduct and whether it is potentially ("a risk") causative of a substantial miscarriage of justice: at [67]-[68].

As the judge made a decision that G2W did not deliberately lie on oath, the premise for the application pursuant to s 53A(1)(c) fell away and there was no error in rejecting it: at [80]-[84].

Sections 53B(d), 53C(1)(a)

Further, the judge did not err in refusing to discharge G2W under s 53B(d) or to discharge the whole jury under s 53C(1)(a).

Section 53B(d) allows for discretionary discharge if it appears that, for any other reason affecting the juror's ability to perform the functions of a juror, the juror should not continue to act**.** No *House v The King* (1936) 55 CLR 499 is identified. The judge's decision is one which the trial judge is best placed to make by reference to "first hand impressions" rather than the "review of a cold record": at [88]; *Wu v The Queen* (1999) 199 CLR 99 at [101]–[102]; ***R v Lamb*** [2016] NSWCCA 135.

Section 53C(1)(a) allows for discharge of the whole jury if, after the discharge of a juror(s), the court is of the opinion that to continue with the remaining jurors would give rise to a miscarriage of justice. No basis has been advanced to warrant interference with the judge's discretionary decision to decline to discharge the jury: at [100]; *House v The King* (1936) 55 CLR 499.

Apprehended bias - trial judge in relationship with Crown Prosecutor who gave advice recommending prosecution

Gleeson v Director of Public Prosecutions (NSW) [2021] NSWCA 63

The Court of Appeal found apprehended bias where the trial judge's long-term partner, S, was a Crown prosecutor who gave advice to police as to laying of charges against applicant.

The Court quashed the judge's order declining to recuse himself and ordered a prohibition on the judge from further hearing the proceedings.

The apprehension of bias test as set out in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 applies. First, the matters which might have led the judge, albeit subconsciously, to conduct the trial other than in accordance with its legal and factual merits. From the judge's longstanding relationship with S it can be inferred a mutual concern for the other's wellbeing personally and professionally. Further, it can be inferred that S has an interest in the vindication of the opinion she gave in the course of her professional duties: at [22]-[23]; ***Ebner***; *Isbester v Knox City Council* (2015) 255 CLR 135.

Second, the "logical connection between the matter [of concern] and the feared deviation from the course of deciding the case on its merits", is that the judge will be required to make procedural and evidentiary decisions of importance to the outcome of the trial - in this case, regarding tendency evidence and *Prasad* directions: at [27].

In these circumstances, the fair-minded lay observer might reasonably apprehend the judge might not bring an impartial mind to performance of duties as trial judge; he might have in mind the potential impact of his decisions on his partner's interest in the outcome of the charges. The fair-minded lay observer would be likely concerned about the close personal relationship between a trial judge and a prosecutor who had advised on the bringing of the charges: at [28]-[29]; *Ebner* at [6].

Apprehended bias – interventions by trial judge

Decision Restricted [2022] NSWCCA 2

Interventions by the trial judge established a reasonable apprehension of bias. At the applicant's retrial, in response to the applicant's objection to certain evidence, the Crown was permitted by the judge to add a s 61M(2) offence to the indictment which had not been previously laid.

The judge made repeated comments that the indictment as framed was "weird" and "bizarre", provided advice to the Crown and departed from his role to adjudicate impartially. The way the judge urged the Crown, the reasonable observer might have apprehended that the judge might not bring an impartial mind to bear upon the issue of whether leave should be granted to allow that course: at [61]-[71]; *Chow v DPP* (1992) 28 NSWLR 593.

The verdict of guilty on that count was quashed on the basis it was unreasonable having regard to the evidence. A retrial was ordered on the original charges on the indictment.

6. APPEALS

Five judge bench - inquiry under Crimes (Appeal and Review) Act 2001 (NSW) not available with respect to conviction for federal offence

Huynh v Attorney General (NSW) [2021] NSWCA 297

The Court of Appeal held that that the post-appeal inquiry procedures under Part 7 *Crimes (Appeal and Review) Act* 2001 (NSW), a State act, is not available with respect to a conviction for a federal offence. The Court dismissed the applicant's application for judicial review of a refusal to grant an inquiry into his conviction by the Supreme Court.

The applicant had been convicted of a federal drug offence. His application to the Supreme Court under s 78 *CAR Act* for an inquiry into his conviction was dismissed.

The Court of Appeal found, inter alia, that it can be inferred that ss 78 and 79 are not intended to apply to federal convictions. Similarly, the Governor has no power to grant a pardon to federal offenders under s 76. The references in ss 78 and 79 to "conviction or sentence" are to convictions and sentences by a State court for offences under State law. Further, the *Judiciary Act 1903* (Cth) cannot pick up part only of a State law if that would vary the operation of the State law, which would be the case here.

Conviction appeal from Local Court to District Court – "rehearing" in s 18 Crimes (Appeal and Review) Act 2001 does not require a review of all of the evidence

Lunney v DPP (NSW) [2021] NSWCA 186

Section 18(1) *Crimes (Appeal and Review) Act* 2001 provides:

> "An appeal against conviction is to be by way of rehearing on the basis of evidence given in the original Local Court proceedings..."

The applicant sought judicial review in the Court of Appeal submitting that the District Court judge "erred in failing to conduct a rehearing of the plaintiff's appeal on the basis of the evidence in the original Local Court proceedings."

The Court of Appeal dismissed the summons.

Section 18 directs that the appeal is to be "by way of rehearing on the basis of evidence" given in the Local Court. It is not (as in the case of a sentence appeal under s 17) a rehearing "of the evidence", or even a rehearing "on the basis of *the* evidence" given in the Local Court. Section 18 is not a direction that the District Court must, in every case, undertake a complete review of the whole of the evidence and form its own view as to guilt regardless of the issues raised by the appellant. The extent of the review required will depend on the circumstances of the case and the kind of error alleged: at [28]; [44]; *AG v DPP* [2015] NSWCA 218.

The applicant took issue with two aspects of the Local Court magistrate's reasoning. The District Court judge rejected the two complaints raised and was not obliged to review the whole of the record with a view to forming his own judgment as to guilt: at [29]-[30].

No jurisdiction to determine application to quash conviction under s 84 Crimes (Appeal and Review) Act 2001 where unconditional pardon granted

Armstrong v R [2021] NSWCCA 311

The CCA held that the Court does not have jurisdiction to hear an application to quash a conviction under s 84(1) *CAR Act* by a person who received a free pardon but was not the subject of an inquiry under Part 7, Division 4.

The applicant was convicted of offences in 2006. In 2011, after a number of letters by the applicant to the Governor, the Governor granted a free pardon - meaning the convictions were spent under the *Criminal Records Act* 1991 but not quashed. In 2021, the applicant applied to the CCA to quash his convictions pursuant to s 84(1).

The CCA said the power to grant a free pardon is by the executive. The applicant was pardoned by the Governor for compassionate reasons, not for any defect regarding his trial and conviction. The CCA found, effectively, that the Court has no jurisdiction to entertain a s 84 application without an inquiry into the "conviction" or review and report under Pt 7, Div 4, rather than reliance on the type of material the applicant provided when he obtained a free pardon: at [43].

7. OTHER CASES

Prisoners – extreme high risk restricted inmate - supervision of visits and telephone calls with legal practitioners – requirement to communicate in English – validity of Commissioner's monitoring policy

Hamzy v Commissioner of Corrective Services NSW [2022] NSWCA 16

Mr Hamzy - an "extreme high risk restricted inmate" (EHRR inmate) - brought proceedings against the Commissioner of Corrective Services NSW challenging the lawfulness of aspects of conditions of imprisonment:-

- Clause 94 *Crimes (Administration of Sentences) Regulation* 2014 (NSW) ("*CAS Regulation*") purported to empower the Commissioner to refuse visits to EHRR inmates by any person, including lawyers, "on the basis of a criminal record check or for any other reason."
- Pursuant to a "drop-in policy" by the Commissioner, Corrective Services officers randomly monitored telephone and AVL calls made by EHRR inmates, including calls with legal practitioners, to check whether they were in English and with the approved recipient.
- cll 101, 116 and 119(6) of the *CAS Regulation* purported to require most communications by EHRR inmates to be in English which contravened ss 9, 10 of the *Racial Discrimination Act*.

The Court of Appeal held:

(i) The Commissioner was not authorised to refuse to permit visits by lawyers to EHRR inmates 'for any reason'- Clause 94 was invalid for this purpose: [206]-[212], [220]-[238]. The power to require a criminal record check was authorised: [202]-[205], [220]-[238].

(ii) The Commissioner's "drop-in" policy of periodically monitoring telephone calls and AVL access to check whether (i) an EHRR inmate and the other person are speaking English and (ii) the other person is the approved recipient of the call, *does not apply* ***and is invalid in its application to communications between an EHRR inmate and that inmate's legal practitioner***: [239]-[252]; [255].

(iii) Having regard to the manner in which the case was conducted, there was no contravention of the *Racial Discrimination Act* - there was nothing to suggest that the purpose of the requirement to use English in the *CAS Regulation* had anything to do with discrimination: at [274].

Inconsistent verdicts – sexual intercourse without consent

Dadley v R [2021] NSWCCA 267

The CCA allowed the applicant's appeal and entered verdicts of acquittal on the ground of inconsistent verdicts.

The applicant was found not guilty of sexual intercourse without consent (count 1), and guilty of sexual intercourse without consent (count 2) and indecent act (count 3).

The alleged counts occurred at the complainant's apartment after a party. Count 1 was that the complainant "passed out" in Bedroom 2 and woke to the applicant having intercourse. The applicant denied intercourse occurred or that he even went into the bedroom. Count 2 was that the applicant

moved the complainant from Bedroom 2 to Bedroom 1 and had intercourse without consent. The complainant did not remember the transition between the two bedrooms. The applicant again denied intercourse occurred. Count 3 was also denied by the applicant.

The CCA set out in detail the authorities stating the test to be applied in considering a ground of appeal based on alleged factual inconsistency between verdicts is one of logic and reasonableness; and in the context of a case involving multiple sexual assaults against a single complainant: at [76]ff, *authorities cited and discussed*.

The CCA found that the acquittal on count 1 was explicable only by doubts the jury must have held as to the complainant's credibility. The events founding the three complaints were intertwined both temporally and contextually that it is a logical affront to accept the inconsistency between the acquittal and the convictions: at [89].

Absence of the following matters renders it very difficult to identify a possible or plausible basis for differentiating the acquittal on Count 1, and guilty verdicts on Counts 2 and 3. This was not a case where:

> (i) the Complainant's account as to what occurred in Bedroom 2 was accompanied by any concession as to the possibility of faulty recollection in contrast to what had occurred in Bedroom 1;
>
> (ii) the Complainant's evidence in relation to Bedroom 2 was any less particular than as to what allegedly occurred in Bedroom 1;
>
> (iii) the Applicant's evidence only addressed what was alleged to have occurred in Bedroom 2, and not Bedroom 1;
>
> (iv) the acquittal was returned in relation to a less serious offence; or
>
> (v) the history of wrongdoing was lengthy with many incidents over a period of time, or conversely a large number of events within a very short time frame: at [94]-[95].

8. BAIL

Bail sought for federal and state offences – appearance of two Crown prosecutors

Simpson v R [2021] NSWCCA 264

The self-represented applicant sought bail whilst awaiting trial on federal and state offences. Two prosecutors (one for the State and one for the Commonwealth) appeared to oppose the application.

Although the Court was not required to express a concluded view, Dhanji J expressed his preliminary view that a single prosecutor should appear on a release or detention application. Bail being "authority to be at liberty for '*an offence*'" (s 7), as a practical matter, a person charged with multiple offences makes a single release application which is, in the ordinary course, a single proceeding in which one prosecutor appears. The simple fact of two indictments (federal and state) does not justify two prosecutors which has the potential for the appearance of unfairness, and where presumably each would assert a right to cross-examine the applicant or witness and there would be two addresses. Here, there were two sets of submissions and both counsel addressed. Further, there was a significant amount of duplication in the material relied upon by the two Directors: at [10]-[19].

Proposed conviction and sentence appeal – no appeal "pending" – no jurisdiction to hear application – Bail Act 2013, ss 61, 67

Mashayekhi v R [2021] NSWCCA 55: The self-represented applicant had been convicted and sentenced. The CCA had refused six applications for extension of time to appeal. The applicant subsequently filed a Notice of Appeal against conviction but no further application for extension of time.

The CCA (Hoeben CJ at CL and Wilson J in a joint judgment; Hamill J dissenting) held it had no jurisdiction to hear a bail application.

Section 61 provides that a court may hear a bail application if proceedings for the offence are pending in the court. An appeal against conviction or sentence is pending if notice of intention to appeal or to apply for leave to appeal has been given (*Criminal Appeal Act* 1912, s 10).

The CCA held that s 61 was not enlivened as the proceedings were not, in the relevant sense, "pending" in the court: at [17], [39].

Nor did s 67 apply as the none of the circumstances set out thereunder applied here: at [17], [39].

The Court has power to grant an extension of time to seek leave to appeal, or grant leave to appeal. However, that is not appropriate where there is no evidence explaining the extensive delays in bringing an appeal, which now exceed three years: at [18]; see *Widdowson v R* [2020] NSWCCA 213.

Hamill J agreed the Court lacks jurisdiction to determine the applicant's release application. However, as the applicant was self-represented the Court should exercise its powers under s 10(1)(b) *Criminal Appeal Act* or r 3A(2) Criminal Appeal Rules to extend the period the notice of intention to appeal has effect, which will give this Court jurisdiction to determine the release application: at [35], [48]-[50]. Nonetheless, the applicant had not established special or exceptional circumstances justifying bail under s 22: at [51]-[53].

Bail - night curfew condition deleted

R v Connor Fontaine (a pseudonym) [2021] NSWSC 177 **:** Hamill J granted the application by a 10-year old boy to delete a curfew condition that he be at home from 6pm to 7am each night. A police email stated that the "police *want* the POI [person of interest] at home during the night".

Hamill J said the alleged offences did not take place at night. Regarding the police email, Hamill J said the desires of the police are not relevant considerations under s 18 *Bail Act* 2013: at [5]-[6]. Bail conditions are calculated to mitigate risk (s 20A(2)). Their imposition does not create an occasion for attempts at social engineering or paternalistic interventions in parenting decisions: at [7].

A. HIGH COURT CASES

Internet inquiries by juror - juror misconduct, s 53A(1)(c) *Jury Act 1977* (NSW) – inquiry for purpose of obtaining information about matters relevant to trial, s 68C(1) *Jury Act* – trial judge took verdicts which jury indicated they had reached unanimous verdict on before discharging juror

***Hoang v The Queen* [2022] HCA 14**

Appeal from NSW.

The appellant, a maths tutor, was convicted by jury of child sexual offences. At trial, evidence was given that the appellant had not undergone a 'Working with Children Check'.

During deliberations, the jury indicated they had reached verdicts on eight of twelve counts. The next day the judge received a note from the foreperson that a juror had told them she looked at the internet for the legislation on 'working with children checks' because she was a retired school teacher and was curious about why she had never obtained one. The judge took guilty verdicts on the eight counts from the previous day, and not guilty verdicts on two counts. The juror who conducted the internet search was then discharged on the basis of misconduct under s 53A(1)(c) *Jury Act* 1977. The remaining jurors later returned guilty verdicts for the two final counts.

The appellant's appeal to the NSWCCA was dismissed by majority.

Held: Appeal allowed in part. Set aside the eight guilty verdicts entered before the juror was discharged and new trial ordered on these counts. Matter remitted to the CCA to determine whether to affirm or vary sentence for remaining two counts.

- The judge erred in taking the ten verdicts before discharging that juror. Section 68C(1) *Jury Act* (Inquiries by juror about trial matters prohibited) read with s 53A(1)(c) (Mandatory discharge of juror for misconduct) meant the juror engaged in misconduct by making an inquiry for the purpose of obtaining information about a matter relevant to the trial: at [11].
- The question prescribed by s 68C(1) is whether the juror's inquiry was "for the purpose of obtaining information about…any matters relevant to the trial". What is a "matter relevant to the trial" will vary from trial to trial. It includes a juror acquiring information about matters of evidence given or addresses to the jury: at [32]-[34].
- The mental element is not concerned with the juror's motive for making the inquiry. It is the fact of the inquiry, and that the *purpose* of the inquiry was to obtain information about a particular

matter relevant to the trial, which is prohibited. Evidence was given about the Working with Children Check at trial, defence counsel made submissions about that evidence, and it was referred to in the judge's summing up. It was irrelevant the juror had been a teacher and was curious about why they themselves did not have a Working with Children Check: at [33]-[38].

- From the trial record and what the judge said before taking the ten verdicts, the judge was affirmatively satisfied there had been misconduct and was required to immediately discharge the juror before taking the verdicts: at [41].
- **Inadvertent searching**: Section 68C(1), read with s 68C(5)(b), does not extend to what might be called 'inadvertent searching'. Section 68C(1) is directed to a juror making an inquiry *for the purpose* of obtaining information about a matter relevant to trial. Any concern for the safety and propriety of a jury trial arising from an inadvertent search undertaken by a juror may be addressed by the trial judge under s 53A(1)(c) read with sub-s (2)(b) or, alternatively, s 53B: at [35].

Continuing detention order (CDO) - power to order CDO constitutionally valid

***Minister for Home Affairs v Benbrika* [2021] HCA 4; 95 ALJR 166; 286 A Crim R 64**.

Appeal from Victoria.

Section 105A.7(1) *Criminal Code* (Cth) provides that a State or Territory Supreme Court may make a CDO against a prisoner serving a sentence for a terrorist offence if "satisfied to a high degree of probability… the offender poses an unacceptable risk of committing a serious terrorism offence…"

The respondent challenged his three-year CDO ordered by the Victorian Supreme Court. The High Court answered the following reserved question:

> "Is all or any part of Division 105A of the *Criminal Code* (Cth) … invalid because the power to make a continuing detention order under section 105A.7 .. is not within the judicial power of the Commonwealth and has been conferred, inter alia, on the Supreme Court of Victoria contrary to Chapter III of the Commonwealth Constitution?"

Held: The power to order a CDO was constitutionally valid.

- A Supreme Court may commit a person to prison in the exercise of federal judicial power after determining, by orthodox judicial process, that the person presents an unacceptable risk of committing a terrorist offence if released from custody: at [2], [11], [12].
- The making of a CDO does not fail to engage judicial power because it does not determine 'a controversy as to existing rights and obligations'. The exercise of judicial power is engaged because it involves the making of orders upon determining that a particular fact or status exists: at [14]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.
- The power to order the continuing detention is a judicial power that does not compromise the Supreme Court's institutional integrity as a court invested with federal jurisdiction. Terrorism poses a threat to society. There is no principled reason for distinguishing the power to order that a mentally ill person be detained in custody for the protection of the community from harm and the power to order a terrorist offender be detained for the same purpose. The protective purpose qualifies a power as an exception to a principle recognised as a safeguard on liberty: at [35]-[36]. *Lim v Minister for Immigration* (1992) 176 CLR 1.
- Division 105A is non-punitive and rightly characterised as directed to ensuring the safety and protection of the community from risk of harm posed by threat of terrorism. Therefore, Division 105A validly confers the judicial power of the Commonwealth on the Supreme Court of a State or Territory: at [39]–[41], [47]–[48].

Husband and wife can be guilty of 'conspiracy' under Criminal Code (Cth), s 11.5

***Namoa v The Queen* [2021] HCA 13; 95 ALJR 396**. Appeal from NSW.

The applicant was convicted of conspiring with her husband to do acts in preparation for a terrorist act (ss 11.5(1), 101.6(1) *Criminal Code Act* 1995 (Cth)). She unsuccessfully argued in the NSW CCA that husband and wife could not be guilty of conspiracy under the *Code*: *Namoa v R* [2020] NSWCCA 62.

The appellant submitted that there is a common law rule that spouses alone cannot conspire; and that this rule affects the meaning of "conspires" and "conspiracy" in s 11.5.

Held: Appeal dismissed.

- The NSW CCA was correct to hold that a husband and wife are each a "person" and can be guilty of conspiring with each other within the meaning of s 11.5: at [3]. Whether there is or was a rule of Australian common law that there can be no criminal conspiracy if the only two parties to the agreement are spouses, that rule is not incorporated into the offence contained in s 11.5 by the words "conspires" and "conspiracy": at [17], [28].

Prosecution duty of disclosure – s 142 *Criminal Procedure Act* 1986 (NSW)

***Edwards v The Queen* [2021] HCA 28; 95 ALJR 808.** Appeal from NSW.

The applicant was convicted of child sexual assault. The prosecution's brief of evidence disclosed the existence of downloaded contents from the applicant's mobile phone and stated that a copy was available. At trial, the prosecution disclosed that a new witness B would be called. When asked by the defence, the prosecution said that B's details had come from the mobile download and thereupon provided a copy of the download to the defence. The defence established another potential witness from the download. The applicant did not seek an adjournment nor that B's evidence be excluded.

The applicant's appeal to the NSW CCA on the ground the trial miscarried due to the prosecutor's failure to provide full and proper disclosure pursuant to s 142 *Criminal Procedure Act* 1986 was dismissed: *Edwards v R* [2020] NSWCCA 57.

s.142 *CP Act* provides:

> *For the purposes of section 141(1)(a), the prosecution's notice is to contain:*
>
> *(i)a copy of any information, document or other thing provided by law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person,*
>
> *……*
>
> *(k)a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness*

Held: Appeal dismissed.

Per Kiefel CJ, Keane and Gleeson JJ

- For the purposes of s 142(1)(i), the applicant was unable to identify how the download's content 'would reasonably be regarded as relevant to the prosecution or defence case' or 'would be relevant to the reliability' of the complainant or any respect in which his entitlement to a fair trial according to law was adversely affected by not being provided with a copy of the download. Argument regarding forensic value of the download was speculative: at [25]-[29].
- If there was a contravention of s 141(2) by late delivery of B's statement, the applicant has not demonstrated fairness of his trial was affected. The applicant could have sought an adjournment and requested a copy of the download: at [30]-[31].

Per Edelman and Steward JJ

- The download 'would reasonably have been regarded as relevant to the prosecution or defence case'. The prosecution was obliged to provide a copy of the download to the defence and failure to do so was a breach of the duty in s 141(1)(a) by non-compliance with s 142(1)(i). However, such failure did not lead to a miscarriage of justice as the appellant did not establish that the information was capable of providing any advantage at trial: at [35], [65]–[84].

Anti-tendency direction not required where distinctly unlikely jury to engage in impermissible tendency reasoning

***Hamilton (a pseudonym) v The Queen* [2021] HCA 33; 95 ALJR 894**. Appeal from NSW.

The appellant was convicted by a jury of 10 counts of aggravated indecent assault against three of his children. He did not seek separate trials so as to give the jury the opportunity to consider his assertion of concoction by his children and wife. The judge rejected the Crown's tendency evidence application. The defence did not seek an anti-tendency direction. Instead, the judge gave a *Murray* direction at defence request (that the jury could not convict unless satisfied beyond a reasonable doubt that the evidence of each child was honest and reliable in relation to each of the counts concerning that child: *R v Murray* (1987) 11 NSWLR 12). The judge also directed the jury they were required to give separate consideration to each count. The NSW CCA refused leave to appeal against conviction.

The appellant appealed to the High Court on the ground the trial miscarried because there was a risk that the jury could have been inclined to engage in tendency reasoning unless clearly directed against that course.

Held: Appeal dismissed (Kiefel CJ, Keane and Steward JJ jointly; Edelman and Gleeson JJ dissenting jointly).

Kiefel CJ, Keane and Steward JJ

- There was no miscarriage of justice by the judge not giving an "anti-tendency direction", that is, the jury must not reason that, because the appellant was guilty of one charge, he was guilty of other charges because he was the kind of person who engaged in that kind of misconduct. An anti-tendency direction was not necessary in this case: at [4]; [45]-[48], [53].
- An anti-tendency direction is not required in every case of multiple sexual offences against several complainants. The risk of tendency reasoning will depend upon issues presented by the parties and other directions by the judge: at [42]-[43]; *KRM v The Queen* (2001) 206 CLR 221 at [38].
- A risk may be higher where at issue is the offender's identity and identification evidence is circumstantial. But here, the defence case of concoction made credibility between the appellant and the complainants and their mother likely to be decisive of guilt. Rejecting concoction was a legitimate path of reasoning consistent with the *Murray* direction and did not stray into tendency reasoning. If the jury accepted each complainant's evidence as honest and reliable, as put by the Crown, there was no occasion to resort to tendency reasoning. No conviction would follow from reasoning that doubts about their honesty and reliability could be resolved in favour of conviction by tendency reasoning: at [44]-[47].
- Further, defence counsel deliberately did not seek an anti-tendency direction where there was little risk the jury would engage in impermissible tendency reasoning: [47]-[57].

Edelman and Gleeson JJ, dissenting

- The CCA failed to identify the real risk of conviction by impermissible reasoning. The jury was not warned explicitly that each complainant's evidence was not relevant to charges concerning the other complainants, or the evidence of offences against one complainant must not be treated as tending to prove guilt of any offence against another complainant or an inclination by the applicant towards the alleged offending. Risk of tendency reasoning was increased by multiple complainants but also alleged conduct suggesting tendencies of paedophilic, incestuous attraction. An anti-tendency warning was important: at [64]-[69], [70]-[72], [78].

Prejudicial cross-examination of appellant by Crown Prosecutor - application of proviso - *Criminal Appeal Act* 1912, s 6(1)

***Hofer v The Queen* [2021] HCA 36; 95 ALJR 937; 395 ALR 1.** Appeal from NSW.

The appellant was convicted of sexual assault offences against two complainants (s 61I *Crimes Act* 1900). The issue at trial was consent.

The appellant gave evidence each complainant was affected by alcohol and sex was mutual. Parts of this evidence was not put to the complainants in cross-examination by defence counsel, for reasons including the risk they would turn the jury against the appellant. The prosecutor, in cross-examination of the appellant, put that parts of his evidence-in-chief were recent inventions. The judge gave no jury directions regarding this evidence, and neither party sought directions.

The appellant's appeal to the NSW CCA, on grounds including that the prosecutor's impermissible questions during cross-examination caused a miscarriage of justice, was dismissed by majority: *Hofer v R* [2019] NSWCCA 244.

Held: Appeal dismissed. (Kiefel CJ, Keane and Gleeson JJ in a joint judgment; Gageler J agreeing with separate reasons; Gordon J dissenting).

Kiefel CJ, Keane and Gleeson JJ

- There was a miscarriage of justice. The prosecution's cross-examination departed from standards of fairness of a criminal trial. It implied that the appellant was obliged to provide explanation on why matters had not been put to the complainants, suggesting he had information which he had not given to his counsel. The attack on credit by assertions of recent invention was based upon an assumption which was not warranted. There was a possibility that there were alternative explanations other than recent invention for not putting a matter to

a witness, as shown by defence counsel's evidence on appeal. These matters were highly prejudicial: at [42]-[46]; authorities cited.

- The judge should have addressed the prejudice, including warning the jury about drawing any inference on the basis of a mere assumption. There was a real chance that the jury may have assumed that the reason for omission was that the appellant had changed or recently made up his story: at [47].
- Proviso: However, there was not a substantial miscarriage of justice within the meaning of the proviso (*Criminal Appeal Act*, s 6(1)): at [77], [80], [124]. Failure of defence counsel to stop the cross-examination and suggestions of recent invention do not make this an example of the rare case where there has been a denial of the presuppositions of the trial. The Crown's impermissible contention of recent invention was of little significance in the determination of the real issue in the trial. The overwhelming difficulty for the appellant lay not in the suggestion of recent invention, but in his fabricated account: at [72]-[76]; authorities cited.
- Rule in *Browne and Dunn*: In criminal proceedings there are difficulties about the proper course to be followed when the rule is not observed. A preferable course is to recall the witness to correct the omission; sometimes the prosecution cross-examines the accused about the omission and reasons for it.

  Where there remains a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for questioning directed to impugning the credit of an accused, except where there are clear indications of recent invention: at [29], [31]-[34].

  A judge should raise any problems associated with cross-examination with counsel. Where cross-examination has occurred, it will be necessary to warn the jury about any assumptions made by the cross-examiner, to draw attention to possible reasons why the matter was not put and direct the jury as to whether any inferences are available: at [37].

Sentencing court subject to jurisdictional limit of two years' imprisonment for offence - s 22(1) CSP Act - sentence that the court "would otherwise have imposed" is the appropriate sentence determined in accordance with the CSP Act and without regard to any jurisdictional limit

***Park v The Queen* [2021] HCA 37; 95 ALJR 968.** Appeal from NSW.

s 22(1) *Crimes (Sentencing Procedure) Act* provides that a guilty plea taken into account for offences not dealt with on indictment is applied to the sentence that the court *"would otherwise have imposed*".

The applicant pleaded guilty to drive vehicle without consent (s 154A *Crimes Act*) which has a maximum penalty of 5 years but a jurisdictional limit of 2 years when dealt with as a 'related offence' by the District Court (s.165 *Criminal Procedure Act* 1986).

The sentencing judge indicated a sentence of 2 years 8 months and applied a 25% reduction pursuant to s 22(1). The applicant was sentenced to 2 years imprisonment.

The applicant's appeal to the NSW CCA was, by majority, dismissed: *Park v R* [2020] NSWCCA 90. The CCA rejected the applicant's argument that the reduction should have been applied to 2 years (jurisdictional limit) not 2 years 8 months (appropriate sentence before jurisdictional limit applied).

Held: Appeal dismissed (Kiefel CJ, Gageler, Keane, Edelman and Gleeson JJ)

- The sentence that the court "would otherwise have imposed" (s 22(1)) is the appropriate sentence determined in accordance with the *CSP Act* and without regard to any jurisdictional limit: at [15]-[17].
- Any relevant jurisdictional limit should be applied after the judge has 'determined the appropriate sentence for an offence' in accordance with s 21A *CSP Act*. A jurisdictional limit relates to the sentencing court, not to the task of identifying and synthesising the relevant factors that are weighed to determine the appropriate sentence: at [19].
- An interpretation of s 22 that does not have regard to any jurisdictional limit is consistent with the more general rule that a court exercising summary jurisdiction has regard to the maximum penalty for the offence as the starting point for sentencing, and not a lower jurisdictional limit: at [23]; *R v Doan* (2000) 50 NSWLR 115 at 123 [35].

Evidence irrelevant and inadmissible – Whether no substantial miscarriage of justice had actually occurred – application of proviso, s 6(1) *Criminal Appeal Act* 1912

***Orreal v The Queen* [2021] HCA 44**. Appeal from Queensland.

The appellant was convicted of child sex offences against the 12-year-old complainant. Evidence showed both had herpes virus (HSV-1) ("the impugned evidence"). HSV-1 was present in the complainant's genitals. Testing showed HSV-1 present in the appellant's blood but not on his genitals. It was not known if the complainant's boyfriend, who had performed oral sex on her once, had HSV-1.

The prosecutor told the jury the impugned evidence was neutral and "it's a matter for you with your life experience what you make of that."

The trial judge told the jury the evidence did not help because "you cannot know when she contracted it… [or] … who she contracted it from… You just take that evidence into account along with all of the other evidence."

The Queensland Court of Appeal found a miscarriage of justice. The impugned evidence was irrelevant and inadmissible and the trial judge failed to direct the jury to disregard it. However, the majority were satisfied there had been no substantial miscarriage of justice, as the impugned evidence would not have impacted the complainant's reliability or credibility and weight was to be given to the jury's findings: *R v Orreal* [2020] QCA 95.

The High Court granted leave to appeal on the basis the proviso was erroneously applied.

Held: Appeal allowed, verdicts quashed and retrial ordered (Gordon, Steward and Gleeson JJ jointly; Kiefel CJ and Keane J agreeing in a joint judgment).

Gordon, Steward and Gleeson JJ

- An appellate court cannot conclude no substantial miscarriage of justice occurred unless persuaded the evidence properly admitted established guilt beyond reasonable doubt (*Weiss v The Queen* (2005) 224 CLR 300). It is necessary to consider the nature and effect of the error (*Kalbasi v Western Australia* (2018) 264 CLR 62). In cases of contested credibility, the nature and effect of the error may render an appellate court unable to assess whether guilt was proved beyond reasonable doubt due to the 'natural limitations' of proceeding on the record: at [41]; *Castle v The Queen* (2016) 259 CLR 449.
- The Court of Appeal erred in placing weight on the verdicts which might have been affected by the misuse of the impugned evidence in the absence of a direction to disregard it: at [42]. The assessment that the impugned evidence did not impact upon credibility or reliability of the complainant's evidence ignored its significantly prejudicial nature and effect. It could only have been its potentially prejudicial effect that made it a miscarriage of justice for the judge to have failed to direct the jury to ignore it: at [43],
- When regard is had to the complainant's young age and single experience of oral sex, it is not difficult to envisage jurors using "life experience" to conclude that the impugned evidence supported her version of events, or that it dispelled doubts about her version: at [44].
- The absence of any direction to the jury to disregard the impugned evidence in effect invited the jury to employ it as they saw fit. In those circumstances, it was not possible for the Court of Appeal to assess whether guilt was proved beyond reasonable doubt: at [45].

Kiefel CJ and Keane J

- Uninstructed by the judge, the jury may well have reasoned that the test results were no coincidence and pointed to the complainant having contracted the virus from the appellant: at [23].
- This case is one which turns on the jury's acceptance of the evidence of the complainant. In such a case the appellate court should not seek to duplicate the function of the jury, because it does not perform the same function in the same way nor have the same advantages: at [22]; *Pell v The Queen* (2020) 268 CLR 123 at [37].

B. SUPREME COURT CASES

Order quashing declaration plaintiff a registrable person under Child Protection (Offenders Registration) Act 2000 (CPOR Act)

Tua v Commissioner of NSW Police [2021] NSWSC 1159

Section 3E *CPOR Act* provides the Local Court with the power, on application by the Police Commissioner, to order a person who has not committed a Class 1 or Class 2 offence to comply with reporting obligations under the Act.

The Court held there was jurisdictional error where the Magistrate made an order that the plaintiff comply with reporting obligations but failed to take into account the considerations and make the necessary findings required by s 3(2) and s 3AA. The Magistrate's reasons made no reference or finding at all in respect of s 3AA(1). The considerations in s 3AA(3) are mandatory and must be taken into account in determining whether the respondent to an application under s 3E "poses a risk to the lives or sexual safety of one or more children or of children generally". Section 3AA makes it clear that the enquiry under s 3E(2)(a) about whether the person poses a risk to children is not at large but is constrained and directed by the statute. A conclusion as to the existence of a risk cannot be drawn lightly: at [20]-[22]; *O'Neill v Cmr of Police* [2020] NSWSC 1805.

Application of Mental Health and Cognitive Impairment Forensic Provisions Act 2020 – existing proceedings under s 38 of 1990 Act, defence of not guilty by reason of mental illness

R v Tonga [2021] NSWSC 1064

The *MHCIFP Act* 2020 ('the Act') commenced on 27 March 2021, replacing the *Mental Health (Forensic Provisions) Act* 1990. Schedule 2 contains transitional provisions. Clause 5 provides for the application of the new Act to existing proceedings where the defence of 'not guilty by reason of mental illness' under s 38 of the 1990 Act has been raised:

> cl.5
>
> (1) This clause applies in proceedings commenced before the commencement of Part 3 of this Act where a question has been raised before that commencement as to whether the defendant was, at the time of commission of the offence, mentally ill as referred to in section 38 of the former Act.
>
> (2) The former Act continues to apply to the defendant until a determination is made as to whether a special verdict should be entered or the defence is no longer being raised.
>
> (3) In circumstances where the court would have found the special verdict of not guilty by reason of mental illness the court must instead find the special verdict of act proven but not criminally responsible.

Wilson J found the Act does not explain what is meant by "the commencement of proceedings" in the context of a mental illness (or impairment) defence under Part 3.

Her Honour found the proceedings commenced with the presentation of the indictment - in this case, on 23 August 2021 in the present trial proceedings before the Court. This interpretation makes sense of the transitional provisions, which allow for the continuation of proceedings under the 1990 Act only until such time as the special verdict should be entered or the defence is no longer raised. That appears to be directed to any trial in which the defence was raised that had commenced before, but was not finalised by, 27 March 2021: at [6]–[10]; followed in ***R v Siemek (No. 1)*** [2021] NSWSC 1292.

Mental Health and Cognitive Impairment Forensic Provisions Act 2020 – s 31 Special verdict of act proven but not criminally responsible – ss 4, 28

R v Tonga [2021] NSWSC 1064 (Wilson J) and ***R v Siemek (No. 1)*** [2021] NSWSC 1292 (Johnson J)

Section 28(1) *MHCIFP Act* 2020 provides that a person is not criminally responsible if they had a mental health impairment or a cognitive impairment.

Section 31 ('*Special verdict where defendant and prosecutor agree on impairment')* provides that the court may enter a special verdict at any stage in proceedings if:

> (a) the defendant and prosecutor agree the proposed evidence establishes a defence of mental health or cognitive impairment,
>
> (b) the defendant is legally represented, and

(c) the court, after considering that evidence, is satisfied the defence is established.

In both cases, the Court sitting as judge alone in a murder trial, found the defence of mental health impairment established and returned the special verdict of "act proven but not criminally responsible" under s 31where both parties agreed defence of mental health impairment was established.

Function of a court under s 31:

- If the Court is satisfied the physical elements of murder are proved beyond reasonable doubt, the Court must consider the defence of mental health impairment, without at that stage considering the question of proof of the mental elements of murder. It is open at this stage to proceed pursuant to s 31: at [99]–[100]. This is consistent with the law prior to the *MHCIFP* Act: ***R v Tonga*** at [15]; ***R v Siemek (No. 1).***
- In a judge alone trial, s 31 permits the judge to enter a special verdict at any stage, without having to formally record findings of fact, principles of law and jury warnings; and the need to explain matters in s 29 ('Explanation to jury'). (Cf. s 133 *Criminal Procedure Act* 1986 which, in a judge-alone trial, requires that the Court must record principles of law and factual findings, with regard to jury warnings): at ***R v Tonga*** at [98]; ***R v Siemek (No. 1)*** at [20].

R v Siemek (No.1):

- It remains for the Court to find the facts and then apply ss 4 and 28 for the purpose of determining whether the defence of mental health impairment is established: at [20].
- An elaborate definition of *"mental health impairment"* in s.4 requires the Court to consider whether, amongst other things, *"a temporary or ongoing disturbance of thought, mood, volition, perception or memory … would be regarded as significant for clinical diagnostic purposes"*: s.4(1)(a) and (b). The introduction of an assessment of the relevant *"disturbance"* as being *"significant for clinical diagnostic purposes"* means that expert medical evidence is now more than a practical necessity where the s.28 defence is raised: at [92].

C. LEGISLATION 2021

1. Mental Health and Cognitive Impairment Forensic Provisions Act 2020

Commenced 21 March 2021

The Act: [4]

- replaced the *Mental Health (Forensic Provisions) Act* 1990
- introduced partial codification of common law standards and tests applying to fitness proceedings, the mental illness defence and partial defences to murder
- amended the *Crimes Act* 1900 in relation to infanticide and substantial impairment

A. Criminal proceedings in the District and Supreme Courts under Parts 3 and 4.

New definitions of 'mental health impairment' and 'cognitive impairment'

Previously, whether a person had a mental health impairment was determined by common law, so that a cognitive impairment did not always come within the 1990 Act. The new statutory definitions:

- present clarity on what mental conditions base a finding of unfitness to be tried or special verdict of "act proven but not criminally responsible" under s 30.
- do not exclude developments in psychiatry / psychology which could fall within further mental health disorders or conditions of cognitive impairment.

[4] The following was greatly assisted by The Hon Justice M Ierace, "Introducing the new Mental Health and Cognitive Impairment Forensic Provisions Act 2020" (2021) 33(2) *Judicial Officers Bulletin* 15. See also Second Reading Speech, Mental Health and Cognitive Impairment Forensic Provisions Bill 2020, NSW Legislative Council, *Hansard*, 16 June 2020, p 51.

Section 4 defines "*mental health impairment*". A person has mental health impairment if:
(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory
(b) the disturbance would be regarded as significant for clinical diagnostic purposes, and
(c) the disturbance impairs the person's emotional wellbeing, judgment or behaviour: s 4(1).

Section 4(2) provides a non-exhaustive list of disorders from which a mental health impairment may arise - an anxiety disorder, an affective disorder (including clinical depression and bipolar disorder), a psychotic disorder, a substance induced mental disorder that is not temporary, or for other reasons.

A person does not have a mental health impairment if it is caused solely by the temporary effect of ingesting a substance or a substance use disorder: s 4(3).

Section 5 defines "*cognitive impairment*". A person has a cognitive impairment if:
(a) the person has an ongoing impairment in adaptive functioning
(b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and
(c) the impairments result from damage to or dysfunction, developmental delay or deterioration of brain or mind that may arise from a condition in s 5(2) or for other reasons.

Section 5(2) provides a cognitive impairment may arise from any of the following conditions but may also arise for other reasons—
(a) intellectual disability,
(b) borderline intellectual functioning,
(c) dementia,
(d) an acquired brain injury,
(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
(f) autism spectrum disorder.

Defence of mental health impairment or cognitive impairment – Part 3
Part 3 applies to criminal proceedings in the Supreme and District Court: s 27.

Section 28 codifies the *M'Naghten* rules. Section 28(1) provides that a person is not criminally responsible if they had a mental health impairment or a cognitive impairment, or both, with the effect that the person-
(a) did not know the nature and quality of the act, or
(b) did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).

Whether a defendant had a mental health impairment or cognitive impairment, or both, that had that effect is a question of fact to be determined by the jury on the balance of probabilities: s 28(2).

s 28(3) reflects the common law principle (*M'Naghten*) that "it is presumed that a defendant did not have a mental health impairment or cognitive impairment, or both".

Special verdict
Section 30 provides a jury must return a special verdict of '*act proven but not criminally responsible*' if satisfied the defence of mental health impairment or cognitive impairment has been established.

Section 31 provides the court may enter the special verdict of 'act proven but not criminally responsible' at any time in proceedings if

(a) the defendant and the prosecutor agree that the proposed evidence in the proceedings establishes a defence of mental health or cognitive impairment,
(b) the defendant is legally represented, and
(c) the court, after considering that evidence, is satisfied the defence is established.

That a court enters a special verdict of act proven but not criminally responsible does not require it to also enter a special verdict in respect of an available alternative offence: s 32.

Fitness to Stand Trial - Part 4
For procedural Table and detail when fitness is raised and for special hearings, see Judicial Commission Criminal Trial Bench Book, Procedures for fitness to be tried (including special hearings), particularly [4-320] Part 4 procedure TABLE.

Part 4 applies to criminal proceedings in the Supreme and District Court: s 35.

Unfitness to be tried:

- may be raised by any party or by the court: s 39
- should, so far as practicable, be raised before arraignment but may be raised any time during the hearing and more than once: ss 37(1), (2)
- is determined by judge alone on balance of probabilities: ss 38, 44(1).

The fitness test
Section 36 provides a statutory test for fitness, based on common law principles (*R v Presser* [1958] VR 45; *Kesavarajah v The Queen* (1994) 181 CLR 230).

Section 36(1) provides a person is unfit to be tried if the person has a mental health impairment or cognitive impairment, or both, or for another reason, cannot do one or more of the following:
(a) understand the offence the subject of the proceedings,
(b) plead to the charge,
(c) exercise the right to challenge jurors,
(d) understand generally the nature of the proceedings as an inquiry into whether the person committed the offence with which the person is charged,
(e) follow the course of the proceedings so as to understand what is going on in a general sense,
(f) understand the substantial effect of any evidence given against the person
(g) make a defence or answer to the charge,
(h) instruct the person's legal representative so as to mount a defence and provide the person's version of the facts to that legal representative and to the court if necessary,
(i) decide what defence the person will rely on and make that decision known to the person's legal representative and the court.

Section 36(1) does not limit the grounds on which a court may consider a person to be unfit to be tried for an offence: s 36(2). This leaves open the possibility of a person being found unfit for other reasons not recognised in *Presser.*

Special hearings - Part 4, Div 3
Division 3, Pt 4 sets out process for defendants unfit to be tried in accordance with normal procedures and is broadly similar to the 1990 Act.

An important change is s 63(5) (below) which sets out considerations when determining a penalty including length of limiting term.

If the court determines a defendant is unfit to be tried, it conducts a special hearing: ss 54, 56.

A special hearing is by judge alone unless an election for a jury is made by the defendant, their legal representative or the prosecutor: s 56(9)

The verdicts which can be given are:
(a) not guilty
(b) a special verdict of act proven but not criminally responsible
(c) that on the limited evidence available, the accused committed the offence charged, or
(d) that on the limited evidence available, the accused committed an available alternative offence: s 59(1).

If the verdict is not guilty or a special verdict of act proven but not criminally responsible, the defendant is dealt with as if that verdict was reached at an ordinary trial: ss 60, 61.

If the court finds the defendant committed the offence, and would have imposed a sentence of imprisonment had the special hearing been an ordinary trial, the court must impose a limiting term: ss 63–65.

Section 63(5) sets out factors for consideration in determining penalty. The court—
(a) must take into account that, because of mental health impairment or cognitive impairment, the person may not be able to demonstrate mitigating factors for sentencing or make a guilty plea for the purposes of a sentencing discount, and
(b) may apply a discount because of those factors or a guilty plea, and
(c) must take into account periods of custody or detention before, during and after the special hearing that related to the offence

B. Summary Proceedings under Part 2

Summary proceedings are dealt with under Part 2 and is substantially similar to the previous scheme under the 1990 Act.

See the Judicial Commission, Local Court Bench Book, Inquiries under the MHCIFP Act 2020 which sets out a comparative Table of provisions in the new Act and 1990 Act.

Main provisions include:

Pt 2 Div 2: Defendants with mental health or cognitive impairment (replaces former s 32 of 1990 Act)

s 13: Power to adjourn proceedings to enable apparent mental health impairment or cognitive impairment to be assessed or diagnosed, or for the development of a treatment or support plan.

s 14: Magistrate may dismiss a charge and discharge the defendant.

s 15: Lists matters a magistrate may consider in deciding whether it would be more appropriate to deal with a defendant in accordance with s 13 (adjournment) and s 14 (dismissal). These include: (a) nature of apparent mental health impairment or cognitive impairment, (b) nature, seriousness and circumstances of alleged offence, and (c) suitability of sentencing options available if the defendant is found guilty.

s 16: Time to bring defendant before court for breach increased from 6 to 12 months.

Pt 2 Div 3: Mentally ill or mentally disordered defendants (replaces former s 33 of 1990 Act)

ss 18, 19: Orders regarding a defendant who is a "mentally ill person" or a "mentally disordered person" within the meaning of the *Mental Health Act* 2007, including detention and assessment orders.

C. Amendments to *Crimes Act* 1900

Infanticide - s 22A *Crimes Act*

s 22A(1) is substituted to provide a woman is guilty of infanticide and not of murder if she—

(a) by an act or omission causes a child's death, in circumstances that would constitute murder, within 12 months of giving birth to the child, and

(b) at the time of the act or omission, had a mental health impairment consequent on or exacerbated by giving birth.

On a murder indictment, a jury may:

- find a woman guilty of infanticide if of the opinion that the two limbs of the definition apply: s 22A(2).
- return a verdict of manslaughter, or a special verdict of act proven but not criminally responsible, or concealment of birth: s 22A(4).

Substantial impairment - s 23A *Crimes Act*

References to "*abnormality of mind*" are replaced with the terms "*mental health impairment or cognitive impairment*".

Amended s 23A(1) provides a person who would otherwise be guilty of murder is not to be convicted of murder if—

(a) at the time of the acts or omissions causing the death concerned, their capacity to understand events, or to judge whether their actions were right or wrong, or to control themselves, was substantially impaired by *a mental health impairment or a cognitive impairment*, and

(b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

New ss 4C, s 10E(7) and 23A(8)-(9) *Crimes Act* define 'mental health impairment' and 'cognitive impairment' – replicating the definitions in ss 4-5 *MHIFP* Act 2020.

2. Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021

Proclaimed to commence on 1 June 2022. Second Reading Speech.

***Crimes Act* 1900**

New 'Subdivision 1A Consent and knowledge of consent' – ss 61HF - 61HK

s 61HF provides an objective of this Subdivision is to recognise—

(a) every person has a right to choose whether or not to participate in a sexual activity,

(b) consent to a sexual activity is not to be presumed,

(c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

The Subdivision applies to ss 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF: s 61HG.

Definition of consent – s 61HI, set out below.
Consistent with current law, under s 61H(1) the core definition of consent is a "free and voluntary agreement." Consent must be present at the time of the sexual activity, and different acts along a sexual continuum require consent.

The legislation does not require every small increment along a sexual continuum to have consent sought and obtained. A principal aim of the reforms is to recognise and deal with misconceptions that consent to one sexual activity is consent to all or any other sexual activity.

Consent can also be withdrawn by words or conduct—see s 61HI (2). "This requirement serves to provide fairness to an accused because it precludes an internal—that is, in their own mind—withdrawal of consent to, for example, penetration when that withdrawal is not communicated" (*Second Reading Speech*).

s 61HI further provides a set of universal statements to support the definition of "consent" in s 61HI(1).

> *s 61HI Consent generally*
> *(1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.*
> *(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.*
> *(3) Sexual activity that occurs after consent has been withdrawn occurs without consent.*
> *(4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.*
> *(5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. Example— A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.*
> *(6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—*
> *(a) that person on another occasion, or*
> *(b) another person on that or another occasion.*

Circumstances in which there is no consent – s 61HJ
s 61HJ sets out a non-exhaustive list of circumstances in which there is no consent, including if the person:

- does not say or do anything to communicate consent (addresses the "freeze" response)
- does not have capacity to consent
- is so affected by alcohol or drug as to be incapable of consenting
- is unconscious or asleep
- participates because of force, fear of serious harm of any kind to the person, another person, an animal or property; because of coercion, blackmail or intimidation; is unlawfully detained; overborne by abuse of a relationship of authority, trust or dependence; or because of fraudulent inducement
- is mistaken about the nature or purpose of the sexual activity, identity of the other person, or being married to the other person.

Knowledge about consent - 61HK
Second Reading Speech: Sections 61HK(1)(a)-(c) retains the three states of mind by which knowledge of non-consent may be established: actual knowledge of non-consent, recklessness, and a hybrid subjective/objective test of no reasonable grounds for believing the other person was consenting.

Section 61HK(1)(c) updates the current test of 'no reasonable grounds' to a 'no reasonable belief' test. The focus is on the reasonableness of any belief an accused has in light of all relevant circumstances, rather than on the narrow question of whether there existed any single ground or grounds on which the accused may have held that belief. A fact finder is to consider whether the accused's belief was objectively reasonable. Specifically, the subjective belief must be as to whether there exists consent in the form of a free and voluntary agreement. The definition of consent, and purpose of the legislation to reinforce a communicative model of consent, limit the extent to which misogynistic beliefs can be taken into account in determining subjective reasonableness of a belief.

Section 61HK(2) reinforces the important principle that consent can never be assumed. It introduces an affirmative consent requirement, meaning the accused must have sought consent by saying or doing something in order to have a reasonable belief that the other person consented. The onus remains on the Crown to prove each element of the sexual offence beyond reasonable doubt.

> *61HK Knowledge about consent*
> *(1) A person (the accused person) is taken to know that another person does not consent to a sexual activity if*
> > *(a) the accused person actually knows the other person does not consent to the sexual activity, or*
> > *(b) the accused person is reckless as to whether the other person consents to the sexual activity, or*
> > *(c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.*
> *(2) Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.*
> *(3) Subsection (2) does not apply if the accused person shows that—*
> > *(a) the accused person had at the time of the sexual activity—*
> > > *(i) a cognitive impairment within the meaning of section 23A(8) and (9), or*
> > > *(ii) a mental health impairment, and*
> > *(b) the impairment was a substantial cause of the accused person not saying or doing anything.*
> *(4) The onus of establishing a matter referred to in subsection (3) lies with the accused person on the balance of probabilities.*
> *(5) For the purposes of making any finding under this section, the trier of fact—*
> > *(a) must consider all the circumstances of the case, including what, if anything, the accused person said or did, and*
> > *(b) must not consider any self-induced intoxication of the accused person.*

Updating of language - Amendments are made to update and clarify the definitions of sexual intercourse, sexual touching and sexual act, including: it is not relevant whether a body part is 'surgically constructed' for the purposes of a sexual offence; provisions concerning sexual intercourse and sexual touching apply regardless of gender or sex; sexual activities are described in appropriate language (for example, s 61HA(c) describes oral sex on a female as "the application of the mouth or tongue to the female genitalia"); the term 'complainant' replaces 'victim.'

Criminal Procedure Act 1986

New jury directions about consent – ss 292A-292E
Five new jury directions about consent seek to address common misconceptions about consent and to ensure a complainant's evidence is assessed fairly and impartially by the tribunal of fact.

Section 292 Directions in relation to consent – provides that the judge must give any one or more of the directions in ss 292A - 292E if there is good reason to do so, or if requested by a party to the proceedings, unless there is good reason not to do so. A judge may give a consent direction at any time during a trial and on more than one occasion; and is not required to use a particular form of words in giving a direction.

Section 292A Circumstances in which non-consensual sexual activity occurs – clarifies that non-consensual sexual activity can occur in different circumstances and between different kinds of people including people who know each other, are married or in an established relationship. The list is non-exhaustive.

Section 292B Responses to non-consensual sexual activity - direction regarding responses to non-consensual sexual activity, including that there is no normal response, people respond in different ways, including by freezing and that the jury must avoid making assessments based on preconceived ideas about responses to non-consensual sexual activity.

Section 292C Lack of physical injury, violence or threats - direction that people who do not consent may not be physically injured, subjected to violence, or threatened with injury or violence; and absence of such evidence does not necessarily mean that a person is not telling the truth.

Section 292D Responses to giving evidence - direction on responses people may have to giving evidence, including that trauma may affect people differently and that the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth.

Section 292E Behaviour and appearance of complainant - direction that it should not be assumed a person consented because of their behaviour, including having worn particular clothing, consumed drugs or alcohol, or being at a particular location.

3. Crimes Legislation Amendment (Loss of Foetus) Act 2021
Commenced 29 March 2022.

***Crimes Act* 1900 - new ss 54A and 54B**
ss 54A and 54B create offences in relation to causing the loss of a foetus of a pregnant woman. The offences apply only to an offence alleged to have been committed on or after commencement.
Foetus is defined as a foetus - (a) of at least 20 weeks' gestation, or (b) where not possible to reliably establish period of gestation - has a body mass of at least 400 grams.
s 54A Offence of causing loss of a foetus

- An offence is committed if the person's act or omission constitutes an offence involving physical elements of causing GBH to a person and the act or omission causes the loss of a foetus of a pregnant woman.
- Maximum penalty is the total of the maximum penalty for (a) the relevant GBH provision and (b) 3 years' imprisonment (the total maximum penalty).
- The prosecution is not required to prove the defendant knew, or ought reasonably to have known, the woman was pregnant, unless the knowledge is an element of the relevant GBH provision.

- In addition to s 54A, the person may be charged and convicted of another offence under the *Crimes Act* if the act or omission caused other injuries to the pregnant woman.
- A court, in sentencing under s 54A and another offence, may take into account any other injuries caused to the pregnant woman, but may not impose a sentence more than the total maximum penalty.

s. 54B Offence of causing loss of a foetus (death of pregnant woman)

- It is an offence where (a) the act or omission constitutes an offence under certain sections of the *Crimes Act* 1900 relating to homicide (see s 54(6)), and (b) the victim is a pregnant woman, and (c) the act or omission includes causing the loss of the foetus.
- A person can only be charged under s 54B if also charged with an offence under a specified homicide provision in relation to the same act or omission.
- Maximum penalty: 3 years' imprisonment.
- The prosecution is not required to prove the defendant knew, or ought reasonably to have known, the woman was pregnant.

ss 54A and 54B do not apply to:
(a) termination of a pregnancy under *Abortion Law Reform Act* 2019, or
(b) an act or omission of a pregnant woman that results in the loss of the woman's foetus.

***Crimes (Sentencing Procedure) Act* 1999**
s 26 - amended definition of 'family victim' to include an immediate family member of a pregnant woman to extend provisions relating to victim impact statements.

***Criminal Procedure Act* 1986**
New s 16(1)(d) provides that stating the name of a foetus does not affect an indictment for an offence under the *Crimes Act* 1900 relating to the destruction or loss of the foetus.

4. Modern Slavery Act 2018 (NSW)

Amended before commencement by Modern Slavery Amendment Act 2021 (NSW)
Commenced 1 January 2022

The Act:

- Aims to combat modern slavery
- Appoints an Anti-slavery Commissioner whose functions include to advocate for and promote action to combat modern slavery; to identify and provide support for victims of modern slavery.
- Introduces certain offences into the *Crimes Act* 1900

***Modern Slavery Act* 2018**
Definitions – s 5(1)
"Modern slavery": includes any conduct—
(a) constituting a modern slavery offence,
(b) involving the use of any form of slavery, servitude or forced labour to exploit children or persons taking place in the supply chains of organisations.

"Modern slavery offence" means—
(a) an offence described in Schedule 2
(b) an offence of attempting, or of incitement, to commit an offence described in Schedule 2
(c) conduct engaged in elsewhere than in NSW that, if it occurred in NSW, would constitute a modern slavery offence under (a) or (b).

Offences in Sch 2 include:

- Causing sexual servitude; conduct of business: *Crimes Act*, ss 80D, 80E
- Use child for production of child abuse material; Production, dissemination or possession of child abuse material: *Crimes Act*, ss 91G, 91H
- Slavery and slavery-like offences: *Crimes Act*, ss 93AA-93AC; *Criminal Code* (Cth), Div 270;
- Trafficking in persons offences: *Criminal Code* (Cth), ss 271.2-271.7
- Organ trafficking offences: *Criminal Code* (Cth), ss 271.7B-271.7E

***Crimes Act* 1900 – new offences**

Aggravated offence of use child for production of child abuse material

s 91G(3)-(3A) - aggravated form of ss 91G(1) and (2) of using a child under 14 years, or 14 years or above, for production of child abuse material. Maximum penalty: 20 years imprisonment.

Offences of digital platforms dealing with child abuse material

s 91HAA(1) - Administering a digital platform used to deal with child abuse material.
s 91HAB(1) - Encouraging use of a digital platform to deal with child abuse material.
s 91HAC - Providing information about avoiding detection of, or prosecution for, conduct that involves an offence against ss 91HAA or 91HAB.
Maximum penalty for each: 14 years imprisonment.

Slavery and slavery-like offences

s 93AB - Slavery, servitude and child forced labour - maximum penalty 25 years imprisonment.
s 93AC - Child forced marriage - maximum penalty 9 years imprisonment.

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

A "personal violence offence" in s 4 is amended to include offences of-

- child forced marriage (s 93AC *Crimes Act*)
- forced marriage offences (*Criminal Code* (Cth), s 270.7B)

"intimidation" in s 7 is amended to include conduct amounting to coercion of, or threats to, a child to enter a forced marriage.

***Crimes (High Risk Offenders) Act* 2006**

"serious sex offence" and "offence of a sexual nature" in s 5 is amended to include an offence of sexual servitude under the *Crimes Act,* Pt 3, Div 10A.

5. Stronger Communities Legislation Amendment (Domestic Violence) Act 2020

The following provisions commenced on dates specified.

Commenced 1 September 2021 -

***Criminal Procedure Act* 1986**

New s 289VA - *Domestic violence offence where accused unrepresented*

For a domestic violence offence where the accused is unrepresented, a complainant cannot be directly examined in chief, cross-examined or re-examined by the accused, but may be examined (a) by a person appointed by the court, or (b) by use of court technology: s 289VA(2).

The Court has no discretion to do otherwise: s 289VA(6).

A person appointed can only ask questions requested by the accused and must not give the accused legal or other advice: s 289VA(4),(5).

If a person is appointed or court technology is used, a Judge must inform the jury that this is standard procedure for the giving of such evidence, and warn the jury not to draw adverse inference against the accused, or give the evidence greater or lesser weight: s 289VA(8).

Application: The section extends to proceedings commenced before the commencement of this section, including proceedings partly heard: s 289VA(9).

Commenced 27 March 2021 -
Crimes (Domestic and Personal Violence) Act
s 39 '*Final order to be made on guilty plea or guilt finding for serious offence' -*
New ss 39(1), (1A) - where a person who pleads, or is found, guilty of a serious offence, the court must make a final AVO for the protection of the person against whom the offence was committed whether or not an interim AVO, or an application for an AVO, has been made.

New ss 39(2A)-(2D) - for an ADVO imposed on a person aged at least 18 at the time of the commission of the relevant offence and who is sentenced to full-time imprisonment, the court must specify that the ADVO is for the period of imprisonment and an additional 2 years, unless there is good reason to impose a different period. The date the ADVO commences may be a day before the day the person starts serving the term of imprisonment.

New s 7(1)(c) and harm to animals (pets)
Inserted to include in the definition of 'intimidation' conduct that causes a reasonable apprehension of:

- injury to the person or another person with whom has a domestic relationship, or
- violence to any person, or
- damage to property, or
- harm to an animal that belongs or belonged to, or is or was in the possession of, the person or another person with whom the person has a domestic relationship

s 36(c) amended so that a prohibition taken to be specified in every AVO extends to the harming of an animal that belongs to, or is in the possession of, the protected person or a person with whom the protected person has a domestic relationship.

6. Crimes Legislation Amendment Act 2021

Commenced 8 December 2021, unless otherwise indicated.

***Crimes Act* 1900**
s 308H(4) - increased time limit from 1 year to 3 years for commencing proceedings for an offence of unauthorised access to or modification of restricted data held in a computer.

New s 547E (commence 8 May 2022) creates two offences:

- s 547E(1): Produce or disseminate bestiality or animal crush material. Maximum penalty: the greater of the maximum penalty for an offence against s 530(1) (serious animal cruelty) or 5 years imprisonment.
- s 547E(2): Possess bestiality or animal crush material. Maximum penalty 3 years imprisonment.

***Crimes (High Risk Offenders) Act* 2006**
s 5(1)(b4)-(b5) are substituted to add to the definition of "serious sex offence" offences in the *Criminal Code* (Cth) relating to:

- Grooming a person to make it easier to engage in sexual activity with, or procure, a child: ss 272.15A, 471.25A, 474.27AA; and
- Use electronic services to commit or facilitate commission of particular child abuse material offences: s 474.23A.

s 5(2)(h3)-(h4) are substituted to add to the definition of "offence of a sexual nature" offences in the *Criminal Code Act* 1995 (Cth) relating to the possession or control of child abuse material: ss 273A.1, 474.22A.

***Law Enforcement (Powers and Responsibilities) Act* 2002**
s 46A definition of "searchable offence" is amended to include offences under the *Crimes Act* 1900, Pt 6 (Computer Offences).

New s 60A - allows applications for warrants to be made by email for a 2 year trial period.

s 99(3) substituted to clarify that *any* police officer may take a person arrested under that section before an authorised officer to be dealt with according to law.

***Surveillance Devices Act* 2007**
s 17 amended to provide that an application for a warrant must be in affidavit form and what information must be included; and that urgent applications may be made in a form other than an affidavit and what information must be included.

***Terrorism (Police Powers) Act* 2002**
s 26ZS amended to extend operation of, and allow applications for, preventative detention orders and prohibited contact orders until 16 December 2023.

Deliberations of High Risk Offenders Assessment Committee not admissible in legal proceedings
New s 28B in the *Crimes (High Risk Offenders) Act* 2006 and new s 71B in the *Terrorism (High Risk Offenders) Act* 2017 provide that minutes and records of deliberations of the High Risk Offenders Assessment Committee and sub-committees are not admissible in legal proceedings. A person cannot be compelled to produce such material in any proceedings.