CRIMINAL LAW UPDATE 2020

Presented by: Lizzie McLaughlin, Barrister, Public Defender

Author: Prita Supomo, Research Lawyer, Public Defenders

PUBLIC DEFENDERS CONFERENCE
SYDNEY, MARCH 2021

COVID-19 Overview

Sentence Appeals

1. *General Sentencing*
2. *Mitigating Factors*
3. *Aggravating Factors*
4. *Discounts: Plea of guilty and Assistance to authorities*
5. *Sentencing Options*
6. *Comparative Cases & Statistics*
7. *Appeals*
8. *Particular Offences*

Conviction Appeals and Other Cases

1. *Evidence*
2. *Procedure*
3. *Dietrich (1992) 177 CLR 292 considerations*
4. *Summing-up / Directions*
5. *Other cases*
6. *Bail*

Annexures

A. High Court Cases 2020
B. Supreme Court 2019
C. Legislation 2020

CONTENTS

s 21A(2)(o) – drug "rip off" – no error finding "potentially a very significant financial gain" - Khoury v R [2020] NSWCCA 190

s 21A(2)(n) - planning and organisation – tension between Legge v R [2007] NSWCCA 244 and DPP v Cornwall [2007] NSWCCA 359 discussed - Pham v R [2020] NSWCCA 269

4. DISCOUNTS

Assistance to authorities by Commonwealth offender – discount where no evidence assistance of use to police - Weber v R [2020] NSWCCA 103

EAGP - s 25D(4)(a) CSPA – facts and evidence of accessory after fact to murder charge "substantially the same" as original murder charge - R v Doudar [2020] NSWSC 1262

EAGP – charge certificate certifying murder and, in the alternative, manslaughter - R v Black (No 2) [2021] NSWSC 77

EAGP - Reduction for plea of guilty not explicitly mentioned in reasons – no error - Tran v R [2020] NSWCCA 39

Guilty plea discount applied to starting point exceeding jurisdictional maximum penalty – sentence that "would otherwise have been imposed" – s 22(1) CSPA - Park v R [2020] NSWCCA 90

Early offer of plea of guilty to excessive self-defence manslaughter rejected by prosecution – insufficient discount - Magro v R [2020] NSWCCA 25

Treatment of plea of guilty for Commonwealth offences - Crimes Act 1914 (Cth), ss 16A(2)(f), (g) - Bae v R [2020] NSWCCA 35; *Betka v & Ors v R* [2020] NSWCCA 191**;** *Kaurasi v R* [2020] NSWCCA 253; *Abreu v R* [2020] NSWCCA 286

Absence of words "utilitarian value" - whether conclusive that value not taken into account - Weber v R [2020] NSWCCA 103

5. SENTENCING OPTIONS

Community Corrections Order (CCO) imposed without sentence assessment report - RC v R; R v RC [2020] NSWCCA 76

Intensive Corrections Order (ICO) – anomalies concerning s 68 CSPA - Abel v R [2020] NSWCCA 82

Indicative sentences in appeal against aggregate sentence – "notional accumulation" - Vaughan v R [2020] NSWCCA 3; *Decision Restricted* [2020] NSWCCA 108

6. COMPARATIVE CASES & STATISTICS

Relying on cases or statistics to contend sentence manifestly excessive - Moodie v R [2020] NSWCCA 160; *Norouzi v R* [2020] NSWCCA 237; *Smith v R* [2020] NSWCCA 181; *Sabbah v R (Cth)* [2020] NSWCCA 89

Error in relying on dissimilar cases to establish a sentencing range - Kannis v R [2020] NSWCCA 79

7. APPEALS

CCA should identify particular indicative sentence warranted for each offence when re-sentencing in respect of an aggregate sentence - Maxwell v R [2020] NSWCCA 94

Crown appeal – CCA cannot increase sentence where not manifestly inadequate, even where error established - Manojlovic v R [2020] NSWCCA 315

Crown motion to reopen sentence appeal dismissed - Barrett v R [2020] NSWCCA 11

Refusal to grant leave to vary or set aside Court order – r 50C Criminal Appeal Rules - Simmons v R (No 2) [2020] NSWCCA 29

Variation of commencement of sentence where earlier unrelated sentence quashed – delay – application refused - CSPA, s 59 - Sahartor v R [2020] NSWCCA 36

Appeal - "lesser sentence is warranted in law" not be determined in summary manner - Abreu v R [2020] NSWCCA 286

Effect of grounds of appeal that factors not given adequate weight - converts appeal to one raising manifest excess and to require establishment of House v R error - Harkin v R [2020] NSWCCA 242

8. PARTICULAR OFFENCES

Ongoing supply DMTA s 25A - not directed to business – paltry profit - ICO manifestly excessive - Kennedy v R [2020] NSWCCA 49

Supply large commercial quantity of gamma-butyrolactone (GBL) - no error in failing to apply Victorian authority describing GBL as "low reward drug" - Petkos v R [2020] NSWCCA 55

Sexual assault - consent - finding beyond reasonable doubt applicant reckless as to consent - not inconsistent to also find reasonably possible applicant believed victim was consenting – s.61HA(3) Crimes Act - Saffin v R [2020] NSWCCA 246

Child sexual offences - whether s 25AA CSPA applies where original sentence imposed before s 25AA commenced and CCA re-sentences - Corliss v R [2020] NSWCCA 65

Child pornography – sexual fantasy – real children of parents - s 91H(2) Crimes Act - R v LS; R v MH [2020] NSWCCA 148

Child cybersex offences - Small v R [2020] NSWCCA 216

Sexual offences with child outside of Australia – Criminal Code (Cth) - Baden v R [2020] NSWCCA 23

Dangerous driving occasioning death – alcohol consumption prior to collision taken into account - Rummukainen v R [2020] NSWCCA 187

Firearms – self-loading rifle not in working order - Andary v R [2020] NSWCCA 75

CONVICTION AND OTHER APPEALS

1. EVIDENCE

Competence - 5 year old child complainant with autism spectrum disorder and hearing impairment – Evidence Act 1995, ss 12, 13 - Gray v R [2020] NSWCCA 240

Compellability of spouses - De facto partner not advised of right to object – s 18 EA - Jurd v R [2020] NSWCCA 91

Complainant permitted to give evidence by pointing at answer cards – s 26(a) EA - ABR (a pseudonym) v R [2020] NSWCCA 33

Evidence wrongly admitted as admissions in furtherance of common purpose – common purpose alleged in the proceeding - s 87 EA - Higgins v R [2020] NSWCCA 149

Tendency - evidence of burns on murder victim shortly before death by blunt force trauma - s 97 EA - TL v R [2020] NSWCCA 265

Tendency - directions pre-Bauer (2018) 92 ALJR 846 - whether criminal standard elevated tendency evidence to an essential intermediate fact – multiple complainants - Jackson v R [2020] NSWCCA 5

Error to not allow good character (no prior convictions) due to 'outstanding allegations' – s 110 EA - Decision Restricted [2020] NSWCCA 247

Lawyer-client legal privilege – privilege lost due to "misconduct" where reasonable grounds for finding communications made in furtherance of an offence – ss 117, 118, 125 EA - DPP (NSW) v Izod; DPP (NSW) v Zreika [2020] NSWSC 381

Illegally obtained evidence - tamper-evident cap missing from blood sample - appeal against s 138 ruling - R v Riley [2020] NSWCCA 283

2. PROCEDURE

Five-judge bench – prior sexual history of complainant – s 293 CPA - Jackmain v R [2020] NSWCCA 150

Sexual assault complainant's evidence from earlier trial – whether complainant compellable to give further evidence at subsequent trial - s 306J Criminal Procedure Act 1986 - WX v R [2020] NSWCCA 142

Appointment of a "children's champion" or witness intermediary – SC v R [2020] NSWCCA 314

Vulnerable complainant - evidence by recording / CCTV – s 306P CPA - Dogan v R [2020] NSWCCA 151

Prosecution duty of disclosure – not obliged to look for exculpatory material - Edwards v R [2020] NSWCCA 57

Search warrants – "rubber stamping" - LEPRA, ss 48,65 - Doyle v Commissioner of Police [2020] NSWCA 11

3. *DIETRICH* (1992) 177 CLR 292 CONSIDERATIONS

Accused unrepresented through no fault of his own – counsel unable to appear – unable to obtain new counsel – temporary stay granted - Croke v R [2020] NSWCCA 8

Error in refusal to grant leave to counsel to withdraw and vacate trial – unfair if accused forced on unrepresented - Kahil v R [2020] NSWCCA 56

No unfairness where unrepresented accused has benefit of legal representation - Decision Restricted [2020] NSWCCA 9

4. SUMMING UP / DIRECTIONS

Summing up - legal responsibility of trial judge - cannot be delegated to parties - Hamilton (a pseudonym) v R [2020] NSWCCA 80

Defence case not put fairly - Decision Restricted [2020] NSWCCA 256

Word against word cases - Markuleski (2001) 52 NSWLR 82 direction - Keen v R [2020] NSWCCA 59

Unwarranted demand money with menaces (Blackmail) – directions mental element - s 249K(1) Crimes Act - Petch v R [2020] NSWCCA 133

5. OTHER CASES

Detain for advantage, s 86(1)(b) Crimes Act 1900 - nature of advantage not an element or essential fact of offence - magistrate erred in refusing to accept guilty plea - Hamilton v DPP [2020] NSWSC 1745

Murder - failure to leave alternative verdict of manslaughter - Objection to evidence under s 84 Evidence Act - Decision Restricted [2020] NSWCCA 284

Jury - investigation by Sheriff pursuant to s 73A Jury Act 1977 – admissibility of investigation material – exclusionary rule – miscarriage of justice - Agelakis v R [2020] NSWCCA 72

Spousal immunity not part of common law at time of enactment of Criminal Code 1995 (Cth) - Namoa v R [2020] NSWCCA 62

Extension order cannot be made with respect to a person who has ceased to be a forensic patient - Attorney General of NSW v WB [2020] NSWCA 7

Incontrovertibility principle - Koloamatangi v R; Popovic v R [2020] NSWCCA 52

6. BAIL

CCA – no jurisdiction - s 67(1) Bail Act 2013 - Karout v DPP (NSW) [2020] NSWCCA 15*; Widdowson v R* [2020] NSWCCA 213

Judicial review proceedings pending in Court of Appeal - jurisdiction of Supreme Court to hear application - Bail Act 2013, s 5(1)(d) - Hay v DPP (NSW) [2020] NSWSC 219

A. HIGH COURT CASES

B. SUPREME COURT CASES

C. LEGISLATION 2020

COVID-19 OVERVIEW

Brief overview from Public Defenders' Covid-19 Resources for Criminal Lawyers.

Bail

Rakielbakhour v DPP [2020] NSWSC 323: Hamill J granted conditional bail, including house arrest, taking into account that prisons are susceptible to spread of COVID-19; onerous conditions due to suspension of visits; delays; suspension of jury trials; high anxiety levels amongst prisoners; and (then) rising rates of COVID-19 in Australia and NSW.

Sentence

Courts have taken into account on sentence:

- increased onerous custodial conditions due to suspension of visits, isolation measures, prisoner anxiety, interruption to rehabilitation/work programs (***McKinnon v R*** [2020] NSWCCA 106; ***Scott v R*** [2020] NSWCCA 81; ***R v Despotovski*** [2020] NSWDC 110)
- impact on prisoner well-being (***Valentine v R*** [2020] NSWCCA 116)
- advanced age and health (***Scott v R*** [2020] NSWCCA 81; ***RC v R; R v RC*** [2020] NSWCCA 76.

The pandemic can be a consideration in favour of special circumstances: ***RC v R; R v RC*** [2020] NSWCCA 76 at [252]; ***R v Polyoak*** [2020] NSWDC 429.

A 5% discount was granted for the utilitarian benefit of an election for trial by judge alone: ***R v Ross (No. 5)*** [2020] NSWDC 306.

The real utilitarian value of a guilty plea in the current circumstances of substantial stresses on the court's capacity to conduct jury trials is recognised: ***R v Diez*** [2020] NSWDC 351; s16A(2)(g) *Crimes Act* 1914.

Procedure

Section 365 *Criminal Procedure Act* was inserted by emergency covid-19 legislation to facilitate more judge only trials: *R v Jaghbir (No 2)* [2020] NSWSC 955 at [23]; ***R v Johnson*** [2020] NSWDC 153; ***Regina v BD (No. 1)*** [2020] NSWDC 150.

R v Macdonald; Obeid; Obeid (No 11) [2020] NSWSC 382: Fullerton J granted the application to adjourn trial proceedings based on technical difficulties of the 'virtual courtroom' and impact upon a fair trial.

Appeals

Borg; Gray v R [2020] NSWCCA 67**:** Where no error established, the Court would not consider additional submissions on COVID-19 as the Court is not entitled to re-sentence: at [7], [10], [48]. Review of sentence is a matter for Executive Government: at [9], [10], [46].

C v R; R v RC [2020] NSWCCA 76: On Crown appeal against sentence, the Court held the sentence (community corrections order) manifestly inadequate, however, exercised its residual discretion not to intervene in the unusual circumstances of this case of the COVID-19 pandemic and advanced age and respiratory ill-health of the respondent.

Cabezuela v R [2020] NSWCCA 107: Following refusal of leave to appeal on the ground the sentence was manifestly excessive, the Court held evidence of the COVID-19 pandemic and its relationship to the applicant's advanced age, ill-health and custodial arrangements was not admissible as fresh evidence.

'Protest cases'

Public assemblies were permitted or prohibited pursuant to s 25 *Summary Offences Act* taking into account risk of transmission of COVID-19 and balancing of the public interest in free speech and freedom of association against public health concerns.

Legislation

Some main legislative changes:

***(i) COVID-19 Legislation Amendment (Emergency Measures) Act* 2020 No** 1 (commenced 25 March 2020)

Criminal Procedure Act 1986

Pre-recorded evidence: Court on its own motion may order evidence of a "relevant witness" be given at a pre-recorded evidence hearing in absence of jury: s 356. (s.354 "Relevant witness": complainant in prescribed sexual offence proceedings, domestic violence offences, serious indictable offences of violence, and complainant /witness at greater risk from COVID-19 pandemic).

Judge-alone trial: Court on its own motion may order a judge-alone trial, in absence of an application by the accused, provided pre-conditions are satisfied: s 365. The consent of the accused is still required.

Evidence (Audio and Audio Visual Links) Act 1998

AVL: s 22C was inserted to facilitate the greater use of audio and AVL in trials and other proceedings.

On 14 May 2020, s 22C was further amended by the *COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act* 2020, see below.

***(ii) COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act* 2020** (Commenced 14 May 2020).

Evidence (Audio and Audio Visual Links) Act 1998

["Physical appearance proceedings" (s 3) means: (a) any trial (including arraignment) or hearing of charges, (b) inquiry into fitness to be tried, (c) bail - at charge and first appearance.

Cl 4A *Regulations* provide that "Proceedings on indictment are prescribed for the purposes of s 22C(3)" so that provision to facilitate appearance of accused by AVL do not to apply to proceedings on indictment (as inserted by *Evidence (Audio and Audio Visual Links) Amendment (Emergency Measures—COVID-19) Regulation 2020*)].

Section 22C provides for appearance by AVL as follows:

- Bail proceedings unless court otherwise directs: s 22C(2).
- Appearance of accused (other than an accused detainee) in any proceedings other than physical appearance proceedings if the court directs or parties consent: s 22C(2A).
- Appearance of accused in any physical appearance proceedings (other than bail or proceedings prescribed by regulations) if the court directs: s 22C(3).
- Appearance of accused (other than an accused detainee) in any physical appearance proceedings prescribed by the regulations under ss (3) is not to take place by AVL unless court directs or parties consent: s 22C(3A).
- Appearance in any proceedings (other than proceedings prescribed by the regulations) of a witness or legal practitioner representing a party if the court directs: s 22C(4).
- A direction under ss (3) or (4) may be made on court's own motion or application of a party but only after the parties have had an opportunity to be heard: s 22C(5).
- The power is subject to the direction being in the interests of justice, having regard to the public health risk posed by COVID-19, efficient use of court resources and any other relevant matter: s 22C(6).
- s 22C(7A) was inserted in October 2020 to clarify that the provision also applied to an accused person outside of NSW: see ***R v Dougas & Ors*** [2020] NSWSC 1731.

***(iii) Crimes (Administration of Sentences) Amendment (COVID-19) Regulation* 2020** (Commenced 3 April 2020)

Prescribed classes of inmate eligible for possible release on parole during the COVID-19 pandemic: (a) whose health is at higher risk because of existing medical condition or vulnerability; (b) whose earliest possible release date is within 12 months: Cl 330 *Crimes (Administration of Sentences) Regulation* 2014.

Certain classes of inmate 'excluded' (cl 330(3)) or not entitled to early release (s 276(3) of the Act).

***(iv) Jury Amendment (Additional Jurors) Regulation* 2020** (Commenced 3 July 2020)

Supreme or District Court can order up to 3 additional jurors for a criminal trial estimated to run for 4 weeks or more: cl 4 *Jury Regulation* 2015; s 19(2) *Jury Act* 1977.

SENTENCE APPEALS

1. GENERAL SENTENCING

Intensive Correction Orders – judge adopted lower court's reasoning - failure to consider s 66(2) CSPA - ICO "controversy"

Wany v DPP [2020] NSWCA 318

Section 66 *CSPA* provides:

> *66 Community safety and other considerations*
>
> *(1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender.*
>
> *(2) When considering community safety, the sentencing court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.*
>
> *(3) When deciding whether to make an intensive correction order, the sentencing court must also consider the provisions of section 3A (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant.*

The applicant sought judicial review of his sentence of full-time imprisonment.

Error to conduct appeal by reference to magistrate's reasons

The Court of Appeal (McCallum JA; Meagher JA and Simpson AJA agreeing) allowed the applicant's appeal on the ground that the District Court sentencing judge fell into jurisdictional error by conducting the appeal by reference to the magistrate's reasons for refusing an ICO rather than determining for himself de novo the appropriate sentence: at [48]-[49]; s 17 *Crimes (Appeal and Review) Act 2001*.

Failure to consider s 66 community safety

McCallum JA with Simpson AJA agreeing (Meagher JA not deciding as the appeal was allowed on the above ground) further found the judge erred by not making the mandatory assessment required by s 66(2).

The obligation to consider making an ICO may be enlivened where a cogent argument is advanced for taking that course: at [52]; *Blanch v R* [2019] NSWCCA 304 at [68]-[69].

McCallum JA stated:

1. When considering an ICO, community safety is a mandatory consideration. That requires assessment as to whether an ICO or full-time detention is more likely to address an offender's risk of reoffending: *R v Fangaloka* [2019] NSWCCA 173 at [60], [65].
2. s 66 does not preclude imposition of an ICO except where the court reaches a positive determination that an ICO (as opposed to full-time detention) is more likely to address an offender's risk of reoffending: at [62]; *Casella v R* [2019] NSWCCA 201 at [108]; *Karout v R* [2019] NSWCCA 253 at [57]-[60];
3. Weight given to the determination of an offender's risk of reoffending is a matter within the sentence judge's discretion: s 66(3).

The task mandated by s 66(2) was not undertaken. For that purpose, it was necessary first to identify any risk of reoffending and then to assess which manner of serving the sentence was more likely to address it. There was no consideration of those issues by magistrate or judge. The judge constructively failed to exercise jurisdiction: at [65], [71]; *Fangaloka* at [65].

ICO "controversy"

In point 2., above, McCallum JA referred to the "controversy" around s 66(2).

In *Fangaloka*, Basten JA (Johnson and Price JJ agreeing) said at [63] that s 66 is restrictive rather than facilitative. Thus the paramount consideration in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the risk of reoffending. Unless a favourable opinion is reached in making that assessment, an ICO should not be imposed.

However, McCallum JA said she respectfully agrees with the view in *Casella* [2019] NSWCCA 201 per Beech-Jones J at [108]; N Adams J agreeing at [111]; and Brereton JA in *Karout* [2019] NSWCCA 253 at

[57]-[60]. That is, s 66 is not restrictive - it should not be understood to preclude the imposition of an ICO except where the court reaches a positive determination that an ICO (as opposed to full-time detention) is more likely to address an offender's risk of reoffending: at [62].

Otherwise, on any view, the authorities are consistent as to the task in s 66(2), which requires the court to determine: which method of serving the sentence (by ICO or detention) is more likely to address the offender's risk of reoffending?: at [61], [63].

Standard non-parole period error

Oncu v R [2020] NSWCCA 260**:** On the basis of incorrect information, the judge sentenced on the basis of a SNPP of 4 years instead of the 3 years which then applied to s 7(1) *Firearms Act* 1996. The appeal was allowed and the applicant resentenced.

A SNPP is a legislative guidepost required to be taken into account (*Muldrock v R* (2011) 244 CLR 120). The erroneous SNPP materially affected the non-parole period for the aggregate sentence: at [25]. By having regard to the incorrect SNPP, the judge allowed an extraneous or irrelevant matter to affect determination of the appropriate non-parole period for the aggregate sentence so as to constitute *House v R* error: at [26]; citing ***Qaumi & Ors v R*** [2020] NSWCCA 163 at [443].

Where an aggregate sentence has been imposed, an appeal relates to the aggregate sentence and not the indicative sentences (***Maxwell v R*** [2020] NSWCCA 94 at [103]. Nonetheless, if error is identified with respect to indicative sentences, such an error may have affected the aggregate sentence (***Qaumi*** at [437]): at [24].

Form 1 errors – Form 1 offences not supported by facts - s 33 CSPA

Ghalbouni v R [2020] NSWCCA 21: The applicant was sentenced for ongoing drug supply (s 25A *DMTA*). The CCA allowed the appeal. The judge made errors regarding the Form 1 offences:

- Taking into account a ''supply 4.71 grams MDMA' offence on the Form 1 when not supported by the facts. The quantity of drug engaged the *deeming* provision (s 29 *DMTA*). However, the statement of facts recorded it was "agreed" that the drugs were for the applicant's "*personal use"*. The judge effectively took into account an offence of which the applicant was not guilty: at [21]-[22].

- Taking into account two Form 1 offences in relation to the wrong principal offences. This appears technical, however, the principal offences had markedly different maximum sentences: at [48].

The CCA observed that the fact the Form 1 offence was taken into account when not supported by the agreed facts demonstrates necessity for compliance with the procedure mandated by s 33 *CSPA* - that the applicant be asked whether he admitted guilt and whether, in all the circumstances, the judge considered it appropriate to take it into account: at [27]-[29]; *Woodward v R* [2017] NSWCCA 44.

Form 1 error - offences taken into account across multiple offences

LS v R [2020] NSWCCA 27**:** The applicant was sentenced for 3 counts of 'aggravated sexual assault' with 4 offences on a Form 1. The Form 1 specified the principal offence as "aggravated sexual assault", understood at sentence proceedings to be Count 3.

The sentencing judge erred by taking into account Form 1 offences across multiple offences on the indictment. The intention of the Form 1 document signed by the applicant was the Form 1 offences be taken into account on count 3, and there was only a single Form 1: at [27]; [37]-[38]; *Doumit v R* [2011] NSWCCA 134.

Parties should make clear on the Form 1 the *particular* substantive offence to which offences are "attached": at [90] per Button J.

The appeal was ultimately dismissed.

Commonwealth additional offences taken into account - legally represented offender need not be directly asked whether other offences to be taken into account

Kabir v R [2020] NSWCCA 139**:** Section 16BA(1) *Crimes Act* 1914 provides a court sentencing a federal offender may "*ask him or her*" whether they admit guilt with respect to offences to be taken into account on a Schedule.

The accused appeared *legally represented*. The CCA held there was no error in the judge not *directly asking the offender* if he admitted guilt. Section 16BA(1) does not require the offender to personally and physically participate in the process. The important issue is that the Court be satisfied that the offender consents, not whether s/he does so in a particular way. A judge can be properly satisfied based upon words or conduct of the legal representative: at [49]-[50].

The case is distinguishable from *Purves* [2019] NSWCCA 227 where the accused was *unrepresented* – and it was held the judge erred in not making necessary statutory inquiries under s 33 *CSPA*, there being no alternative to that offender indicating consent: at [49].

Error taking into account federal offences on Form 1 attached to NSW offence

Ilic v R [2020] NSWCCA 300: In sentencing for a NSW State offence, it is an error to take into account Commonwealth offences on a Form 1. The matter was remitted to the District Court for resentence.

The prohibition in s 19AJ *Crimes Act* 1914 (Cth) on fixing a single non-parole period in respect of both federal and State sentences prohibits "mixing" federal and State sentences of imprisonment, whether by aggregate sentence or by taking offences into account on a Form 1: at [38]-[45]; *DPP (Cth) v Beattie* [2017] NSWCCA 301.

Further, s 16BA *Crimes Act* 1914 makes its own provision for federal offences to be taken into account on a "Form 1"-type document: at [40]. The inclusion of a federal offence on a Form 1 would have the effect of no sentence being imposed for such an offence regardless of the attitude of the federal prosecutor: at [44]; *DPP Act* 1983 (Cth), s 6.

Likewise, see also ***Hildebrand v R*** [2021] NSWCCA 9.

Failure to refer to Guideline Judgment

Moodie v R [2020] NSWCCA 160**:** The judge erred by not taking into account the *Whyte* culpable driving Guideline Judgment in a matter of dangerous driving occasioning death (s 52A(1)(c) *Crimes Act*) (*R v Whyte* (2002) 55 NSWLR 252).

The judge did not refer at all to *Whyte* which must be taken into account (*Whyte* at [62]). Whether the judge did so is a question of substance not form, assessed by a comparison between factors in the Guideline Judgment and sentencing reasons, and whether the judge was referred to the Guideline Judgment: at [47].

The judge failed to effectively have regard to *Whyte* resulting in error as to objective seriousness. Neither counsel referred to it nor the *Whyte* factors. Had *Whyte* been taken into account, one would reasonably expect the judge to advert to presence or absence of factors in *Whyte* relevant to moral culpability and objective seriousness: at [65], [66].

Application of guideline judgment in R v Henry (1999) 46 NSWLR 346

Foaiaulima v R [2020] NSWCCA 270: (Robbery in company, s 97(1) *Crimes Act* 1900). By majority, the CCA held the sentencing judge did not err in applying the *R v Henry* armed robbery guideline judgment.

Rothman J, dissenting, said the judge erred by dealing with objective seriousness and range of sentence in two stages. First, by considering the issue by reference to the *Henry* guidelines, then separately considering aggravating and mitigating circumstances over and above those in the guideline: at [3]; [144]-[146].

However, Bathurst CJ and Johnson J said there was no misapplication; the judge treated the guideline as a guidepost in determining sentence in accordance with the instinctive synthesis approach: at [6]; [50]–[51]; *Markarian* (2005) 228 CLR 357; *Muldrock* (2011) 244 CLR 120.

The reasons for this conclusion are:

1. s 42A *CSPA* requires the guideline be taken into account: at [7]; [30]; *Moodie v R* [2020] NSWCCA 160.
2. Unlike standard non-parole periods, *Henry* refers to a range of sentences determined by particular factors. To take the guideline into account, it is necessary to consider where within the *Henry* range the particular offence stood: at [8].
3. After considering where the offence fell within the *Henry* range the judge did not conduct a separate assessment but took that into account as part of the overall instinctive synthesis process: at [9].

4. The judge specifically referred to the sentencing approach required by *Veen v The Queen (No 2)* (1988) 164 CLR 465, *Markarian* and *Muldrock*, describing *Henry* as one aspect on sentence: at [10].

Johnson J noted courts must apply guideline judgments alongside statutory and common law principles developed since the guideline was issued 21 years ago; and s 97(1) is not included in the standard non-parole period scheme: at [24]-[27].

Photographs establishing matters of fact - not "judicial notice"

Amante v R [2020] NSWCCA 34: The applicant was sentenced for damage building by fire (s 195(1)(b) *Crimes Act*). Photographs showed damage to the roof. In the absence of expert evidence on consequences of fire entering a roof void, the judge found that, "*the Court can take judicial notice that that posed a serious structural risk to the integrity of the building*." The appellant submitted the judge erred.

Dismissing the appeal, the CCA found the judge mis-described what he was doing as taking "judicial notice" of the relevant fact. This ground was actually a challenge to a factual finding of the judge: at [55], [65].

The relevant test is whether the finding was "open": at [58]; *R v O'Donoghue* (1988) 34 A Crim R 397.

Photographs can have probative value but must be subject of "careful delineation", that is, cannot be used as the sole method by which a primary fact is proved where that fact is not revealed on the face of the photograph (*Blacktown City Council v Hocking* [2008] NSWCA 144). Such facts might include distance, height or shadows. Photographs cannot be used to substitute for oral evidence from a witness or as a reason for rejecting "virtually unchallenged and consistent" evidence: at [60]; *Angel v Hawkesbury City Council* [2008] NSWCA 130 at [67]; [71]-[72].

The judge did not rely solely upon the photograph. He drew an inference that was open based on combination of the agreed fact that the fire went into the roof void *and* photographs clearly showing burned wooden beams in the roof: at [61]. It was open to make the finding: at [58], [70].

Photographs used to determine nature of wounding

Taitoko v R [2020] NSWCCA 43: The sentencing judge did not give undue weight to photographs tendered by the Crown of the victims' injuries for reckless wounding offences in determining the nature of the wounding.

The photographs were properly used to refute the applicant's submission that the injury was "in essence a split lip" and to explain the documentary evidence that there was a "Laceration/wound above right side of lip – requiring closure": at [83].

Care must be taken with photographs (especially reproductions of photographs in appeal books) which can contain obvious and *non-obvious* distortions of distance, colour and shape. Such observations do not establish some rule of law or principle of evidence. Each case will depend on the particular photograph and particular purpose for which it is sought to be deployed: at [81]; *Angel v Hawkesbury City Council* [2008] NSWCA 130 at [69]–[72]; *Blacktown City Council v Hocking* [2008] NSWCA 144 at [167]–[172]; cf *Amante v R* [2020] NSWCCA 34 at [4]-[8].

Parity – offender sentenced in District Court – co-offenders sentenced in Local Court

Greaves v R [2020] NSWCCA 140: The sentencing judge erred by finding the parity principle did not apply where the applicant was being sentenced in the District Court and two co-offenders had already been sentenced in the Local Court because they had been dealt with summarily.

Sentencing principles remain the same in the Local and District Courts. The jurisdictional limit of the Local Court was not a factor, having regard to the sentences imposed. In any event, the Magistrate was required to determine sentence having regard to the maximum penalty for each offence, not jurisdictional limit. The jurisdictional limit only becomes relevant if the assessment leads to a sentence greater than the limit: at [66].

Appeal from Drug Court – initial and final sentence – Drug Court Act 1998, s 12

Beal v R [2020] NSWCCA 357

Section 12(1) *Drug Court Act* provides that when terminating an offender's Drug Court program, the Drug Court "*must reconsider"* an offender's initial sentence.

Section 12(2) provides that in reconsidering the initial sentence, the Drug Court must take into consideration various matters including the "nature of the offender's participation" in the program.

The appellant failed to comply with conditions of her program and was sentenced to imprisonment. She appealed (s 5AF *Criminal Appeal Act* 1912) on grounds that the sentencing judge did not sentence in accordance with s 12 because the judge only considered the facts of three fresh offences and fixed the same indicative offences for the earlier offences. She submitted "*reconsider*" in ss 12(1) and (2) obliges the judge on final sentence to take into account matters in s 12(2) and engage in a "*resentencing exercise*" of the offences subject of the initial sentence.

The CCA held the judge sentenced in accordance with s 12: [1]; [2]; [81].

- The idea that the initial sentence be disregarded in the final sentencing exercise is inconsistent with the Act: at [76]. The purpose of the initial sentence, which is "*suspended*", is to set the sentence on the basis of the evidence before the Court, subject to performance in the program, so the offender understands what is at stake if they abandon the program: at [74].
- s 12 makes clear the central role of the participant's performance in the program in reconsidering and determining final sentence. The meaning of "reconsider" is to take into account s 12(2) matters: [76].
- In determining final sentence, s 12 does not exclude the Court taking into account matters other than those in s 12(2). The Act does not prevent the Court handing down a different sentence for offences subject of the initial sentence, in light of evidence or submissions by the appellant in the final sentence hearing: at [77].

Error to refer to child criminal history from Children's Court

Dungay v R [2020] NSWCCA 209**:** The sentencing judge erred by having regard to the applicant's Children's Court criminal history.

Such records can be relevant to a disadvantaged childhood or other purposes of sentencing. However the *Children (Criminal Proceedings) Act* limits the circumstances in which such matters can be used when being sentenced as an adult: at [88].

Section 14 provides if a child aged less than 16 in the Children's Court is guilty of an offence, no conviction is to be entered. If over 16, there is discretion whether to enter a conviction.

Section 15 provides that if a child is found guilty in the Children's Court but without conviction entered and is not subject to any other judicially-imposed punishment for two years then the finding of guilt is not admissible in any subsequent criminal proceedings.

The judge referred to matters on the Children's Court history as "convictions" when she observed the applicant's "record" for offences, including "a serious offence of breaking and entering" as a juvenile. The applicant was not convicted of these offences. They were not admissible in the proceedings: at [95].

s.112(2) - finding appellants in possession of toy gun on s.112(2) charge – no breach of De Simoni

Taufa v R; Siola'a v R [2020] NSWCCA 264: The appellants were convicted of s 112(2) aggravated break and enter with intent to commit larceny in company, in the alternative to s 112(3) specially aggravated break and enter, *being armed with a dangerous weapon*, of which they were found not guilty.

On sentence for the s 112(2) offence, the judge took into account the appellants had *toy guns*.

The CCA held this did not breach *De Simoni*.

The judge was not prevented from taking into account a circumstance of aggravation that, while not alleged in the indictment, would not have converted the offence into a more serious one: at [81]-[82]; *Marshall v R* [2007] NSWCCA 24.

The not guilty verdict for s 112(3) prevented a finding they had imitation guns, but not that they had guns at all. However, the only guns which did not amount to dangerous weapons (which would have led to a conviction under s 112(3)) were toy guns: at [96].

De Simoni does not require a judge to disregard evidence at a trial. It prevents the judge finding facts for a more serious offence. The judge sentenced on facts most favourable to the offenders but did not disregard the evidence. It was open to find beyond reasonable doubt they were carrying something that looked like a gun but the judge was constrained to find it was a toy gun: at [98]-[99]; *Cheung v The Queen* (2001) 209 CLR 1.

Uncharged acts of abuse and assaults preceding death properly taken into account

LN v R [2020] NSWCCA 131**:** The applicant was sentenced for the murder of her 3 year old son who had suffered physical and psychological abuse for seven weeks before his death. The CCA (Basten JA; RA Hulme J agreeing separately; Hamill J dissenting on this ground) held the sentencing judge did not err by taking account of the earlier acts of violence: at [60].

It would be an error to sentence for an uncharged offence, but it does not follow that uncharged conduct cannot be taken into account in sentencing for a more serious offence (in this case, murder): at [40]; cf *De Simoni*. Evidence of conduct which might be relevant to sentence might be irrelevant to the elements of the offence; it is provable on sentence as with any other (non-criminal) conduct. Otherwise, a prosecutor would be forced to include separate charges for each alleged assault sought to be relied upon: at [40].

Context, which may include other activities of the offender, may increase objective seriousness or moral culpability: at [54]; *R v Einfeld* (2010) 200 A Crim R 1 at [143]–[148]; *Lago v R* [2015] NSWCCA 296 at [49].

The sentence imposed was higher than it would have been. The actual violence required to cause death was lessened by the victim's weakened state due to the abuse. It defies common sense to suggest the earlier violence could not thereby be taken into account unless subject of separate charges: at [59].

The appeal was allowed on other grounds.

Domestic violence – uncharged pre-offence conduct properly taken into account - choking of victim – no breach of De Simoni

Ebsworth v R [2020] NSWCCA 229: The applicant was sentenced for domestic violence offences including aggravated break, enter commit assault occasioning actual bodily harm. The applicant submitted the judge erred by taking into account the applicant had *earlier choked* the victim which was not the conduct relied upon in support of the offence.

The CCA dismissed the appeal. The judge depicted the circumstances that led to the charged offending and took that conduct into account to determine there was one course of conduct. To omit the preceding conduct would misrepresent what occurred on the day. It was appropriate to recite events which gave rise to motivation and context for the assault charged: at [50]-[52].

The judge also did not breach *De Simoni* by sentencing for more serious offences under 29 *Crimes Act* (attempt strangle with intent murder) and s 37(2) (choke and render person unconscious with intent of enabling another indictable offence). Section 29 requires an intention to kill; not one to inflict really serious injury as in this case. As to s 37(2), there is nothing to suggest the judge considered choking was done for the purpose of committing another offence. Taking into account the choking as part of or giving effect to continued intimidation of the victim does not amount to a s 37(2) offence: at [58]-[62].

The judge described, on one hand, motivation, premeditation and planning and, on the other, the context of the offence: at [66]; ***LN v R*** [2020] NSWCCA 131.

Judge referred to incorrect offence at conclusion of remarks – no breach of De Simoni

Cao v R; McGregor-Macdonald v R [2020] NSWCCA 223: In sentencing ex-tempore for reckless wounding in company (s 35(3) *Crimes Act* 1900), the judge consistently referred to "reckless wounding" but before imposing sentence, made three references to "recklessly cause/inflict grievous bodily harm" - a more serious offence under s 35(4) with a higher maximum penalty.

The mistaken references were 'mere slips' and the judge did not breach *De Simoni* (1981) 147 CLR 383: at [28]-[30].

The Agreed Facts stated the victim suffered a "fracture of the medial wall of the orbit", had blood on his face and around his eyes. The judge was entitled to take the fracture into account as associated with the wounding and indicative of the force of punches resulting in both wounding and fracture. The judge considered the fracture to be significant but not grievous bodily harm and did not take the fracture into account an impermissible way: at [43], [46].

2. MITIGATING FACTORS

***Deprived background - Application of Bugmy* (2013) 249 CLR 571**

R v Dungay [2020] NSWCCA 209: N Adams J summarises the application of *Bugmy*.

- The effects of "profound childhood deprivation" are to be given "full weight". The application of the *Bugmy* principles "is not discretionary" (*R v Irwin* [2019] NSWCCA 133 at [3]): at [138].
- However, countervailing factors such as protection of the community may reduce their weight (*Ingrey v R* [2016] NSWCCA 31 at [35]). Although *Bugmy* factors must be given "full weight", this does not mean that they need to be given the *same* weight in every case. The extent to which the moral culpability is reduced will vary in each case and sometimes it will not be reduced at all but instead taken into account in other ways: at [139].
- If there is a basis for a finding that an offender's moral culpability is reduced then the purpose of general deterrence (s3A(b) *CSPA*) may be of less significance, although the need to protect the community may be higher (s 3A(c)). Each case will turn on its own facts: at [141].
- A causal link between background and the offending is not required. However, it seems that if such a link exists then inevitably there will be a reduction in moral culpability (***Kliendienst v R*** [2020] NSWCCA 98): at [153].
- On the other hand, absence of a link does not mean that the Court does not give full weight to a childhood of profound deprivation if that is established: at [153].

See also: ***Prince v R*** [2020] NSWCCA 268, confirming the principle that if there is a basis for finding that an offender's moral culpability was reduced, then general deterrence may be of less significance although the need to protect the community may be higher: at [36]-[40]; citing ***Dungay*** at [141].

Failure to refer to Bugmy where factual basis for raising Bugmy principles even though not raised by counsel at first instance

Kliendienst v R [2020] NSWCCA 98: Even though applicant's counsel at sentence did not expressly put any *Bugmy* submission, the CCA held the sentencing judge erred in failing to consider *Bugmy* where there was uncontested evidence of a factual basis for raising *Bugmy* principles (that the applicant had a deprived up-bringing and expert evidence concerning anger management difficulties): at [60]-[62]; *Bugmy* (2013) 249 CLR 571.

That the applicant's counsel did not expressly raise the *Bugmy* approach does not mean that there was no error in the judge's failure to consider it given the uncontested material before the Court: at [67]. The *Zreika* principles (that the appeal court will not lightly entertain arguments not put at first instance) do not mean this Court will never entertain a ground of appeal contending failure to have regard to a mitigating factor not specifically addressed at sentence: at [65]; *Griffin v R* [2018] NSWCCA 259 at [36]-[38].

Cf. ***Harkin v R*** [2020] NSWCCA 242 at [90] where again no submission was made at first instance that the judge should have regard to *Bugmy*. The CCA said that although such a ground of appeal was upheld in ***Kliendienst v R***, the facts in that matter were very different; the offending was a spontaneous act of violence. Where no submission was made that the *Bugmy* principles applied, this was not a case where failure to mention them suggests error. In any event, the judge observed he proposed to take into account the applicant's "childhood trauma for which he is in no way responsible" and had set out details of his childhood earlier in his Reasons. The judge thus approached the matter consistent with that adopted in ***Dungay v R*** at [153].

Bugmy principles - enduring negative impact of a disadvantaged background - where offender now living prosocial life

Hoskins v R [2020] NSWCCA 18: The applicant was sentenced for fail to stop and assist after a vehicle impact causing death.

The CCA held the judge erred in approach to the *Bugmy* principles put by the applicant.

The applicant submitted he left the scene based on a psychologist Report giving a background of childhood disadvantage and that "emotional distress immediately following the incident likely led to his panicked state…and poor decision-making."

However, the judge found background played no part in the offence and had no bearing upon moral culpability. The Report showed he had overcome disadvantage and the Agreed Facts stated he told police he left because he was an unlicensed driver. The judge found he did not flee the scene in a "blind panic" but on a "calculated basis" because he was unlicensed.

The judge erred in finding inconsistency between the Report and the explanation to police for why he left when they were entirely consistent – emotional distress and a panicked state resulting in impaired judgment and poor decision-making. The sentencing discretion miscarried in that the judge mistook the facts (*House v R* (1936) 55 CLR 499): at [70]-[71], [74].

It is important that *Bugmy* at [43] spoke of the *enduring negative impact* of disadvantage: at [73].

The applicant's disadvantaged background operated favourably by, first, providing explanation for his decision to flee. Second, his stable and prosocial life, despite his background, supports findings of good prospects of rehabilitation and unlikelihood of reoffending: at [78].

Relevance of drug addiction – childhood sexual abuse leading to drug use

R v Newburn [2020] NSWSC 1878 (Wilson J)

The offender was sentenced for manslaughter. Although ordinarily not available as a feature of mitigation, in the unusual circumstances of this case, substance dependence mitigated culpability to a degree. The case fell into the very small number of matters where it can operate in this way: at [62]-[64].

Unchallenged psychiatric evidence was that drugs were a means of coping with the trauma of childhood sexual abuse. A drug habit acquired in childhood as a response to sexual assault can be given weight as a mitigating feature: at [65]; *Hayek v R* [2016] NSWCCA 126 at [75]-[80].

Although there is no direct causal link, on the psychiatric evidence the drug addiction is nevertheless relevant. Increased substance abuse aged 16 onwards was likely triggered by sexual abuse and contributed to drug use and related offending. Disorders (ADHD) and drugs contributed to emotional deficits that likely made the offender more sensitive to real or perceived threats and diminished capacity to think of alternative courses of action: at [66]-[69].

Special circumstances (s 44 *CSPA*) allows for longer supervision given his former addiction as a means of anaesthetising himself from childhood trauma: at [76].

Error in applying Guideline Judgment in Henry without assessing relative youth of offender

Yildiz v R [2020] NSWCCA 69: The sentencing judge erred in finding 'youth' was already a factor in the *Henry* armed robbery Guideline Judgment and not a further mitigating factor: at [6], [48]: *Henry* (1999) 46 NSWLR 346. That *Henry* takes into account that the sentence is being imposed on a "'young offender" with no or little criminal history, does not mean 'youth' is an irrelevant factor on sentence: at [48]. Otherwise, all young persons would be treated identically, rather than an appropriate assessment being conducted, bearing in mind the degree of immaturity associated with the offending: at [70].

Good character

BG v R **[2020] NSWCCA 295:** The applicant was sentenced for child sex offences.

The sentencing judge erred in the manner in which he addressed prior good character: at [4], [13].

In determining the use to be made of character on sentence, first, it is necessary to determine whether an offender is of otherwise good character. If so, it is then necessary to determine the weight to be given to that fact. If an offender is a person of otherwise good character a sentencing judge is bound to take that into account, although weight given will vary according to all of the circumstances: at [9]; [138]; *Ryan v The Queen* (2000) 206 CLR 267 at [23].

The judge found the applicant was a person of otherwise good character but said nothing of the weight he ascribed to that finding when determining sentence, thus he overlooked the second of the determinations in *Ryan*: at [10]-[11].

The requirement to make such a determination is not satisfied simply by referring to the provisions of s 21A *CSPA*, and stating that factors have been taken into account: at [12].

Error in approach to plea of guilty - failing to consider remorse and contrition as mitigating factor - s 21A(3)(k) Crimes (Sentencing Procedure) Act 1999

Hoskins v R [2020] NSWCCA 18: Section 21A(3)(k) *CSPA* provides a 'plea of guilty' is a mitigating factor on sentence.

The judge allowed a discount for the utilitarian value of the applicant's early plea but stated he would not take the plea into account as a mitigating factor under s 21A(3)(k) because this would be double counting.

The CCA allowed the appeal. The judge erred in his approach to the guilty plea and s 21A(3)(k). A plea may provide evidence of remorse and contrition and to take account of that factor does not involve any double counting: at [8].

It is true if the judge were not asked to consider remorse, that error might be immaterial. However, it would be a startling proposition that remorse could be disregarded where the applicant surrendered promptly to police, made a full statement, entered an early plea, and tendered a psychological report stating he "expressed genuine remorse" and "fully accepted responsibility": at [9], [13].

Self-induced intoxication erroneously taken into account in mitigation – s 21A(5AA) CSPA

DPP (NSW) v Burton [2020] NSWCCA 54 (Crown Appeal)

s.21A(5AA) *CSPA* provides:

> *Special rule for self-induced intoxication* - In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

The CCA allowed the Crown appeal against sentence for sexual intercourse without consent (s 61I *Crimes Act*).

The judge properly disregarded the offender's self-induced intoxication as required by s 61HE(4)(b).

However, the judge erred in finding intoxication led to the applicant's "*clouded judgment*" thereby reducing moral culpability. The judge was entitled to have regard to the offender's state of intoxication to explain otherwise inexplicable conduct, however, there was a fine line between that and accepting the explanation as an excuse, in the sense of a mitigating factor (s 21A(5AA). This was a material error capable of affecting the determination that a non-custodial sentence be imposed: at [23]-[28].

3. AGGRAVATING FACTORS

s 21A(2)(e) Crimes (Sentencing Procedure) Act 1999 – in company

Pehar v R [2020] NSWCCA 118**:** The applicant was sentenced for nine offences including larceny, damage property and take and drive conveyance. The sentencing judge erred in finding *all* of the offences aggravated under s 21A(2)(e) 'offence committed in company'.

CCTV showed presence of the applicant with different variations of other persons and one offence was not captured by CCTV at all.

The mere fact two persons are in the company of each other at the time of offending is not, of itself, a sufficient basis upon which to conclude offending is aggravated within the meaning of s 21A(2)(e): at [47]; *R v Pham* [2018] NSWSC 822 at [17]; *Gore v R; Hunter v R* (2010) 208 A Crim R 353.

The judge did not consider the relevance of the fact that the offences (all erroneously in his view) had been committed "in company" and failed to take a principled approach to whether s 21A(2)(e) was borne out by the evidence: at [48].

On re-sentence, the CCA found the applicant acted in company in just four of the larceny offences where the other offenders were assisting or encouraging him to commit the offences – but these four offences were aggravated only to a relatively minor degree given there is no evidence he inveigled their assistance or promised a reward.

Further, the offences were committed at night with no witnesses and no confrontation with people. This ameliorates the impact of the aggravating "in company" factor and does not add significantly to his culpability for those four offences relative to other larceny offences where he acted alone: at [50]–[53].

s 21A(2)(j) – breach of conditional liberty

Field v R [2020] NSWCCA 105: The applicant was sentenced for cause GBH with intent (s 33 *Crimes Act*), committed in excessive self-defence. At the time, the applicant was subject to two s 9 bonds. The applicant submitted the judge erred by finding that a breach of conditional liberty (s 21A(2)(j)) was an aggravating factor where the offence was committed in circumstances of excessive self-defence.

The CCA dismissed this ground.

The fact that the applicant was subject to conditional liberty at the time of the offences operates as an aggravating factor by virtue of its existence at the operative time and not because of its capacity to rationally affect the criminality of the offence: at [86].

It was not clear the judge was referring to s 21A(2)(j) when referring to the breach of the s 9 bonds. Breach of the s 9 bonds is an aggravating factor under the general law and does not require application of s 21A(2)(j).

An offence committed while on conditional liberty does not go to objective seriousness. It is a matter in the offender's subjective case. It does not elevate criminality of the offence. Rather, it has an aggravating effect by affecting considerations of punishment, deterrence and protection of the community: at [84]-[85]; *R v FD; R v JD* [2006] NSWCCA 31; 160 A Crim R 392 at [152]; *R v Richards* (1981) 2 NSWLR 464 at 465.

s 21A(2)(k) – abuse of position of trust

DPP (NSW) v Burton [2020] NSWCCA 54 (Crown Appeal)

s 21A(2)(k) states it is an aggravating factor where "*the offender abused a position of trust or authority in relation to the victim."*

The respondent was sentenced for sexual intercourse without consent upon his niece.

There was no evidence as to the extent of their relationship. The applicant had resided in Western Australia for 20 years and the victim in Sydney: at [31]-[32].

The CCA rejected the Crown's submission that the judge erred in finding the offence was not aggravated by s 21A(2)(k) offender abusing "*a position of trust … in relation to the victim*". The term is used by way of alternative to a position of "authority". It refers to an established relationship, not simply where the victim asserts trust in the offender, or a social arrangement involving a close knit group: at [30]; *Suleman v R* [2009] NSWCCA 70 at [22]; *MAH v R; R v MAH* [2006] NSWCCA 226 at [69]. The Crown appeal was dismissed.

s 21A(2)(o) – financial gain – drug "rip off"

Khoury v R [2020] NSWCCA 190: The applicant agreed to supply to an undercover police officer 2kg of cocaine for $400,000 but the supplied substance did not contain any prohibited drug and was thereby a "drug rip-off". The applicant was arrested and received no payment.

The CCA held the judge did not err in finding that there was "potentially a very significant financial gain" constituting an aggravating factor under s 21A(2)(o), despite there being no drugs to supply: at [31]; [71].

The applicant submitted that, as this was a fraudulent transaction, there was a form of double counting in that s 21A(2)(o) was misapplied by reference to the financial gain which the applicant was to make from what was a fraudulent transaction: at [61].

The CCA said there has been no double counting (*Hejazi v R* (2009) 217 A Crim R 151 at [10]). The factors informing the aggravating factor of financial gain were that there was no other party (no upstream supplier) who would share in the profit and no cost or overheads as the substance was not cocaine. If the purchaser had paid, the applicant stood to gain the full financial sum. The nature and extent of financial gain in this case was unusual (*Lee v R* [2019] NSWCCA 15 at [54]). These were appropriate matters taken into account as an aggravating factor: at [72].

s 21A(2)(n) - planning and organisation – tension between Legge v R [2007] NSWCCA 244 and DPP v Cornwall [2007] NSWCCA 359 discussed

***Pham v R* [2020] NSWCCA 269:** The applicant was sentenced for cultivate large commercial quantity of cannabis plants (s 23(2)(a) *DMTA* 1985).

The CCA held the sentencing judge did not err in finding the offence aggravated "by reason of the level of planning and preparation involved in arranging the leases for 13 separate properties" under s 21A(2)(n). The sheer scale of the cultivation allowed the judge to find the offence was more serious than ordinarily encountered and it was open to find aggravation under s 21A(2)(n) even if evidence of the applicant's actual contribution to the planning and organisation was limited: at [50].

Legge v R [2007] NSWCCA 244 and *DPP v Cornwall* [2007] NSWCCA 359

The applicant submitted the correct approach to s 21A(2)(n) was that in *Legge,* not *Cornwall*.

The CCA in *Legge* said s 21A(2)(n) was not "intended to aggravate an offence where the offender being sentenced was not involved in, or part of, the planning and organisation" of the offence (at [34]).

But in *Cornwall* said s 21A(2)(n) "fixes upon the characteristics of the offence, not the degree to which an individual contributes to the planning" (at [54]): at [30]-[31].

The CCA said it is unnecessary to resolve this apparent tension: at [1]; [46]. *Legge* and *Cornwall* do not so much reveal a difference of opinion on the construction of s 21A(2)(n) but a difference in the way the section might be applied in different factual contexts. The extent to which s 21A(2)(n) applies depends on the offence, the particular offending within a broad category of offending, the involvement of an offender including cases of threats of violence or non-exculpatory duress, and role and knowledge of the criminal enterprise: at [47].

4. DISCOUNTS

Assistance to authorities by Commonwealth offender – discount where no evidence assistance of use to police – s 16A(2)(h) Crimes Act (Cth) 1914

Weber v R [2020] NSWCCA 103**:** On re-sentence, the CCA allowed a discount for the applicant's assistance to authorities pursuant to s 16A(2)(h) where there was no evidence that the assistance had in fact been of use to police. The applicant had spontaneously named persons involved in the offence to police without even knowing a discount would be available: at [65]-[66].

The CCA said s 16A(2)(h) simply mandates that the court take into account "*the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or other offences*".

Cf. s 23 *Crimes (Sentencing Procedure) Act* 1999 which mandates that when reducing penalties for assistance by a State offender, the court "*must have regard to the significance and usefulness"* of the assistance: at [66].

A federal offender who has co-operated with authorities is entitled by s 16A(2)(h) to have that factor taken into account. Absence of evidence establishing the usefulness of the co-operation does not mean there should be no discount at all, although it may be less than otherwise: at [67].

EAGP (Early Appropriate Guilty Pleas) - s 25D(4)(a) CSPA – facts and evidence of accessory after fact to murder charge "substantially the same" as original murder charge

R v Doudar [2020] NSWSC 1262 (R A Hulme J)

The accused was committed for trial on murder. He pleaded not guilty at arraignment and a trial was fixed for 27 July 2020. On 8 July 2020, he offered to plead guilty to accessory after the fact which was accepted by the Crown. The plea was entered on 27 July 2020.

The EAGP provisions in ss 25A-F *CSPA* applied. An exception to the mandatory discounts in s 25D is a "*new count offence*" - an offence different to that for which one was committed for trial.

The Court held the correct discount was 10%, not 25% as submitted by the accused.

Sections 25D(3) and (4) provide:

> (3) **Discount variations—new count offences** The discount for a guilty plea by an offender in respect of a new count offence is as follows—
>
> (a) a reduction of 25% … if an offer to plead guilty was 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) a reduction of 10% .. if paragraph (a) does not apply and the offender—
>
> (i) pleaded guilty at least 14 days before the first day of the trial …, or
>
> (ii) complied with the pre-trial notice requirements and pleaded guilty to the offence at the first available opportunity able to be obtained by the offender,
>
> (c) a reduction of 5% in any sentence that would otherwise have been imposed, if paragraph (a) 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 on the offender 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 set out in the original indictment, or

(b) the offender refused an offer to plead guilty to the new count offence that was made by the prosecutor in the committal proceedings relating to the original indictment and the offer was recorded in a negotiations document.

The Court said that:

s 25D(3)(a) preserves the full discount where an offender pleads guilty to a new offence.

s 25D(4)(a) qualifies that preservation where a new offence is founded on unchanged facts (and has the same or lesser maximum penalty than the original offence): at [57].

The brief at committal proceedings could have raised the possibility of a plea offer to accessory after the fact, by either party. The legislative intention of the EAGP scheme is to foreclose on large discounts where there was earlier opportunity for pleas to be offered and negotiated: at [63]; Second Reading Speech; NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas,* Report No 141, December 2014.

"Substantially the same" in s 25D(4)(a) is given its natural and ordinary meaning. "Substantially" invites qualitative and quantitative analysis. The essence of the accused's act founding the new offence is the same as in the old offence – he assisted N to evade detection following H's murder. The quantity of evidence founding the offence is substantially similar because the majority of the original brief went to the commission of the principal offence (by the principal offender) which was a necessary implicit part of the new offence: at [64]-[65].

A narrowing of the offender's role does not mean the facts and evidence of the offending are substantially different. The new offence occurred within substantially the same factual and evidentiary matrix as the original offence: at [67].

EAGP – charge certificate certifying murder and, in the alternative, manslaughter

R v Black (No 2) [2021] NSWSC 77: A charge certificate in respect of the offender was filed in the Local Court certifying a charge of murder and, in the alternative, manslaughter. The offender's offer to plead guilty to manslaughter was not accepted by the Crown. Later at trial / re-arraignment, the offender's plea of not guilty to murder but guilty to manslaughter accepted by the Crown.

The Court held that the only available discount is 10 per cent (s 25D(2)(b) *CSPA*). The charge of manslaughter was not a "different offence" (s 25E(2)(b)). The Court was determining the sentence for the offence of manslaughter and not for any other offence under s 25E(2)(a). The Court held that where there were two charges and offender being sentenced for one of those charges, it cannot be said that the charge of manslaughter was not the subject of the proceedings at the time the offer was made: at [143]-[147].

EAGP - Reduction for plea of guilty not explicitly mentioned in reasons

Tran v R [2020] NSWCCA 39: The EAGP provisions applied. Although the judge made no mention of the quantified discount under s 25D, it could be inferred that a discount had in fact been taken it into account and applied such that failure to so state may be treated as an immaterial error: at [22]-[23]; *Lee v R* [2016] NSWCCA 146 at [37]; *Zhang v R* [2018] NSWCCA 82 at [51].

Under EAGP provisions, a court is required to indicate and record the discount applied and how the sentence is calculated, and to give reasons if the court determines to reduce, or not apply, the discount: s 25F(7). Failure to comply with this, and other requirements, does not invalidate any sentence: s 25F(8). This does not mean that the issue cannot be subject of a ground of appeal: at [21]; s 101A CSPA; *Forti v R* [2016] NSWCCA 127 at [48]-[49].

Here, it could be inferred the judge sentenced on the basis that the applicant was entitled to a 25% discount. The judge was aware the applicant entered a plea in the Local Court; it is elementary this attracts a 25% reduction and is explicit in the legislation; the Crown conceded the applicant was entitled to the "full discount" well understood to be 25%; and the judge looked to a sentencing range involving guilty pleas: at [24]-[31].

Guilty plea discount applied to starting point exceeding jurisdictional maximum penalty – "sentence that would otherwise have been imposed" – s 22(1) CSPA

Park v R [2020] NSWCCA 90

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 was sentenced for drive vehicle without consent (s 154A *Crimes Act*) on a s 166 certificate. Section 154A has a maximum penalty of 5 years but summarily has a maximum penalty (or "jurisdictional limit") of 2 years which applied in this case (Table 2, s 268A *Criminal Procedure Act*).

The CCA (R A Hulme J; Bathurst CJ agreeing; Fullerton J dissenting) held there was no error in applying a discount of 25% to an indicative sentence of 2 years imprisonment which implied a pre-discount sentence of 2 years 8 months, that is, a starting point that exceeded the jurisdictional maximum penalty: at [3].

Referring to s 22(1), "*otherwise would have been imposed*" is a reference to the sentence a court considers appropriate having regard to the maximum penalty and all of the facts and circumstances, which may then be discounted. Once that assessment is made and discount applied, where any jurisdictional limit applies then a sentence will need to be reduced to the limit if it would otherwise be exceeded: at [30]-[32]; [174]-[175]; authorities discussed at [76]ff.

Dissenting, Fullerton J said that s 22(1) obliges a court to apply the discount to a sentence that the court would *in fact have* imposed *but for* an offender's plea of guilty and the Court is to have regard to any jurisdictional limit when applying the discount: at [142]-[144].

Early offer of plea of guilty to excessive self-defence manslaughter rejected by prosecution

(EAGP provisions did not apply).

Magro v R [2020] NSWCCA 25***:*** The judge erred in allowing only a "modest" discount of 10% for an offered plea of guilty prior to committal to excessive self-defence manslaughter. The offer had been rejected by the prosecution. At trial, the applicant was found not guilty of murder but guilty of manslaughter.

The CCA allowed the appeal and allowed a discount of 20%: at [64], [72].

The judge erred by finding that the offered plea "did not disclose the circumstances and degree of culpability intended to be acknowledged by the applicant" – adopting *Merrick v R* [2017] NSWCCA 264. However, in *Merrick* the offer to plead guilty to manslaughter was conditional upon being "subject to agreed facts" and the basis of the plea was unclear. Here, the applicant's offer indicated the particulars of criminal responsibility, namely, manslaughter by reason of excessive self-defence. A plea would have constituted admission of essential elements of that offence (*R v O'Neill* [1979] 2 NSWLR 582 at 588, 596; *O'Neil-Shaw v R* [2010] NSWCCA 42 at [43]): at [58]-[60].

The judge did not err in proceeding on the basis that the applicant was not entitled to the same discount as a person who makes an offer and does not require, and loses, a contested hearing: at [62]-[63]; *R v AB* at [32].

However, the judge's assessment that there was "no great utilitarian value" from the offered plea failed to take into account that, notwithstanding the likelihood that the applicant would not have acknowledged the facts of the shooting as established at trial, there was no contest at trial that the applicant's actions amounted to excessive self-defence: at [64].

Treatment of plea of guilty for Commonwealth offences - Crimes Act 1914 (Cth), ss 16A(2)(f), (g)

Note*:* On 20 July 2020 s 16A(2)(g) Crimes Act 1914 was amended so that when considering the fact a person pleaded guilty, regard must also be had to timing of the plea; and the degree to which that fact and timing resulted in any benefit to the community, victim or witness.[1]

A number of cases considered the discount for the utilitarian value of a guilty plea in Commonwealth matters.

The principles in *R v Borkowski* (2009) 195 A Crim R 1; [2009] NSWCCA 102 regarding the utilitarian value of a guilty plea for State offences are now applied to Commonwealth offences: ***Abreu v R*** [2020] NSWCCA 286 at [42] per Campbell J (McCallum JA and N Adams J agreeing) citing ***Bae v R*** [2020] NSWCCA 35 at

[1] Inserted by *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act* 2020 (Cth), Sch.8, 1.

[52] (Johnson J; Bell P and Walton J agreeing); ***Kaurasi v R*** [2020] NSWCCA 253 at [40] (Wilson J; Fullerton and Ierace JJ agreeing on this point).

Timing of the guilty plea for both Commonwealth and State offences is largely determinative of its objective or utilitarian value and attracts an arithmetical discount. While in assessing the utilitarian value for a Commonwealth offence under s 16A(2)(g) *Crimes Act 1914* there is a need to guard against the application of the fixed or normative discount that applies to State offences, it is generally accepted that an early guilty plea for a Commonwealth offence will attract a discount of 25%: ***Kaurasi*** at [2], [55], [63]-[64]; ***Betka & Ors v R*** [2020] NSWCCA 191.

The objective value of the utilitarian benefit of a plea of guilty (s 16A(2)(g)) can become confused with the subjective value of an offender's willingness to facilitate the course of justice (s 16A(2)(f)): ***Kaurasi v R*** per Wilson J at [39] citing ***Bae v R*** at [54]-[58] where Johnson J explained:

- Identification of the utilitarian value involves an objective assessment for the purposes of s.16A(2)(g) and is preferably quantified (*Xiao v R* at [280]; *Huang v R* at [9], [49], [55]).
- If an offender has demonstrated contrition involving facilitation of the course of justice, this unquantified factor may be taken into account under s.16A(2)(f). This is a subjective factor involving enquiry as to attitude of the offender and assessment of contrition, with the court guarding against double counting.
- Reference to objective and subjective factors is useful for distinguishing between these considerations (*Diaz v R* [2019] NSWCCA 216). However, whilst contrition and remorse are taken into account separately under s 16A(2)(f) in addition to the guilty plea under s 16A(2)(g), those factors often overlap.

Thus subjective factors of contrition and remorse in s 16A(2)(f) do not attract an arithmetical discount but are factors which favour an offender in the process of arriving at a sentence. They may be the most material factor influencing the ultimate sentence but it is important that such weight, or lack of it, that they might attract do not increase or diminish the utilitarian value by some arithmetical measure: ***Kaurasi*** at [5], [63]-[64]; ***Betka & Ors.***

In ***Betka & Ors*** [2020] NSWCCA 191, the judge noted pleas were entered in the Local Court and were of utilitarian value. However, the judge then stated, "*each plea primarily presents as being entered in the face of a strong case and in recognition of the inevitable rather than a pure desire to facilitate the course of justice. However, each has resultantly facilitated the course of justice*". The judge applied a discount of 20%. The CCA allowed the appeal and imposed a discount of 25%. It was the objective or utilitarian value of the pleas of guilty that the judge was assessing. In giving a discount of 20%, the judge erred by taking into account factors material solely to an assessment of the subjective value of the pleas: at [56].

See also ***Kaurasi*** at [42]-[46].

Absence of words "utilitarian value" - whether conclusive that value not taken into account

Weber v R [2020] NSWCCA 103: Simpson J (Rothman J agreeing) said that the fact the judge did not use the words "utilitarian value" is not conclusive that he did not take that value into account. The judge stated that the applicant was entitled to a discount for pleading "*at the earliest opportunity"* – i.e. the utilitarian value. In *Xiao* and *Huang* there were express statements that utilitarian value had been disregarded (the correct approach at that time), unlike here. However, the Crown concedes error and the court does not have the benefit of argument: [16]-[24]; [30]-[34].

5. SENTENCING OPTIONS

Community Corrections Order (CCO) imposed without assessment report

RC v R; R v RC [2020] NSWCCA 76**:** The Crown appealed against the respondent's sentence of an 18 month CCO for sexual intercourse with a child under 10 (s 66A *Crimes Act*).

Without first receiving a sentence assessment report, the judge ordered the CCO stating it would have a work service condition. However, at later proceedings the judge received a report stating that no agency was available to offer work to a convicted child sex offender. This procedural irregularity resulted in a lower sentence than the judge intended. The sentencing exercise miscarried: at [226]-[228].

An assessment report is mandatory prior to the imposition of some community-based orders to properly inform the judge's consideration of "appropriate sentence options": at [223], [226]; s 17C *CSPA.*

The sentence was manifestly inadequate, however, the CCA exercised its residual discretion to not intervene: at [256].

Intensive Corrections Order (ICO) – anomalies concerning s 68 CSPA

Abel v R [2020] NSWCCA 82

Section 68 *CSPA* provides:

- If the head sentence for an offence exceeds 2 years then an ICO cannot be imposed: s 68(1).
- An ICO may be made in respect of an aggregate sentence not exceeding 3 years: s 68(2).
- Two ICO's may be made for 2 offences but not where any individual term exceeds 2 years and the term for all offences exceeds 3 years: s 68(3)(a)-(b).

The judge indicated in remarks he would impose a sentence of 2 years 5 months for a drug offence on indictment and a proceeds of crime offence on a Form 1. This meant the sentence could not be served by ICO.

The applicant sought to withdraw the Form 1 offence and the matter was adjourned to assess suitability for an ICO. At later proceedings, the Crown presented a fresh indictment containing both offences. The applicant was re-arraigned and pleaded guilty to both offences. The judge imposed the aforementioned sentence. The applicant appealed on various grounds.

The CCA refused leave to appeal. The CCA noted it was doubtful the Form 1 offence could be withdrawn: at [82]. It will very rarely be the case that a judge, at conclusion of remarks, should accede to an application to adjourn and "start again": at [81].

Section 68 anomalies. s 68 was leading to anomalous outcomes which Parliament should reconsider.

- Some offenders will believe it is not in their interests to have an offence on a Form 1, contrary to the philosophy of Pt 3, Div 3 *CSPA*: at [84].
- If a sentence between 2 and 3 years is imposed, an ICO may be made if it is an aggregate sentence. An ICO cannot be made if there is a total effective sentence in that range but one of the individual sentences exceeds 2 years (*R v Pullen* [2018] NSWCCA 264 at [83]). See *Cross v R* [2019] NSWCCA 280 where concurrent sentences of 2 years 6 months were not eligible for an ICO, but if the primary judge had imposed an aggregate sentence, an ICO would have been an option: at [4]-[5].

Indicative sentences in appeal against aggregate sentence – "notional accumulation"

Vaughan v R [2020] NSWCCA 3**:** The applicant submitted the judge erred in the 'notional accumulation' of indicative sentences when imposing an aggregate sentence because regardless of how the indicative sentences might be accumulated, it was not possible to arrive at a sentence consistent with the aggregate sentence imposed: at [67].

Dismissing the appeal, the CCA stated that the only operative sentence is the aggregate sentence. A Court indicates sentences for the purpose of understanding the components of the aggregate sentence. However, a Court does not pass indicative sentences. The periods indicated have no practical operation: at [90].

Accumulation and concurrency principles (*Pearce v R)* have no application to an aggregate sentence. The principle of totality does: at [91]; *ZA v R* (2017) 267 A Crim R 105. The judge complied with ss 53, 53A *CSPA* and the totality principle: at [102]-[103].

RA Hulme J noted that, commonly, there are references to "notional accumulation" in aggregate sentences - but if such a reference is apt at all, sight should not be lost of the fact that it is truly something that is "notional": at [117].

Vaughan is cited in ***Decision Restricted*** **[2020] NSWCCA 108**. The applicant appealed his aggregate sentence for murder and other serious offences. The CCA said the applicant's emphasis on the indicative sentence for murder was misconceived. The extent of concurrency of the indicative sentences which produced the aggregate sentence is simply not known. Rather, it is necessary to consider the criminality in all of the offences to assess whether the aggregate sentence is manifestly excessive: at [163]. Even if the indicative sentence for the murder is manifestly excessive, given the remaining very serious offences and substantial sentences indicated, the aggregate sentence is not manifestly excessive: at [175].

6. COMPARATIVE CASES & STATISTICS

Relying on cases or statistics to contend sentence manifestly excessive

Moodie v R [2020] NSWCCA 160: Bell P (Davies and N Adams JJ agreeing) reviewed the authorities regarding the principled approach to a consideration of comparative cases where a submission is made that a sentence is manifestly excessive.

Bell P disagreed with the view that "no two crimes and no two offenders are alike" (cf. ***FL v R*** [2020] NSWCCA 114 at [79]). Decisions which do take into account comparative sentences proceed on the basis that cases do share common, or at least similar, features: at [85].

However, analysis is not aided by an uncritical assembly of cases where little attention is paid to the degree of similarity between the cases and the facts of the case: at [85]-[89]; *Wong* (2001) 207 CLR 584; *Hili v R* (2010) 242 CLR 520.

In this case (dangerous driving occasioning death, s 52A(1)(c) *Crimes Act)* counsel provided detailed submissions on comparable cases (see Appendix to the Court's reasons) showing strong similarities to inform the conclusion of manifest excess: at [95].

In ***Smith v R*** [2020] NSWCCA 181 the CCA allowed the applicant's appeal for manslaughter (s 24) by motor vehicle. Comparative cases were found to be nearly comparable and showed the sentence to be inconsistent with past and current practice. In those few cases where an equal or greater sentence was imposed (or would, but for reduction, have been imposed), the offending was of considerably greater magnitude, invariably involving more deaths and/or injuries: at [77]-[78].

In ***Norouzi v R*** [2020] NSWCCA 237 (aggravated driving occasioning death) the Crown submissions tended to deprecate statistics and prior cases as providing any assistance to the Court. The CCA (Walton J; Payne JA and Fullerton J) agreed with Bell P's observations in ***Moodie***: at [90]. The CCA also cited ***Smith v R*** [2020] NSWCCA 181 per Bellew J at [90]: that accepting that it is only by examination of the whole of the circumstances that have given rise to the sentence that unifying principles may be discerned, such cases stand as a yardstick against which to examine a sentence: at [3], [90]; *Hili*; DPP*(Cth) v De La Rosa* (2010) 79 NSWLR 1. In this case, the statistics and comparative cases did not demonstrate manifest excess.

Sabbah v R (Cth) [2020] NSWCCA 89: The CCA dismissed the applicant's appeal brought on the sole ground of manifest excess for possess counterfeit money (s 9(1)(a) *Crimes (Currency) Act 1981* (Cth)). None of the cases provided a useful comparison to the applicant's circumstances, nor establish a "correct" range, outside which the sentence may fall, pointing to error: at [139], [150].

Error in relying on dissimilar cases to determine a sentencing range

Kannis v R [2020] NSWCCA 79: The judge erred by treating cases which were materially and significantly different from the applicant's case as providing a "*sentencing range*": at [271], [286]-[287].

The applicant was 18 and "mentally disturbed" when he committed a number of cybersex offences involving 14 year old girls. None of the cases relied upon (submitted by the Crown) involved sentencing a complex, immature 18-year old offender with a mental condition which served to reduce moral culpability and ameliorate specific and general deterrence: at [269], [271], [278].

Care should be taken to indicate to a court the basis upon which other sentencing decisions are to be relied upon for a particular offender: at [272]; *R v Dinh* (2010) 199 A Crim R 573; [2010] NSWCCA 74 at [60].

7. APPEALS

CCA should identify particular indicative sentence warranted for each offence when re-sentencing in respect of an aggregate sentence

Maxwell v R [2020] NSWCCA 94**:** The CCA held that where an aggregate sentence had been imposed and due to error the Court must re-exercise the sentencing discretion in accordance with *Kentwell v R* (2014) 252 CLR 601, the Court should announce the indicative sentences warranted for each offence.

In accordance with *RO v R* [2019] NSWCCA 183 at [89], the Court:

(a) should put aside the sentence imposed at first instance;

(b) should identify the particular indicative sentences which are warranted for each of the offences;

(c) should form a conclusion about whether the aggregate sentence that is warranted in law is more (or less) severe than the aggregate sentence subject of the appeal;

(d) need not announce the aggregate sentence if the aggregate sentence which is warranted in law is more severe — the Court can state that a less severe aggregate sentence is not warranted in law and then proceed to dismiss the appeal

(e) should, only if the Court determines that a less severe aggregate sentence is warranted in law, proceed to state the new aggregate sentence and then resentence accordingly.

The Court should state the indicative sentences to be nominated for all offences as part of the process of determining whether a lesser aggregate sentence is warranted in law for the purpose of s.6(3) *Criminal Appeal Act* 1912. This is particularly appropriate in the present case as the Crown contends that higher indicative sentences should be nominated than those stated below: at [107].

The CCA concluded that no lesser aggregate sentence was warranted. The CCA allowed the appeal, pronounced indicative sentences and dismissed the appeal.

Applied in ***Qaumi & Ors v R*** [2020] NSWCCA 163 at [443].

Crown appeal – CCA cannot increase sentence where not manifestly inadequate, even where error established

Manojlovic v R [2020] NSWCCA 315: The CCA said that the decision in *DPP v Burton* [2020] NSWCCA 54 at [33] is not authority for the proposition that where error is found on a Crown appeal, this Court would interfere to increase a sentence even if it was *not* manifestly inadequate: at [225]; [243]-[246]; cf *R v Ralston* [2020] ACTCA 47.

Crown motion to reopen sentence appeal dismissed

Barrett v R [2020] NSWCCA 11**:** The offender appealed his murder sentence. The Crown filed a Notice of Motion to reopen the appeal and allow fresh evidence that the applicant repeatedly violently sexually assaulted the victim whilst she was restrained and derived pleasure from her pain and suffering to demonstrate, alongside existing established facts and circumstances, that the sentence was not manifestly excessive: at [168].

The CCA dismissed the offender's appeal and rejected the Crown's motion. Assuming such a power to receive and act adversely to an applicant exists, without so deciding, the exercise of such a power involves a discretion having regard to all facts and circumstances of the case: at [177]. The CCA declined to exercise its discretion in favour of the Crown for circumstances including: the applicant did not challenge any factual findings, the Crown did not suggest error by the sentencing Judge including any finding of fact, and the sentencing proceedings were conducted on the basis of an agreed statement of facts. Further, the Court is not well placed to make findings on disputed questions of fact: at [163]-[183].

Refusal to grant leave to vary or set aside Court order – r 50C Criminal Appeal Rules

Simmons v R (No 2) [2020] NSWCCA 29: The CCA refused the applicant leave pursuant to r 50C *Criminal Appeal Rules* to vary or set aside the Court's order dismissing his earlier sentence appeal (*Simmons* [2020] NSWCCA 16). The applicant sought leave on the basis that the Court had not addressed ground 3 separately and there was an error on the Form 1 adopted by the Court.

Failure of the court to address a ground of appeal may constitute a basis for leave to be granted under r 50C (*Baghdadi v R (No 2)* [2012] NSWCCA 77). However r 50C does not permit a party to re-agitate an unsuccessful appeal or seek to argue it differently in the hope of obtaining a different result: at [6]; *Miller v R (No 2)* (2016) 260 A Crim R 554 at [48]-[53].

Leave was not warranted in this case. In the earlier appeal, ground 3 was expressed as a separate ground in the notice of appeal and written submissions. However, in oral argument, counsel for the applicant conceded ground 3 was corollary to grounds 1 and 2. The applicant is bound by his counsel's conduct: at [9],[13]-[14]. The error in the Form 1 did not affect the earlier court decision in a material way: at [19].

Variation of commencement of sentence where earlier unrelated sentence quashed – delay – application refused - Crimes (Sentencing Procedure) Act 1999, s 59

Sahartor v R [2020] NSWCCA 36: Section 59 *CSPA* provides that a Court may vary commencement of a sentence on quashing or varying of another unrelated sentence.

The applicant's sentence was partly accumulated on an unrelated existing sentence. The applicant made a s 59 application 12 months after the unrelated existing sentence was quashed in other appeal proceedings.

The CCA refused the application. Delay is not determinative but is relevant to discretion under s 59: at [22], [24]. The applicant had committed more offences since released from custody, been sentenced to further imprisonment and had parole revoked. Significant problems arise where events have intervened and circumstances have changed during the delay period: at [24]-[28], [35].

Had the s 59 application been made at or about the time the earlier sentence was quashed, adjustment to the commencement date would have been made: at [13]; (*Sahartor v R* [2018] NSWCCA 236 at [2]).

Practitioners are reminded a s 59 application should be brought expeditiously. Normally the prosecutor should raise the issue with the bench quashing or varying sentence: at [35]; *R v Pham* [2004] NSWCCA 263.

"Lesser sentence is warranted in law" not be determined in summary manner

Abreu v R [2020] NSWCCA 286: The applicant sought extension of time for leave to appeal sentence on the basis of *Xiao* error ((2018) 96 NSWLR 1 – fail to consider utilitarian value of guilty plea). The Crown conceded error but, as the applicant argued that no lesser sentence is warranted in law, the Crown submitted the Court should consider refusing the required extension of time as serving no useful purpose: at [9].

The CCA granted the applicant's application for extension of time and leave to appeal. In the case of error, whether a "lesser sentence is warranted in law" (s 6(3) *Criminal Appeal Act*) can only be answered by re-exercising the sentencing discretion afresh. It is not appropriate to do so in a merely summary manner in the context of the determination of an application for an extension of time. This is not a case of a sentence being so demonstrably lenient that there is no prospect of a lesser sentence being imposed: at [1]; [10]; *Kentwell v The Queen* (2014) 252 CLR 601.

The duty to exercise the sentencing discretion afresh is not discharged "merely by adopting the sentence imposed at first instance and concluding that 'no lesser sentence is warranted in law': at [1]; *Turnbull v R* [2019] NSWCCA 97 at [44] approved in *RO v R* [2019] NSWCCA 183 at [79]-[82].

Effect of grounds of appeal that factors not given adequate weight - convert appeal to one raising manifest excess and to require establishment of House v R error

Harkin v R [2020] NSWCCA 242: There was a threshold difficulty where the grounds of appeal all referred in varying degrees to "not adequately taking a matter into account", "not giving adequate weight to a factor" and "failing to further apply the principle of totality in favour of the applicant". Implicit in all grounds is acceptance that the relevant principle was applied by the sentencing judge but insufficient weight was given. The effect of pleading grounds of appeal this way was to convert the appeal to one raising manifest excess and to require establishment of *House v R* (1936) 55 CLR 499 error before the particular ground(s) could be made out. It follows that the principles applicable to a claim for manifest excess apply to these grounds of appeal. Those principles were recently summarised in *JJ v R* [2020] NSWCCA 165 at [14]: at [44]-[46].

8. PARTICULAR OFFENCES

Ongoing supply DMTA s 25A - not directed to business - paltry profit - ICO manifestly excessive

Kennedy v R [2020] NSWCCA 49**:** The CCA allowed the applicant's appeal against an Intensive Corrections Order for ongoing drug supply (s 25A *DMTA*). The CCA recorded a conviction under s 10A *CSPA*.

The applicant (a 20 year old university student and part-time childcare worker) supplied small quantities of MDMA on three occasions to undercover police. Her "financial or material reward" was a paltry profit, she had not supplied to anyone else nor engaged in a practice or business of supplying. There was no repetition, system or organisation: at [6]-[7].

Section 25A is directed to those in "a practice or business of supplying" (*Smiroldo* (2000) 112 A Crim R 47 at [15]). It is directed to repetition, system and organisation. Objective criminality is determined by reference

to those features, not merely number and quantities of individual supplies: at [3]; *Hoon; Pouoa* [2000] NSWCCA 137 at [39].

The ICO was manifestly excessive given the offence was at the lower end of objective seriousness and the applicant's strong subjective case: at [6]-[7].

Supply large commercial quantity of gamma-butyrolactone (GBL) - no error in failing to apply Victorian authority describing GBL as "low reward drug"

Petkos v R [2020] NSWCCA 55**:** The applicant pleaded guilty to supply large commercial quantity (5.624kg) gamma-butyrolactone ("GBL") and attempt supply 584.3g GBL, carrying penalties of life imprisonment and 15 year SNPP, and 15 years imprisonment, respectively. The judge imposed an aggregate sentence of 8 years, NPP 5 years.

The applicant's profit was less than $8000. The applicant submitted error in assessment of objective seriousness by the judge failing to take into account "the enormous reward differential" of GBL as a "low-reward drug" and culpability is materially reduced where likely financial reward is relatively small, as held in *DPP (Cth) v Maxwell* [2013] VSCA 50 at [36].

The CCA dismissed the appeal. *Maxwell* involved a Cth *Criminal Code* offence but was decided under different State legislation and not strictly binding. It was not incumbent on the judge to make specific reference to it in an extemporaneous judgment: at [25].

A difficulty in application of any "principle" of the relative harmfulness of drugs is "the difficulty of establishing a suitable factual foundation for such an approach" (*Adams v The Queen* (2008) 234 CLR 143). Further, of the vast number of substances in Schedule 1 *DMTA,* many Judges will not know in the absence of evidence which are "high" or "low reward" drugs: at [26].

The judge did not err in assessment of objective seriousness, taking into account the financial reward "the offender hoped to receive" and "modest" profit and connecting the findings to assessment of the objective gravity: at [27]-[32]; *Wong v The Queen* (2001) 207 CLR 584; *Maxwell* at [21].

Sexual assault - consent - finding beyond reasonable doubt applicant reckless as to consent - not inconsistent to also find reasonably possible applicant believed victim was consenting – s.61HA(3) Crimes Act

Saffin v R [2020] NSWCCA 246: The applicant was convicted of sexual offences including aggravated sexual intercourse without consent (s 61J). The jury rejected the applicant's defence that the acts were consensual.

s 61HA(3) (now s 61HE(3)) stated that a person who has sexual intercourse with another person without their consent knows the other person does not consent to the sexual intercourse if they:

> *(a) know the other person does not consent, or*
>
> *(b) are reckless as to consent, or*
>
> *(c) have no reasonable grounds for believing the other person consents.*

The applicant submitted the sentencing judge accepted the possibility but not the probability that the applicant honestly but unreasonably believed there was consent. Inconsistently, the judge accepted beyond reasonable doubt that the applicant was reckless, in that he at least appreciated the real possibility of lack of consent and persisted anyway. These two conclusions cannot sit together: at [42].

The CCA held the judge did not err in sentencing on the basis of recklessness as to consent.

Sentencing was run on the basis that the verdicts were supportable on any of the three states of mind in s 61HA; it was a matter for the trial judge to determine on which basis the applicant should be sentenced: at [40].

The fact that, between two possible explanations, the judge is not satisfied beyond reasonable doubt of the explanation by the prosecutor, it does not follow s/he must sentence on the basis of the alternative explanation: at [48]; *Filippou v The Queen* (2015) 256 CLR 47 at [65].

There is no inconsistency. Acceptance of a reasonable possibility is not inconsistent with a finding as to recklessness: at [50].

The separate states of mind in s 61HA(2) are not discrete categories. The idea a person "knows" that the other is not consenting itself involves the formation of a belief at a certain level of conviction. A disregard

of circumstances will readily lead to a finding of reckless as to consent. There is no clear dividing line between pars (a) and (b).

Par (c) does not refer to an actual belief in consent, but only to the lack of reasonable grounds for such a belief. A finding as to lack of reasonable grounds may be consistent with the person being reckless. It is only if that finding is accompanied by a finding as to an actual belief in consent that par (c) is distinguishable in terms of culpability from pars (a) and (b): at [50].

Note: The current consent provision s 61HE applies to sexual intercourse without consent offences, sexual act and sexual touching offences (ss 61KC, 61KD, 61KE and 61KF).

Child sexual offences - whether s 25AA Crimes (Sentencing Procedure) Act applies where original sentence imposed before s 25AA commenced and CCA re-sentences

Corliss v R [2020] NSWCCA 65: Section 25AA *CSPA* commenced on 31.8.2018. Section 25AA provides a court must sentence for a child sexual offence in accordance with sentencing patterns and practices at the time of sentencing, not the time of the offence.

The CCA dismissed the applicant's appeal but considered whether s 25AA would have applied where the original sentence was passed before its commencement and the applicant has demonstrated error and it is necessary to re-sentence**.**

Johnson J (Lonergan J agreeing) said s 25AA would apply. "Court" in s 25AA includes the Court of Criminal Appeal exercising its sentencing function under s 6(3) *Criminal Appeal Act* 1912. The text of s 25AA, and extrinsic material, makes clear the legislature's intention to abolish for all sentences for relevant child sexual offences (within s 25AA(5)) the principle in *R v MJR* (2002) 54 NSWLR 368 (that a court take into account "…sentencing practice as at the date of commission of an offence when sentencing practice has moved adversely"): at [67]-[85].

Brereton J disagreed. Section 25AA does not intend that an offender in these circumstances be exposed to greater jeopardy and deprived of the right to a sentence in accordance with the law at the date of the original sentence. Section 6(3) and extrinsic material do not support that s 25AA would apply: at [20]-[21].

Child pornography – sexual fantasy – real children of parents - s 91H(2) Crimes Act

R v LS; R v MH [2020] NSWCCA 148**:** The CCA allowed the Crown appeal against sentence for offences including produce, disseminate and possess child pornography. The respondents - husband and wife - exchanged explicit "fantasy" messages about sexual activity with their own children.

The judge erred in regarding these messages to be of lesser seriousness because they contained no images of actual children. That is relevant. Fantasy material involving both imaginary and real children is grave (*Ponniah v The Queen* [2011] WASCA 105). However,material involving real children under care of the relevant adult gives rise to a much heightened, immediate, and specific risk to the children and significantly heightens gravity of the offences: at [36], [135]-[139], [141].

Matters taken into account in assessing offences of child abuse material are not exhaustive. Other features which must be given great weight are the relationship of the children and circumstances in which the material came to be produced etc: at [34]-[35]; *Minehan v R* [2010] NSWCCA 140; *R v Hutchinson* [2018] NSWCCA 152 at [45].

Child cybersex offences

Small v R [2020] NSWCCA 216: The CCA discussed the seriousness of cybersex offences and that the presumption that a child has suffered harm as a result of prohibited sexual activity applies no less to cybersex offences than it does to (in person) sexual offences committed against young persons: citing ***Kannis v R*** [2020] NSWCCA 79; *Adamson v R* (2015) VR 268.

Sexual offences with child outside of Australia – Criminal Code (Cth)

Baden v R [2020] NSWCCA 23: This matter involved sentences for offences including engage in sexual activity (other than sexual intercourse) with a child outside Australia, persistent sexual abuse of a child outside Australia and procuring a child to engage in sexual activity outside Australia pursuant to *Criminal Code* (Cth), ss 272.9(1), 272.11(1), 272.14(1).

The applicant communicated online with two victims in the Philippines about sexual activity and sent money to their mother to access to the children.

The CCA held the judge did not err in assessment of objective seriousness. The 14 factors identified to be of relevance to an assessment of the objective seriousness of offences against ss 272.8(2) and 272.9(2) in *DPP (Cth) v Beattie* (2017) 270 A Crim R 556; [2017] NSWCCA 301 at [127] apply equally to offences against ss 272.11 and 272.14: at [27]. Most of those factors were present here: [45].

Dangerous driving occasioning death – alcohol consumption prior to collision taken into account

Rummukainen v R [2020] NSWCCA 187**:** The applicant was sentenced for dangerous driving occasioning death (s 52A *Crimes Act*). The applicant submitted the judge erred in taking into account the applicant's alcohol consumption prior to the collision because the Crown had not proven beyond reasonable doubt blood alcohol concentration at the time of the collision was greater than 0.05 and had thereby not established commission of an offence of driving with PCA.

The CCA dismissed the appeal.

The "aggravating factors" in the *Whyte* (2002) 55 NSWLR 252 guideline judgment relate to moral culpability which is relevant to objective seriousness (*Filippou v The Queen* (2015) 256 CLR 47 at [70]). Whilst a number of these aggravating factors may amount to separate offences, many do not involve commission of an offence. Item (4) "*the degree of intoxication*" is not limited to intoxication constituting a separate offence. There is no basis to treat as irrelevant evidence of one of the *Whyte* factors unless the Crown can establish a separate offence was thereby committed: at [22]-[24].

The prior alcohol consumption was relevant to moral culpability and thus objective seriousness, general deterrence, and in considering significance of prior record which included drink driving: at [29].

Firearms – self-loading rifle not in working order

Andary v R [2020] NSWCCA 75: The judge erred in assessing objective seriousness of possess prohibited firearm (an AR-15 self-loading rifle) as in the "mid-range" where the firearm was not capable of being used as a repeating rifle in the state it was found.

Absence of a magazine meant it was not capable of being used as a repeating rifle; the missing retaining pin meant it would not (sic) have been dangerous to fire at all; it was partially disassembled and not loaded: at [33].

Presence of ammunition, nature of the weapon and being unsecured meant the offence was above low-range objective seriousness. The offence fell between low and mid-range: at [34].

CONVICTION AND OTHER APPEALS

1. EVIDENCE

Competence - 5 year old child complainant with autism spectrum disorder and hearing impairment – s 13 EA

Gray v R **[2020] NSWCCA 240**: The applicant was convicted of sexual intercourse against the complainant (his sister) aged 5 and diagnosed with autism spectrum disorder and a hearing impairment.

The CCA held there was no miscarriage of justice in the judge finding the complainant was competent to give evidence: at [92]-[95].

What s 13 requires to establish competency is simply an examination of whether the witness has basic comprehension skills to understand a question and provide an intelligible answer. It is purely a question about capacity, not whether a witness has capacity to understand a particular question framed in a particular way. If there is an issue about whether a question is confusing or misleading, s 41 is available: at [88]-[90].

That the complainant may have given answers that may be argued to be unreliable is different to the question of competence. The question of reliability is an issue for the jury: at [98].

The complainant was competent. A Witness Intermediary Assessment Report stated she has necessary cognitive and communication skills to communicate evidence in court if appropriately questioned and supported: at [59], [92]. The judge took into account the Report knowing a witness intermediary would not

be present and to which applicant's counsel did not object. An experienced judge and counsel could proceed on the basis the complainant could perform the basic tasks required by s 13 with assistance from the Report as to appropriately worded questions: at [95].

Compellability of spouses - De facto partner not advised of right to object – s 18 EA

Jurd v R [2020] NSWCCA 91

An accused's de facto partner has a right to object to giving evidence as a prosecution witness: s 18(2) *Evidence Act* 1995.

Subsections 18(3)-(6) provide:

> *(3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.*
>
> *(4) If it appears to the court that a person may have a right to make an objection …, the court is to satisfy itself that the person is aware of the effect of this section ....*
>
> *(5) If there is a jury, the court is to hear and determine any objection … in the absence of the jury.*
>
> *(6) A person who makes an objection .. must not be required to give the evidence if the court finds that:*
>
> > *(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant..; and*
> >
> > *(b) the nature and extent of that harm outweighs the desirability of having the evidence given.*

Section 18(7) lists matters to be taken into account for the purposes of s 18(6).

B, the applicant's de facto partner, was only made aware of her right under s 18 after giving evidence before the jury. On voir dire the next day, B stated she would not have given evidence if she had known of her right to object.

The CCA held the evidence was wrongly admitted. Subsequent steps taken by the judge did not make that evidence admissible: at [94]. However, there was no substantial miscarriage of justice and the appeal was dismissed: at [94]-[95]; [169], [186], [230].

The CCA stated:

- Where awareness of the right to object arises after such evidence, it is doubtful s 18 can be complied with: at [82]-[83].
- When B first gave evidence of her de facto relationship, the judge ought to have taken evidence in the jury's absence to determine if B may have a right under s 18 to object. If so, the judge was obliged to satisfy himself B was "aware of the effect of the section" under s 18(4): at [73]-[74]; [88]ff; *Tran v R* [2017] NSWCCA 93.
- The judge failed to satisfy himself that B was "aware of the effect of the section" (s 18(4)). He confined himself to being satisfied that B was aware that she may have a right to object. He was obliged to enquire of B from whom she had obtained legal advice and confirm she was aware of matters under s 18. He could not have been satisfied B had independent legal advice nor been apprised of matters in ss 18(6)-(7): at [90]-[92].

Complainant permitted to give evidence by pointing at answer cards – s 26(a) Evidence Act 1995

ABR (a pseudonym) v R [2020] NSWCCA 33

Section 26(a) *Evidence Act* provides that "*a court may make such orders as it considers just in relation to the way in which witnesses are to be questioned*."

The applicant faced trial for indecency offences. The CCA held there was no error in allowing the child complainant to give evidence in cross-examination by pointing to cards that contained an answer "Yes", "No" and "I don't understand."

The complainant was upset during cross-examination and struggled to answer questions. The judge had broad powers under s 26 to control the manner in which witnesses were questioned. The complainant used the cards only twice and in response to leading questions. Having regard to its extremely limited use, the procedure did not lead to a miscarriage of justice: at [79]-[81].

Evidence wrongly admitted as admissions in furtherance of common purpose – common purpose alleged in the proceeding - s 87 EA

Higgins v R [2020] NSWCCA 149

s 87(1)(c) *Evidence Act* states:

> *87 Admissions made with authority*
>
> *(1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that—*
>
> *……*
>
> *(c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party ….*

The applicant appealed his conviction for alleged sexual offences against a student at his school where he was a teacher. For one offence, the Crown alleged he penetrated the complainant's anus but stopped when Brother D (now deceased) walked into the classroom.

The CCA held the judge erred in admitting as an "admission by the applicant" (s 87) evidence by the complainant that Brother D told him to tell his parents he fell over and hurt his bottom, and by the complainant's mother that Brother D had told her the same story.

The appeal was allowed (as well as on other grounds) and verdicts of acquittal entered.

Section 87

The correct operation of s 87 is outlined in *R v Dolding* (2018) 100 NSWLR 314.

Satisfaction of s 87(1)(c) does not itself render evidence of the representation admissible in substantive proceedings. Assuming s 87(1)(c) is satisfied the court must *then* determine whether evidence by X is to be taken to be an admission by Y; and, if so, whether evidence of the admission should be admitted against Y in the substantive proceedings: at [31]-[33]: [31]-[33]; *R v Dolding* at [22]-[23].

Furtherance of *the* common purpose

There was no common purpose alleged between the applicant and Brother D in the trial. Section 87 is confined to representations made in furtherance of *the* common purpose alleged in those proceedings - not a common purpose unrelated to the common purpose alleged by the Crown. The Crown's contention that "a" common purpose was to cover up the sexual assault committed by the applicant was not the subject of any allegation at trial and is not sufficient basis to admit the evidence: at [37]-[39], [43]; *Dolding* at [32].

Tendency – evidence of burns on murder victim shortly before death by blunt force trauma – s 97

***TL v R* [2020] NSWCCA 265:** The applicant was convicted of the murder of TM, his partner's 2 year old daughter. Cause of death was blunt force trauma. A week prior, TM was taken to the doctor with burns after the applicant had bathed her, which he claimed were accidental.

The CCA held there was no error in admitting evidence of the burns as tendency: at [228]; [309]; [319].

The test in s 97(1)(b) is whether the Court thinks that the evidence will, either by itself or having regard to other evidence adduced, have significant probative value. The bath evidence was to be assessed with the other evidence adduced that the applicant was one of only three persons with opportunity to commit the offence. That combination of facts gave the evidence its significant probative value and not whether there was a *close similarity* between the bath incident and the manner in which TM was killed: at [203]; [307]-[308].

Requirement for *close similarity* should arise when the tendency evidence is the only or predominant evidence that goes to *identity*. *Hughes v The Queen* (2017) 263 CLR 338 did not lay down a prescriptive test for tendency evidence sought to be used to prove identity. By saying "it almost certainly will" their Honours allowed for exceptions. This case falls into that class of exceptions. The undisputed fact that only three persons had the opportunity to kill TM was decisive evidence: at [207].

Tendency related to conduct ten years prior to offence admissible – s 97

Taylor v R [2020] NSWCCA 355: The applicant was convicted of domestic violence related offences. The CCA, by majority, held admissible evidence that the applicant had a tendency "to be physically violent towards women with whom he is in an intimate relationship" based on violence in 2008 towards his ex-wife during their relationship breakdown.

The evidence has significant probative value. The 2008 and other evidence strongly supports proof the applicant had the alleged tendency in 2018 (*Hughes* (2017) 263 CLR 338 at [41]; *McPhillamy* (2018) 92 ALJR 1045 at [26]).

The ten year period must be considered in context of the precise tendency alleged and other evidence. The alleged tendency was violence towards women with whom he had an intimate relationship during a breakdown, not violence to women generally. He had no other relationship between his marriage breakdown and his relationship with the present victim i.e. the two relevant sets of events. Cf. *McPhillamy* where the appellant's supervision of other boys during the period of time between the earlier and later events weakened the alleged tendency: at [145]-[148]. Further, assessment of differences between the 2008 and 2018 events show the tendency strongly supports proof of facts that makes up the offence: at [152]-[155]; *Hughes.*

Tendency - directions pre-Bauer (2018) 92 ALJR 846 - whether criminal standard elevated tendency evidence to an essential intermediate fact – multiple complainants

Jackson v R [2020] NSWCCA 5**:** At the applicant's trial for child sexual offences against two complainants, the Crown relied on tendency evidence by a third child WC that he was sexually assaulted.

The applicant submitted the judge erred in directing the jury that the alleged tendency events concerning WC required proof beyond reasonable doubt – so that, if accepted, was elevated to an intermediate fact or otherwise regarded as an essential and direct causal link in proof of counts 1 and 2.

The CCA dismissed the appeal. The directions were pre-*Bauer*. The judge followed then law in NSW that the standard of proof of tendency evidence in sexual offences is beyond reasonable doubt: at [57]. WC's evidence was not elevated to the level of an essential intermediate fact: at [78]-[79]. There was no risk WC's evidence would be accorded significant or substantial undue weight. The directions made plain the limits for which WC's evidence could be used and that weight was a matter for the jury: at [71]-[73].

The High Court in *Bauer* at [68] considered in single complainant sexual offences cases that the jury should not ordinarily be directed that the standard of proof of uncharged acts is beyond reasonable doubt: at [64]. It is not clear if that is confined to single complainant trials. Here, there were two complainants. However, there is no logical basis for different standards of proof dependent upon the number of complainants: at [67]. This case is not an appropriate vehicle to determine this issue. Ordinarily the accused favours application of the criminal standard of proof not the Crown. Here, the usual argumentation has been inverted: at [68].

Error to not allow good character (no prior convictions) due to 'outstanding allegations' – s 110 EA

Decision Restricted **[2020] NSWCCA 247**: The applicant was convicted of child sexual assault offences. The CCA allowed the appeal. A miscarriage of justice occurred by the trial judge excluding evidence of the absence of prior convictions over many decades which was to be adduced by consent, on the basis the applicant had "allegations outstanding": at [71]ff; authorities on good character cited.

This is not a case in which to apply the proviso (s 6(1)). The applicant faced formidable hurdles in his first trial. He needed evidence of prior good character to support credibility. One way was to prove that at age 86, for his entire life he had never had a criminal conviction. The Court cannot conclude that absence of this evidence would not have affected the verdict of the jury: at [87].

Lawyer-client legal privilege – privilege lost due to "misconduct" where reasonable grounds for finding communications made in furtherance of an offence – Evidence Act 1995, ss 117, 118, 125

DPP (NSW) v Izod; DPP (NSW) v Zreika [2020] NSWSC 381 (Simpson AJ)

A confidential communication between client and lawyer for the dominant purpose of providing legal advice is subject to client legal privilege: ss 117-118 *EA*.

Section 125(2) provides that privilege can be lost due to "misconduct" where there are "*reasonable grounds for finding that a communication was made in furtherance of an offence*".

The defendants were charged with pervert the course of justice (s 319 *Crimes Act*). MZ (a solicitor) allegedly advised MI (his client) to give a false history to a doctor to obtain a medical certificate to procure an adjournment of criminal proceedings against MI. The DPP relied on communications (lawfully obtained text messages) between them.

Simpson AJ allowed the DPP's appeal. The magistrate erred in finding the communications were inadmissible because they were privileged and there was no "misconduct" within s 125.

The magistrate applied the wrong test to s 125(2). Section 125(2) required an evaluation of evidence for a conclusion that there were *reasonable grounds* for finding communications were made in furtherance of the offences. That is a lesser test than the magistrate applied in asking whether, *in fact*, the communications were made. The magistrate's reasons reveal application of a test of finality: at [36]-[37].

The magistrate failed to take into account relevant considerations, including MI's false history to the doctor and MZ knew MI did not have gastroenteritis: at [44]-[45].

Illegally obtained evidence - tamper-evident cap missing from blood sample - appeal against s 138 ruling

R v Riley [2020] NSWCCA 283: The respondent was charged with culpable driving under the influence of drugs. A blood sample was taken. The sample collection tube has two caps. The first cap, which maintains sample integrity, was in place. The second outer cap, which prevents evidence tampering, was missing (in breach of cl 24 *Road Transport Act* 2013). It was not known how the outer cap came to be off. There was no evidence the inner cap had been removed or sample integrity compromised: at [119].

The trial judge ruled that blood sample evidence from two prosecution experts was inadmissible under s 138. The judge found the evidence was unlawfully obtained because when received by the experts it was not sealed in accordance with the legislation. Probative value was not high because integrity of the sample was not guaranteed.

The CCA allowed the DPP's appeal against the judge's ruling. The judge erred in assessing probative value. It was necessary to take the evidence at its highest. Although the absence of the outer cap casts some doubts on reliability of the evidence, that would ultimately be a matter for the jury in assessing the evidence: at [120]; *The Queen v Bauer* (2018) 266 CLR 56 at [69]; *IMM v The Queen* (2016) 257 CLR 300.

The evidence was admissible: see at [126]-[128]. The importance of the evidence and seriousness of the charge is that desirability of bringing to account a potential wrongdoer outweighs the undesirability of curial approval of the taking and handling of blood samples in disregard of legislation: at [131].

2. PROCEDURE

Five-judge bench – prior sexual history of complainant – s 293 Criminal Procedure Act

Note: Section 293 is currently under review by the NSW Department of Justice.

Jackmain v R [2020] NSWCCA 150

Section 293(3) *Criminal Procedure Act 1986* provides:

> *293(3) Evidence that discloses or implies—*
> *(a) that the complainant has or may have had sexual experience or a lack of sexual experience, or*
> *(b) has or may have taken part or not taken part in any sexual activity,*
> *is inadmissible*.

A five-judge bench upheld the primary judge's decision that *false complaint* evidence by the complainant was caught by the exclusionary rule in s 293 and refusal to stay the proceedings.

The false complaint evidence would imply that the complainant had not taken part in sexual activity which she claimed occurred thus falling within s 293(3)(b). It is not to the point that the purpose of leading the evidence was to establish she was a person who made false complaints of sexual assault. Section 293 looks to what the evidence is taken to disclose or imply, not the reason it was led: at [22].

Correctness of *M v R* (1993) 67 A Crim R 549: The Court (Bathurst CJ; Johnson, Button and Wilson JJ agreeing; Leeming JA contra) held *M v R* was correctly decided: at [24]. *M v R* held that s 409B (the predecessor to s 293) applied to evidence that the complainant fantasised or lied about sexual activity with the accused. The evidence was inadmissible as it would have disclosed or implied that in fact she had not participated in the sexual activity the subject of the lies.

Section 293 and absence of a residual discretion has been the subject of trenchant criticism. However, it would be inappropriate for the Court to overturn a decision of longstanding and subject to re-enactment in 1999, even if incorrectly decided. Any change to the law is a matter for the legislature: at [11]-[12].

Sexual assault complainant's evidence from earlier trial – whether complainant compellable to give further evidence at subsequent trial - s 306J Criminal Procedure Act 1986

WX v R [2020] NSWCCA 142

Section 306J *Criminal Procedure Act* has not been previously considered by the CCA.

In sexual assault matters, s 306J provides that if the complainant's original evidence is admitted in proceedings, the complainant is not compellable to give further evidence in the proceedings *unless the court is satisfied it is necessary:*

> *(a) to clarify any matters relating to the original evidence of the complainant or special witness, or*
> *(b) to canvas information or material that has become available since the original proceedings, or*
> *(c) in the interests of justice.*

This appeal was from the appellant's third trial. At his (aborted) second trial the Crown tendered the complainant's evidence from the first trial and the trial judge refused an application for the complainant to give evidence pursuant to s 306J. At this third trial, the judge applied the ruling of the second trial judge.

The CCA held the judge erred in application of s 306J by treating findings about the conduct of counsel at the first trial as determinative of whether the statutory test was made out. The judge did not expressly address the impact on any second or subsequent trial of the appellant if the complainant was not recalled, especially in light of what the judge was advised was the change in the defence case: at [64].

The CCA allowed the appeal ordered a retrial.

Operation of s 306J (at [37]-[42]):

(i) The starting point is the presumption that the complainant is not compellable.

(ii) s 306J(1) does not confer a discretion but instead requires an evaluative judgment that if the court is satisfied in terms of the provision then the complainant is deemed compellable.

(iii) Before it is determined that a complainant is compellable, the Court must be satisfied it is "necessary" for the complainant to give further evidence as per any of ss 306J(1)(a)-(c). "Necessary" is a "strong word" requiring more than the formation of an opinion that something is "convenient, reasonable or sensible" (*Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [30] to [31]).

(iv) Against that, the criteria in ss 306J(1)(a) to (c) is expressed in broad terms.

In the context of s 306J(1)(c), "interests of justice" requires a consideration of the impact on the fairness of the accused's trial if the complainant does not give further evidence and the desirability of not occasioning further trauma to the complainant. In relation to the former, if the court concludes that a trial will definitely be unfair if the complainant is not called then this would almost certainly compel a conclusion that s 306J(1) is satisfied (and, if not, the trial would have to be stayed). However, the converse does not apply, that it is not necessary to conclude that a trial will be unfair for s 306J(1) to be satisfied. Otherwise, the breadth of ss 306J(1)(a) to (c) and the requirement that the court be satisfied that it is "necessary" for the complainant to give further evidence defy any attempt to proscribe any rules concerning when, or the circumstances in which, a complainant will or will not be required to give evidence at a subsequent trial.

Appointment of a "children's champion" or witness intermediary

SC v R [2020] NSWCCA 314**:** The CCA allowed the applicant's appeal against the trial judge's refusal to revoke the appointment of a "children's champion" / witness intermediary for the child sexual assault complainants (*Criminal Appeal Act*, s 5F(3)). The CCA set aside the intermediary's appointment.

Clause 89(5) of Part 29 Schedule 2 *CPA 1986* provides a person must not be appointed as a "witness intermediary" (cl 88(1)) if the person:

> *(a) is a relative, friend or acquaintance of the witness, or*
>
> *(b) has assisted the witness in a professional capacity (otherwise than as a children's champion), or*
>
> *(c) is a party or potential witness in the proceedings concerned.*

The CCA held the intermediary had assisted the complainant in a professional capacity before her appointment and thus was not eligible to be appointed (cl 89(5)(b)).

The judge erred by:

- finding that cl 89(5)(b) requires a judge to determine whether the intermediary is no longer neutral or impartial: at [65]-[68].
- limiting professional assistance to 'direct assistance with a therapeutic function'. "Professional" and "assisted" are ordinary words. The intermediary's initial consultation was diagnostic and involved exchange of information or observations; and supervision of speech pathology students assisting the complainant was professional assistance: at [36], [66]-[67].

Clause 89(5) disqualifying conditions

Clause 89(5) imposes no ongoing qualifications on a witness intermediary after appointment. Instead, the District Court has power to revoke an appointment. If prior to appointment they were disqualified under cl 89(5)(a), (b) or (c), that power must be exercised. Otherwise the power is discretionary: at [33].

Exercise of discretion is informed by cl 89(5)(a), (b) or (c), but only in context of considering the intermediary's capacity to perform their functions (cl 88(1)) consistently with their duty (cl 88(2)) and the accused's right to a fair trial: at [34].

Mere potential for the intermediary to be a witness on an issue of fact does not require revocation of their appointment. Revocation would depend on, inter alia, the extent to which being a witness affects capacity to perform their functions and duty under cl 88(1)-(2). This requires assessment of the likelihood of being called as a witness, the nature and importance of the issue of fact and nature of their evidence: at [34].

Vulnerable complainant - evidence by recording / CCTV – s 306P Criminal Procedure Act

Dogan v R [2020] NSWCCA 151: A vulnerable complainant may give evidence via alternative means under Ch 6 Pt 6 *Criminal Procedure Act 1986*.

Section 306P(2) states those provisions would apply if the court was "*satisfied that the facts of the case may be better ascertained if the person's evidence is given in such a manner*".

At the applicant's trial, all parties agreed that the complainant give evidence by way of recorded police interview under s 306(1)(a) and via CCTV. The applicant submitted the judge erred in not applying s 306P(2).

The appeal was dismissed. Where all parties consent to evidence being given in accordance with s 306S(1)(a) and there is no tender of evidence directed to the question of whether "the facts of the case may be better ascertained" by the tender, such agreement is a sound basis upon which the Court may be satisfied of the condition in s 306P(2). The limitation under s 306P(2) is primarily a protection for the benefit of the accused: at [16]-[17].

Prosecution duty of disclosure – not obliged to look for exculpatory material

Edwards v R [2020] NSWCCA 57**:** The applicant was convicted of child sexual assault. The brief of evidence to defence disclosed the existence of downloaded contents from his mobile phone and that a copy was available. At trial, the prosecution disclosed a new witness B would be called. On request, the prosecution disclosed that that B's details came from the mobile download and provided a copy. The defence established another potential witness from the download. The applicant submitted the trial miscarried due to late production of witness B and the nature and extent of the disclosure of the download.

The CCA dismissed the appeal. It was not necessary the Crown do more than make available in electronic form the mobile information. The Crown was not obliged to look for exculpatory material where it has disclosed the material in its entirety: at [60]. The statutory duties are satisfied, and fall short of requiring interrogation of a large body of electronic material if the entire material is disclosed and made available, or explanation of how such material was used to identify a Crown witness: at [55]-[56]; s 141 *Criminal Procedure Act* 1986, s 15A *DPP Act 1986* (NSW); r.87 *Legal Profession Uniform Conduct (Barristers) Rules* 2015; *Marwan v DPP* [2019] NSWCCA 161 at [34]-[37].

Search warrants – "rubber stamping" - Law Enforcement (Powers and Responsibilities) Act 2002 ("LEPRA"), ss 48,65

Doyle v Commissioner of Police [2020] NSWCA 11**:**

Section 48 LEPRA provides an eligible issuing officer may issue a search warrant if satisfied there are reasonable grounds to do so.

Section 65(1) obliges the issuing officer to cause a record to be made of "all relevant particulars of the grounds" relied on to justify issue of the warrant.

The Court of Appeal held the search warrant was invalid where almost the entirety of the warrant forms were completed by the police officer applying for the warrant before the application was presented to the issuing officer. The issuing officer failed to comply with s 65 *LEPRA*: at [52].

The "Eligible officer's record of application for a search warrant" was signed and dated by the issuing officer, consistent with adoption by her as the record of what she relied upon. However, it is equally consistent with "rubber stamping" when independent scrutiny is required (*George v Rockett* (1990) 170 CLR 104). There was no room for the issuing officer to record *any* matters relied upon in reaching a decision. Further parts were left uncompleted: at [63]-[64].

"Efficiency" considerations do not justify the practice of presenting issuing officers with warrant application forms which presuppose the outcome of the application: at [67]-[68].

3. *DIETRICH* (1992) 177 CLR 292 CONSIDERATIONS

Accused unrepresented through no fault of his own – counsel unable to appear – unable to obtain new counsel – temporary stay granted

Croke v R [2020] NSWCCA 8: The trial judge erred by refusing applications for adjournment and a temporary stay where trial counsel advised not long before the trial date that he was no longer able to appear for the applicant, and the applicant could not obtain new counsel. The CCA ordered a temporary stay.

Dietrich (1992) 177 CLR 292 is not confined to an accused who is not represented because they cannot afford it. It extends to other circumstances such as where the accused's legal representative is unable to attend due to accident or misfortune and there is insufficient time to arrange new representation: at [31].

Addressing three aspects from *Dietrich* relevant to the application before the primary judge (see at [32]), the CCA found:

(i) The only reasonable finding was that this trial commencing was likely to be unfair: at [38]

(ii) Absence of counsel was not the fault of the applicant: at [47]; and

(iii) Other considerations affecting the interests of justice, e.g, limited listing dates and potential unavailability of an overseas witness. Where to not adjourn results in the accused facing trial on a serious charge without representation through no fault of his own, then only in "exceptional circumstances" could he be forced on (*Dietrich* at 311). It is neither necessary nor possible to define what might constitute exceptional circumstances. In this case, potential difficulty in securing the witness' attendance again to give evidence does not meet that standard: at [30], [48]-[49].

Error in refusal to grant leave to counsel to withdraw and vacate trial – unfair if accused forced on unrepresented

Kahil v R [2020] NSWCCA 56: The trial judge erred by refusing an application by counsel to withdraw on the seventh day of trial and to discharge the jury. Counsel said he needed to self-isolate to prevent possible contraction of COVID-19.

The CCA allowed the appeal (s 5F *Criminal Appeal Act*), ordered the jury be discharged and trial vacated and remitted the proceedings to the District Court.

The judge was bound to treat the applicant as unrepresented as the application for jury discharge and vacation of trial was made *after* counsel was refused leave to withdraw. Withdrawal of counsel left the applicant, through no fault of his own, without adequate representation: at [22]-[23].

The judge failed to address the key question in determining whether to grant an adjournment or stay - whether the trial was likely to be unfair if the accused were forced on unrepresented: at [23]-[25]; *Dietrich*

(1992) 177 CLR 292 at 311. This *dictum* applies not only to where an accused is unrepresented because s/he cannot afford legal representation, but also where the legal representative is unable to attend for a reason not the fault of the accused: at [24]; ***Croke v R*** [2020] NSWCCA 8 at [31].

No unfairness where unrepresented Accused has benefit of legal representation

***Decision Restricted* [2020] NSWCCA 9:** The applicant was granted legal aid for his murder trial. Shortly before trial, he withdrew instructions asserting his representatives had not followed instructions and the matter was not ready to proceed. His legal representatives asserted this was incorrect. The trial judge dismissed the applicant's application to vacate the trial.

The CCA dismissed his appeal (s 5F(3) *Criminal Appeal Act* 1912).

The trial process must not be allowed to degenerate by manipulation by the accused to be at his or her mercy: at [33]; *R v BK* [2000] NSWCCA 4. A criminal trial will be relevantly fair notwithstanding the accused is unrepresented where s/he desires to be unrepresented or persistently neglects or refuses to take advantage of available legal representation: at [39]; *Dietrich* (1992) 177 CLR 292 at 335–336; *Greer v R* (1992) 62 A Crim R 442.

Fairness in this context must mean having the opportunity to be represented. There is no relevant unfairness where a party has the benefit of legal representation funded by Legal Aid. This was not a case of a failure of a fair legal system to provide the applicant with counsel: [48]; *Greer v R* at 450.

4. SUMMING UP / DIRECTIONS

Summing up - legal responsibility of trial judge - cannot be delegated to parties

Hamilton (a pseudonym) v R [2020] NSWCCA 80**:** The trial judge requested the parties to prepare a draft summing-up and to agree on its contents so that the judge could read it out to the jury.

The appropriateness of this course was not the subject of argument on appeal. However, the CCA observed that summing up cannot be delegated to the parties. The legal responsibility of preparing the summing up is the trial judge's alone. Although trial judges are entitled to expect counsel assistance in determining appropriate directions, the content of the summing up is determined by the judge. There are also practical reasons in not burdening legal representatives with preparing the summing up: at [84], [97].

Defence case not put fairly

***Decision Restricted* [2020] NSWCCA 256**: The CCA held failure by the trial judge to put the defence case fairly in this murder trial based on circumstantial evidence resulted in a miscarriage of justice. The principles as to the role and duty of a trial judge in summing up are discussed at [55]ff; and where a prosecution case is based on circumstantial evidence at [61]ff.

Word against word cases - Markuleski (2001) 52 NSWLR 82 direction

Keen v R [2020] NSWCCA 59: The CCA dismissed the applicant's conviction appeal. There was no miscarriage of justice by the trial judge not giving a *Markuleski* direction, that if the jury had a reasonable doubt in respect of one count, including with respect to the reliability of a witness, they were entitled to consider that fact in considering other counts (*Markuleski* (2001) 52 NSWLR 82 at [186], [191]).

Markuleski does not stand as authority for the proposition that a direction is given "as a general rule" in word on word cases involving multiple counts or is "crucial". The proposition from *Markuleski* is that the judge should consider, by reference to all circumstances, whether a direction is necessary to ensure a balance of fairness: at [76], [81]; *Hajje v R* at [102]; *Criminal Trial Courts Bench Book* at [5-1590].

The Crown relied heavily on evidence of accomplice B. The CCA found that it would have been obvious to the jury that the credibility of the two accomplices, particularly Witness B, was seriously in question. A *Markuleski* direction was not necessary to achieve a balance of fairness, nor would have done any more to secure an acquittal: at [102]; *Hajje v R* [2006] NSWCCA 23.

This was not a case of all counts relying on word against word. An important feature of the so-called "word on word" case is that the proof of all the elements of the offence rests on the word of the complainant or relevant witness. That was not the case here, where some counts depended on the word of B but his evidence could not prove all of the elements of the offence: at [98]-[99].

Unwarranted demand money with menaces (Blackmail) – directions mental element - s 249K(1) Crimes Act

Petch v R [2020] NSWCCA 133**:** The appellant was convicted by a jury of making an unwarranted demand with menaces ('Blackmail') under s 249K *Crimes Act 1900*.

The appellant (then Mayor of the City of Ryde) allegedly made an implied threat to D (then Acting General Manager of Ryde City Council) that she wold not be appointed general manager in an attempt to influence her to reimburse the appellant and other councillors for litigation costs in which they were defendants.

The CCA held the trial judge failed to correctly direct the jury with respect to the mental element. The CCA allowed the appeal in part, quashed the conviction and entered a verdict of acquittal.

> s 249K provides:
>
> (1) A person who *makes any unwarranted demand with menaces*—
>
> (a) with the intention of obtaining a gain or of causing a loss, or
>
> (b) with the intention of influencing the exercise of a public duty,
>
> is guilty of an offence.
>
> "Menaces" is defined in s 249M. Sub-section 249M(1) provides:
>
> (1) .. ***"menaces"*** includes—
>
> (a) an express or implied threat of any action detrimental or unpleasant to another person, and
>
> (b) a general threat of detrimental or unpleasant action that is implied because the person making the unwarranted demand holds a public office.
>
> (2) A threat against an individual does not constitute a menace unless--
>
> (a) the threat would cause an individual of normal stability and courage to act unwillingly in response to the threat, or
>
> (b) the threat would cause the particular individual to act unwillingly in response to the threat and the person who makes the threat is aware of the vulnerability of the particular individual to the threat.

The judge gave a proper direction regarding s 249K(1)(b) [an intention of influencing the exercise of a public duty: at [46].

s 249K also requires proof of an intention to make an "unwarranted demand with menaces". By the definition of "menaces" (s 249M), this requires proof the accused intended to make "an express or implied threat" and intended to cause the person subject to that threat to act unwillingly in response: at [47].

The directions implicitly addressed the second of those requirements by the words "the accused must have intended that Ms [D] fear that the threat would be carried out unless she complied". However, the directions did not demand proof the accused intended to issue *an express or implied threat* - which is the core of the definition of menaces in s 249M. This was an error as to an essential element of the offence: at [48].

The jury must be directed that the offence is only established if it is proved beyond reasonable doubt that the accused intended to make an unwarranted demand with menaces and that requires (amongst other things) proof that he intended to make an express or implied threat. No particular form of words is required. But it must be clear, especially in the case of an implied threat, that the accused intended to make an unwarranted demand, intended the demand to be with menaces and that this involves an intention to make a threat: at [49].

5. OTHER CASES

Detain for advantage, s 86(1)(b) Crimes Act 1900 - nature of advantage not an element or essential fact of offence - magistrate erred in refusing to accept guilty plea

Hamilton v DPP [2020] NSWSC 1745**:** The defendant was charged with detain with intent to obtain an advantage, namely sexual gratification, under s 86(1)(b) *Crimes Act* 1900. He sought to plead guilty in the Local Court on the basis he intended to obtain a financial advantage only. The magistrate committed the defendant for trial.

Button J held the magistrate erred by refusing to accept the guilty plea. The defendant should have been committed for sentence: at [116].

Proof of an intention to obtain *an* advantage is an element that must be proven beyond reasonable doubt. But a *specific* particularised advantage is not. And in the circumstances of this case, there is nothing that elevates the mere fact of one alleged advantage, as opposed to another conceded advantage, into becoming an essential fact: at [81], [115]. There is no fetter on the DPP pursuing on sentence an allegation that the defendant intended to sexually assault the complainant: at [82].

Section 86(1)(b) is very broad: it speaks of an intention of obtaining "any other advantage". Parliament has made a considered decision to permit that subsection to operate as a "catch-all": at [68].

No form of offence with its own elements is part of a charge pursuant to s 86(1)(b) - what needs to have been intended to be obtained is "any other advantage", an amorphous concept and element. By contrast, for an offence under s 86(1)(a1) (detain with intent to commit serious indictable offence), it would be incumbent upon the prosecution to aver and prove the *particular* serious indictable offence alleged; the "sub-elements" of the "sub-offence" become elements of the overarching offence, and must be pleaded, and proven beyond reasonable doubt: at [98]-[99]; *Dean v R* [2019] NSWCCA 27.

Murder - failure to leave alternative verdict of manslaughter - Objection to evidence under s 84 Evidence Act.

***Decision Restricted* [2020] NSWCCA 284:** At trial, the Crown alleged the Applicant and Witness A attended the deceased's home to steal money and stabbed the deceased. Witness A gave evidence for the Crown that both he and the Applicant stabbed the deceased. The Applicant denied being present.

The trial Judge gave written directions regarding murder by extended joint criminal enterprise.

The Applicant's trial counsel requested the Judge not give written directions concerning manslaughter.

The Applicant was convicted of murder.

The CCA allowed the appeal and ordered a retrial.

<u>Alternative verdict manslaughter - directions</u>

The trial Judge should have left directions for alternative verdict of manslaughter by unlawful and dangerous act. If the jury was satisfied that both Witness A and the Applicant went to the deceased's home with an intention to steal and that Witness A inflicted the fatal wounds, then a scenario which would arise, as a matter of inference and not speculation, was whether the Applicant foresaw that Witness A might deliberately assault the deceased, but not intending to cause him grievous bodily harm: at [34]-[38]; *Martinez; Tortell v R* [2019] NSWCCA 153; *Basanovic v R* (2018) 100 NSWLR 840; *Lane v R* (2013) 241 A Crim R 321.

Where a direction on murder by extended joint criminal enterprise was given, a direction concerning manslaughter by unlawful and dangerous act should have been given: at [37].

The Applicant's case was that she was not present. Although, tactically, trial counsel would not wish to argue an alternative verdict of manslaughter, the proper approach by defence counsel is that such application be made to the Judge in absence of the jury, with it being a matter for the Judge whether the alternative verdict should be left: at [39]; *Basanovic* at [82]-[83].

<u>s 84 Evidence Act</u>

The CCA noted where an accused seeks to object to evidence under s.84 *Evidence Act*, objection should be taken as a pretrial issue by way of voir dire under s.189: at [16]ff; *R v Tarantino (No. 6)* [2019] NSWSC 1174; *R v Blackman* [2018] NSWSC 395; *R v Spiteri-Ahern; R v Barber; R v Zraika (No. 10)* [2017] NSWSC 1380.

In the absence of an objection to evidence under s.84, the trial Judge was not obliged to consider whether evidence ought be excluded under that provision: at [19].

s 84 is capable of applying to evidence of admissions of the Applicant said to have been influenced by violence threatened by Witness A, the alleged co-offender. Section 84 is not limited to admissions

made by the improper conduct of a person seeking to obtain an admission: at [22], [138]; *R v Spiteri-Ahern* at [21]-[22]; *R v Douglas* [2000] NSWCCA 275. At re-trial, the Applicant could seek to object to evidence under s 84 by voir dire under s 189: at [25].

Jury - investigation by Sheriff pursuant to s 73A Jury Act 1977 – admissibility of investigation material – exclusionary rule – miscarriage of justice

Agelakis v R [2020] NSWCCA 72

The appellant was convicted of sexual assault. In an earlier conviction appeal, the CCA ordered an investigation by the Sheriff, pursuant to s 73A *Jury Act 1977*, regarding jury conduct (*Agelakis v R* [2019] NSWCCA 71).

The resulting Sheriff's report suggested one or more jurors had knowledge of other charges against the appellant; and another juror had a reasonable apprehension of bias against sexual offenders which she had expressed in a Facebook post.

Sheriff report admissible on appeal - evidence not within exclusionary rule

The CCA held the material was admissible on appeal as it did not fall within the exclusionary rule, namely, that the Court does not admit evidence of a juror as to what took place in the jury room, either as to the grounds of the verdict or what s/he believed its effect to be: at [19]-[24]; *Smith v Western Australia* (2014) 250 CLR 473.

The exclusionary rule does not deny the admissibility of evidence 'extrinsic' to the jury's deliberations. What is 'extrinsic' for this purpose is unsettled. It is preferable to seek understanding of the limits of the exclusionary rule in an understanding of its rationale, which is to preserve the 'secrecy of jury deliberations' and maintain finality of verdict: at [20]; citing *Smith* at [27]-[30].

In this case, evidence that a juror had knowledge of matters which should not have been taken into account by the jury in deliberations, and had communicated that knowledge to another juror, falls outside the rationale of the exclusionary rule. Similarly, the publicly expressed attitudes of the other juror did not form part of the jury deliberations: at [23]-[24].

Miscarriage of justice

There was a miscarriage of justice. The evidence might lead a fair minded and informed member of the public to conclude the jurors had not discharged their task impartially: at [32]-[37]; *Webb v The Queen* (1994) 181 CLR 41 at 53.

Admissibility under s 73A

It was unnecessary to decide whether a Sheriff report is admissible pursuant to s 73A, as submitted by the Crown. However, it is arguable s 73A allows use of such material for prosecutions of ss 68B (Disclosure of information by jurors) and 68C (Inquiries by juror about trial matters prohibited) of the *Jury Act*: [25]-[31]; *Petroulias v The Hon Justice McClellan* (2013) 246 A Crim R 6.

Spousal immunity not part of common law at time of enactment of Criminal Code 1995 (Cth)

Namoa v R [2020] NSWCCA 62**:** The applicant, 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)), submitted that husband and wife could not be guilty of conspiracy under the *Code*.

The appeal was dismissed. The CCA affirmed the trial judge's finding that at the time immediately prior to the introduction of the *Code,* Australian common law did not recognise an immunity from prosecution for conspiracy for husband and wife, even where the husband and wife were the only alleged conspirators: at [56]-[57]; *PGA v The Queen* (2012) 245 CLR 355. The underlying basis for the rule that legally husband and wife were "one person" has not been true in Australia since 1975: at [76]. Even assuming the common law immunity in relation to criminal conspiracy survived until 1995, it would be inconsistent with s 11.5 of the *Code*: at [77]-[86].

Extension order cannot be made with respect to a person who has ceased to be a forensic patient

Attorney General of NSW v WB [2020] NSWCA 7: Before the primary judge, the Attorney had sought an extension order of the respondent's status as a forensic patient under Sch 1, *Mental Health (Forensic Provisions) Act* 1990. The day before the expiration of the respondent's limiting term, the judge made orders

appointing a psychiatrist and a psychologist to examine the respondent and furnish reports but refused to grant an interim extension order.

The Court of Appeal upheld the Attorney's appeal against the judge's refusal to grant the interim extension order.

The central issue was whether the power of a court to grant an extension order operates only for a person who is, at the time, a forensic patient. As the primary judge's orders were made a day before the limiting term expired, absent an interim extension order, there would have been no opportunity to obtain medical examinations and deploy the reports in support of the application for an extension order: at [24]. The effect of the relevant statutory provisions is that an extension order cannot be made once a person has ceased to be a forensic patient: at [52]-[53].

Incontrovertibility principle

Koloamatangi v R; Popovic v R [2020] NSWCCA 52**:** The applicants were convicted of murder. The applicants had previously been convicted of the murder at a first trial with two others, H and B. On appeal, H and B's convictions were quashed and verdicts of acquittal entered. The applicants' convictions were also quashed and a new trial ordered.

At retrial, the Crown alleged K was the gunman and P was a party to a joint criminal enterprise to kill the deceased. The Crown relied on the evidence by two witnesses, T and R.

The CCA allowed the appeal on the basis of unreasonable verdicts. The convictions were quashed and verdicts of acquittal entered.

Incontrovertibility principle: It was argued admission of T's evidence that H supplied the gun controverted H's acquittal on the charge of murder. However, the incontrovertibility principle does not apply to proceedings where the acquitted person (H) is not a party: at [295]; *Likiardopoulos v The Queen* (2012) 247 CLR 265 at [35]–[36]. There was no miscarriage of justice in admitting T's evidence: at [294]-[312]; [384]; [385].

H's acquittal does not of itself preclude proceeding against the applicants for murder, nor evidence tending to prove H was involved in the murder: at [298]. Absent any allegation H supplied the gun for the purpose of enabling a murder to be committed, it would not be manifestly inconsistent with his acquittal: at [305].

However, here the reason for H's acquittal was clear. The CCA judge had doubt H provided a gun to T at all and whether the gun in H's possession was used in shooting of the deceased. Therefore a further charge against H involving supply of the gun would controvert his acquittal, although not encompassing all the elements of the previous offence: at [307].

Abuse of process: The applicants submitted there was a miscarriage of justice as T and R were condemned as liars in the first appeal. The CCA held use of their evidence was not an affront to the administration of justice. There was no abuse of process: the proceedings do not controvert H's acquittal; there had been a retrial order; the retrial did not allege that H or B were parties to the joint criminal enterprise; there was nothing to suggest that the retrial would not involve T's evidence about the gun: at [316]–[317].

7. BAIL

CCA jurisdiction - s 67(1) Bail Act 2013

The CCA lacked jurisdiction to grant bail in the following two cases. s 67 *Bail Act* provides:

s.67 Powers specific to Court of Criminal Appeal

(1) The Court of Criminal Appeal may hear a bail application for an offence if—
(a) the Court has ordered a new trial and the new trial has not commenced, or
(b) the Court has made an order under section 8A (1) of the *Criminal Appeal Act 1912* and the person is before the Court, or
(c) the Court has directed a stay of execution of a conviction and the stay is in force, or
(d) an appeal from the Court is pending in the High Court, or
(e) a bail decision has been made by the Land and Environment Court or the Supreme Court.

(i) application for special leave to appeal to the High Court not yet granted

Karout v DPP (NSW) [2020] NSWCCA 15**:** Where there is only an application for special leave to appeal to the High Court, the CCA lacks jurisdiction to grant bail under s 67(1)(d) as there is not "an appeal" from the CCA "pending in the High Court." There are no proceedings inter partes before the High Court until there is a grant of special leave: at [23]-[24]; *Collins v The Queen* (1975) 133 CLR 120 at 122; *HT v DPP (NSW)* [2019] NSWCCA 141.

Nor was s 67(1)(c) engaged. Jurisdiction to stay a judgment of an intermediate appellate court pending a special leave application is an extraordinary jurisdiction and exceptional circumstances must be shown: at [32]; *Jennings Construction Ltd v Burgundy Royale Investment Pty Ltd (No. 1)* (1986) 161 CLR 681 at 684. The Applicant falls far short of making out a case for a stay pending special leave; nor establishes a substantial prospect that special leave will be granted (*R v AB (No. 2)* (2018) 97 NSWLR 1031 at [27]) and has not sought expedition of his special leave application: at [32]-[33].

(ii) no application for leave to appeal pending before CCA

Widdowson v R [2020] NSWCCA 213: The (unrepresented) applicant filed a Notice of intention to apply for leave to appeal but failed to file any Application for leave to appeal. He applied for leave to appeal without seeking an extension of time or providing explanation for delay.

The CCA held the circumstances did not come within s 67 and there is no general power to hear the application: at [10]-[11].

A bail application does not of itself enliven the Court's jurisdiction. Section 61 provides for a court to hear a bail application if proceedings for the offence are pending in the Court. *"Proceedings pending in the Court*' (s 59) is a reference to 'substantive proceedings' for an offence which do not include bail proceedings (s 5).

No appeal is pending before this Court and there is no basis upon which the Court could hear the release application. There is no jurisdiction unless an extension of time is granted to file the Notice of intention to seek leave to appeal on the date which it was filed. As there is no application for extension, no explanation for the delay, and insufficient information to enable assessment of the merits of the proposed appeal, that course cannot be properly taken: at [12]-[15]; *Criminal Appeal Act* 1912, s 10(2)(b); *Criminal Appeal Rules*.

Judicial review proceedings pending in Court of Appeal - jurisdiction of Supreme Court to hear application - Bail Act 2013, s 5(1)(d)

Hay v DPP (NSW) [2020] NSWSC 219 **(Johnson J)*:*** The applicant sought judicial review in the Court of Appeal of his District Court appeal from the Local Court. He made an application for bail in the Supreme Court.

Johnson J observed there is an open question as to the Court's power to grant bail where judicial proceedings are pending in the Court of Appeal: see discussion at [16], [22]-[24]**.**

Without expressing a concluded view, Johnson J was prepared to assume the *Bail Act* applies to the present application (as was the case in *Liristis v DPP (NSW)* [2015] NSWCA 261 at [9]). *Bail Act* and *Supreme Court Act* provisions (ss 69C(3), 69A(3)) do appear to indicate bail is available to a person seeking judicial review in the Court of Appeal: at [25]–[27], [30].

The application was refused as the applicant did not have a reasonably arguable prospect of success under s 18(1)(j).

A. HIGH COURT CASES 2020

1. ***Kadir & Grech v The Queen* [2020] HCA 1** (Appeal from NSW)

s 138 Evidence Act - evidence obtained improperly or in contravention of an Australian law

K and G were charged with acts of serious animal cruelty by alleged use of rabbits as "live bait" in training racing greyhounds.

The Crown proposed to tender three categories of evidence: (i) covertly recorded video-recordings by Animals Australia showing activities at K's property in contravention of s 8(1) *Surveillance Devices Act 2007* (NSW); (ii) material obtained as a result of a search warrant by the RSPCA; and (iii) alleged admissions by K .

Section 138 *EA* provides that evidence obtained improperly or in contravention of an Australian law, or in consequence thereof, is not to be admitted unless the desirability of admitting it outweighs the undesirability of admitting evidence that has been obtained "in the way in which the evidence was obtained." In assessing admissibility, a court takes into account matters in s 138(3), including s 138(3)(h) - "the difficulty of obtaining the evidence without contravening an Australian law."

The trial judge excluded all three categories of evidence pursuant to s 138. The CCA upheld in part a Crown appeal, holding the first recording of the surveillance evidence (but not subsequent recordings), search warrant evidence and admissions were admissible. K and G appealed to the High Court.

Held: Appeals allowed in part. *All* of the surveillance evidence is inadmissible. The search warrant evidence and admissions are admissible.

- The CCA found the difficulty of lawfully obtaining the evidence "tipped the balance" in favour of admitting the first surveillance recording: at [36]. The basis upon which s 138(3)(h) was approached was misconceived. Demonstration of the difficulty of obtaining the evidence lawfully did not weigh in favour of admitting evidence obtained in deliberate defiance of the law. *All* of the surveillance evidence should be excluded: at [9].
- The search warrant evidence and admissions were admissible. The surveillance evidence was obtained in contravention of the law, but the search warrant evidence was obtained by a regulator acting lawfully and without prior knowledge of the contravention, albeit procured on the strength of the surveillance evidence. The causal link between contravention and admissions was tenuous, a consideration capable of affecting the weighing of the public interest in not giving curial approval or encouragement to the unlawful conduct: at [9], [41].

2. ***KMC* [2020] HCA 6 (**Appeal from South Australia)

Persistent sexual exploitation of child - s 50(1) Criminal Law Consolidation Act 1935

The offender was sentenced for 'sexual exploitation of child' under s 50(1) *Criminal Law Consolidation Act* 1935 prior to *Chiro* (2017) 260 CLR 425. *Chiro* held that for s 50 offences, the jury should be asked by the trial judge to identify the underlying acts of sexual exploitation found proved and, if not asked, must sentence on the basis most favourable to the offender.

Section 9(1) *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act* 2017 (SA) was introduced to overcome the effect of *Chiro*. Section 9(1) provides that a sentence imposed pursuant to s 50 before s 9(1) commenced is not affected by error merely because:

- the court did not ask the jury any question ascertaining the acts of sexual exploitation and did not sentence on the facts most favourable to the offender (s 9(1)(a)); and
- the court sentenced the person consistently with the verdict of the jury but "*having regard to the acts of sexual exploitation determined by the sentencing court to have been proved beyond reasonable doubt*": s 9(1)(b).

On appeal to the CCA, the case was removed to the High Court to consider the constitutional validity of s 9(1). As s 9(1)(a) was satisfied in this case, the issue was whether the applicant was sentenced according to s 9(1)(b).

Held: Appeal allowed. Sentence set aside. Matter remitted to sentencing judge.

- Contrary to s 9(1)(b), the judge did not make findings as to what acts of sexual exploitation he found proved beyond reasonable doubt: at [30]-[31].
- Section 9(1) was not engaged. The applicant was not sentenced on the basis of the facts most favourable to him. His sentencing was contrary to *Chiro*. Section 9(1) does not validate the sentence: at [3], [34].
- The constitutional validity of s 9(1) does not arise: at [34].

3. ***Guode* [2020] HCA 8** (Crown Appeal from Victoria)

Error to evaluate appropriateness of sentences imposed for murder and attempted murder in light of offence of infanticide.

The respondent with impaired mental functioning pleaded guilty to infanticide, two counts of murder and attempt murder. The respondent drove her car into a lake with her four children including the deceased (infanticide charge).

Infanticide (s 6(1) *Crimes Act* 1958) carries a significantly shorter maximum penalty (5 years) than murder (Life) and attempt murder (25 years).

The Victorian Court of Appeal allowed the applicant's sentence appeal. The Crown appealed.

Held (by majority): Crown appeal allowed. Sentences imposed by Court of Appeal quashed and remitted for determination according to law.

- The Court of Appeal erred, in determining whether the murder and attempted murder sentences were manifestly excessive, by taking into account the plea of guilty to infanticide and in light of the statutory definition of infanticide in s 6(1): at [31].
- The mental condition relevant to infanticide is the "balance of the woman's mind was disturbed because of a disorder consequent on her giving birth to the deceased child within the preceding two years" (s 6(1)). Sentencing is by reference to the 5 year maximum penalty having regard to the nature and gravity of the disturbance of mind: at [21].
- For other offences committed at the same time as the infanticide, the sentences are by reference to maximum penalties for those offences, in accordance with *Verdins* considerations having regard to mental condition at time of offending, sentence, or both. In this case, a "major depressive disorder" impaired capacity to exercise appropriate judgment and appreciate wrongfulness of conduct, and very likely causally associated with driving the children into the lake: at [22]; *Verdins* (2007) 16 VR 269.

4. ***Strbak* [2020] HCA 10** (Appeal from QLD)

Facts disputed on sentence - error to draw adverse inference where offender failed to give evidence

The appellant pleaded guilty to the manslaughter of her 4 year old son. She denied inflicting the fatal injuries but admitted liability on the basis of omitting to provide the necessaries of life by failing to seek medical assistance. She did not give evidence on sentence. The judge made adverse findings that she inflicted injuries, not just failed to obtain medical assistance, taking into account that she did not give contrary evidence, applying *R v Miller* [2004] 1 Qd R 548.

Held: *Miller* was wrongly decided. Appeal allowed. Matter remitted to court for re-sentence.

- The appellant's plea was not an admission of inflicting the force that caused death and did not relieve the prosecution of the obligation to prove the facts on which it sought to have the appellant sentenced. *Miller* was wrongly decided and, to the extent that the judge determined contested facts applying *Miller* (as obliged), he erred: at [33].
- Where there is a dispute on sentence as to facts, the judge should not draw an adverse inference by reason of the offender's failure to give evidence save in rare and exceptional circumstances (*Azzopardi v R*): at [13].
- Where the prosecution seeks to have the court sentence on a factual basis that goes beyond the facts admitted by the plea, which is disputed, the prosecution must adduce evidence to establish that basis: *Olbrich* (1999) 199 CLR 270 at [25].

5. ***Swan v The Queen* [2020] HCA 11** (Appeal from NSW)

Murder – Causation

The appellant was convicted of murder. The appellant's assault caused serious injury to the victim who suffered severe deterioration in quality of life. Eight months after the assault, the victim suffered a fractured femur requiring surgery. A decision was made not to undergo possible life-saving surgery. The victim died from consequences of the fracture shortly thereafter. An appeal against conviction was dismissed by the CCA.

Held: Appeal dismissed.

The Crown at trial put three possible pathways of causation. It was open to the jury to convict on the third pathway by concluding (i) surgery was available and would reasonably have been expected to save the victim's life; (ii) the victim or his son made a decision that surgery not be undertaken, and (iii) that decision was motivated by the victim's low quality of life due to the assault: at [36]ff. It was sufficient, on the trial judge's direction, that the effects of the assault substantially or significantly contributed to the decision which, in turn, on the third causation pathway, prevented the surgery that was reasonably expected to save the victim's life: at [46]; *Royall* (1991) 172 CLR 378.

6. ***Pell v The Queen* [2020] HCA 12** (Appeal from Victoria)

Unreasonable verdicts

The applicant was convicted of child sex offences, allegedly committed in 1996 and 1997 when he was a priest, against two altar boys, A and B, in the priests' sacristy after Sunday Mass. B had died by the time of the trial.

By majority, the Court of Appeal dismissed the applicant's conviction appeal.

Held: Appeal allowed. Convictions quashed. Verdicts of acquittal entered.

Evidence as a whole not capable of excluding a reasonable doubt as to guilt. Upon assumption that the jury assessed A's evidence as thoroughly credible and reliable, the issue for the Court of Appeal was whether the compounding

improbabilities caused by unchallenged evidence [of the applicant's movements and activity/movements in the sacristy] nonetheless required the jury, acting rationally, to have entertained a doubt as to guilt. Plainly they did. Making full allowance for the advantages enjoyed by the jury, there is "a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof": at [9]; [119]; *Chidiac* (1991) 171 CLR 432 at [444]; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at [618]–[619].

Viewing of video-recordings of witness evidence. The Court of Appeal viewed video-recordings of the evidence of certain witnesses at trial. The existence of the video-recordings does not make it appropriate for them to be watched by the Court of Appeal (*SKA v The Queen* (2011) 243 CLR 400 at [27]-[35]). There may be cases where there is something particular in the video-recording apt to affect an appellate court's assessment of the evidence but such cases will be exceptional, and ordinarily such a course will be adopted by the parties rather than upon independent scrutiny by the court: at [35]-[36].

7. ***Coughlan v The Queen* [2020] HCA 15** (Appeal from QLD)

Unreasonable verdict – circumstantial case

The appellant was convicted of arson and attempted insurance fraud when an explosion destroyed his holiday home on circumstantial evidence.

Held: Appeal allowed. Verdicts of acquittal entered.

It was not open to the jury to be satisfied of guilt beyond reasonable doubt. Prosecution expert evidence did not exclude the reasonable possibility that the explosion was caused from a build-up of gas ignited by an electrical fire. The appellant's reasons for being at the house and conduct after (including reporting the matter to police) were not capable, when viewed with other circumstances (petrol residues on his clothing; witness evidence of smelling petrol, absence of financial motive), of excluding that possibility: at [56]; *Shepherd v The Queen* (1990) 170 CLR 573 at 579; *Fennell v The Queen* (2019) 93 ALJR 1219 at [82].

8. ***Pickett; Mead; Mead; Anthony & TSM (A Child) v State of WA* [2020] HCA 20** (Appeal from WA)

Common purpose – murder – where victim may have been killed by child not criminally responsible

The High Court considered whether ss 7(b), 7(c) and 8 *Criminal Code* (WA) apply so that an enabler or an aider, or a party to an unlawful common purpose, is guilty of murder where the deceased may have been killed by a child who was not proven to be criminally responsible for the killing.

Eight persons – including the five appellants and PM (aged 11) - assaulted the deceased. One of the group stabbed the deceased. It was uncontested that PM may have been the person who inflicted the fatal wound: at [5].

The appellants were each convicted of murder. (PM was convicted of manslaughter in the Children's Court).

As PM was over 10 but under 14, he could not be criminally responsible unless at the time of the killing he had capacity to know he ought not to do the act (s 29 *Criminal Code*).

The trial judge declined to direct the jury that they could not convict the appellants of murder unless they were satisfied beyond reasonable doubt that PM was not the person who stabbed the deceased.

Held: Appeals dismissed.

- ss 7 and 8 apply when "*an offence* is committed". "An offence" refers to the act or omission which constitutes the offence not the criminal responsibility of the actor: at [66]-[67]; *R v Barlow* (1997) 188 CLR 1.
- That the particular assailant who stabbed the deceased may not have been criminally responsible for murder by reason of some circumstance peculiar to that assailant did not affect the operation of ss 7 and 8: at [68].
- The liability of each appellant for murder did not depend upon proof beyond reasonable doubt that PM had the capacity to know that he ought not to strike the blow that killed the deceased, or that he did not strike that blow. Accordingly, the trial judge did not err in declining to instruct the jury that it did: at [69].

9. ***Cumberland v the Queen* [2020] HCA 21** (Appeal from NT)

Crown appeal - procedural fairness

The Crown appealed the appellant's sentence to the NT CCA. The CCA announced that the appeal would be allowed for reasons to be published "in due course" but that the matter would first be referred to a five-judge Bench for determination of a statutory interpretation issue: at [23]. Almost 11 months later, a five-judge Bench delivered judgment on the interpretation question. Immediately after, a reconstituted three-judge bench resentenced the appellant to a more severe sentence without hearing submissions. The appellant appealed to the High Court.

Held: Appeal allowed. Decision of the NT CCA reversed.

The appellant was not given opportunity to put material before the CCA as to progress in custody or make submissions regarding resentence or dismissal of the appeal in the residual discretion, when circumstances were very different almost 11 months since the matter was heard: at [32]-[33].

The existence of the residual discretion to dismiss a Crown appeal notwithstanding the identification of error below suffices to show that it was an error to decide to allow the appeal before the CCA was in a position to make final orders. Considerations were distinctly different from when the CCA announced intention to allow the appeal. The only proper exercise of discretion was to dismiss the Crown appeal: at [35]-[37]

10. ***Nguyen v The Queen* [2020] HCA 23** (Appeal from NT)

Prosecution duty to tender record of interview containing "mixed statements"

The High Court considered whether the Crown was obliged to tender a record of interview where the appellant made inculpatory and exculpatory statements ("mixed statements"). The prosecution did not tender the recorded interview essentially because the statements would not assist its case. The recorded interview was otherwise relevant and admissible.

Held: Appeal allowed.

- The prosecution's principal duty is to put its case fully and fairly. Where an accused provides both inculpatory and exculpatory statements to investigating police, it is to be expected the prosecutor will tender that evidence in the Crown case, unless there is good reason not to do so, if the prosecutorial duty is to be met: at [41].
- It should only be where reliability or credibility of the evidence is demonstrably lacking that the circumstances may be said to warrant a refusal, on the part of a prosecutor, to call such evidence: at [44].

The Court noted differences of opinion and practice in Australia:

- NT, WA, QLD and SA authorities have held there is no prosecution obligation to tender a mixed statement: at [28]-[29].
- NSW, however, has existing authority which refers to the common practice of the prosecution adducing evidence of conversations with police containing exculpatory statements – a justification for the practice being that otherwise the jury would be left to speculate as to whether the accused had given any account of their actions when first challenged by the police: at [31], [40] citing *Familic* (1994) 75 A Crim R 229 at 234; *R v Keevers* (unreported, NSWCCA, 26 July 1994) at 7; *R v Astill* (unreported, NSWCCA, 17 July 1992).
- Victoria has similar practice to NSW: at [30].

11. ***The Queen v Abdirahman-Khalif* [2020] HCA 36** (Appeal from SA)

Criminal Code (Cth), s 102.3(1) - membership of terrorist organisation - "steps" taken to become a member

The respondent was convicted of intentionally being a member of a terrorist organisation under s 102.3(1) *Criminal Code* (Cth), having "*taken steps*" (s 102.1(1)(b)) to become a member of Islamic State. The SA CCA allowed her conviction appeal on the basis that evidence at trial did not establish the process of how members of Islamic State were recruited, selected and accepted. The Crown appealed to the High Court.

Held: Crown appeal allowed. The Court also dismissed the respondent's conviction appeal.

- It was open to the jury to be satisfied that the respondent intentionally took "steps" to become a member of a terrorist organisation: at [49]; [105].
- The nature and purpose of 'terrorist' provisions (Pt 5.3 Code) is such that "organisation" is not amenable to exhaustive or rigid definition and is a question of fact and degree: at [46]. The provisions extend to groups that function in secrecy with no structural hierarchy, rules or contractual relationship between members. Existence of such a terrorist organisation is more readily proved by evidence of what it does than analysis of structure: at [49].
- The question was not whether the respondent had taken all, or any, of the steps necessary to become a member, but whether, by taking the steps that she was shown to have taken, she had intentionally taken steps to become a member. In determining whether the physical element of the offence is proved, the jury could have regard to her state of mind: at [54].

12. ***GBF v The Queen* [2020] HCA 40** (Appeal from Qld)

Jury instructed that failure of appellant to give sworn evidence "may make it easier" to assess complainant's credibility

The appellant was convicted of sexual offences allegedly committed against his half-sister aged 13-14. The prosecution case was wholly dependent on her evidence. The appellant did not give or call evidence.

The trial judge instructed the jury: "*bear in mind that [the complainant] gave evidence and there is no evidence, no sworn evidence, by the defendant to the contrary of her account. That may make it easier*".

The Court of Appeal found the statement should not have been made but did not occasion a miscarriage of justice given earlier, correct directions.

Held: Appeal allowed. New trial ordered.

- The instruction invited the jury to find it easier to accept the complainant's allegations because the appellant had not given sworn evidence denying them. The statement encouraged the jury to reason in this way.
- Such reasoning proceeds upon a view an accused may be expected to give evidence. Recognition of the attractiveness of reasoning that an allegation is more likely to be true in the absence of denial explains the need, in almost all cases in which the accused does not give evidence, for a direction as per *Azzopardi* (2001) 205 CLR 50.
- The impugned statement contradicted earlier directions on onus of proof and right to silence. In circumstances in which the statement had capacity to affect the jury's assessment of the credibility and reliability of the complainant's evidence, it was not open to find that no substantial miscarriage of justice occurred: at [27]; *Collins v The Queen* (2018) 265 CLR 178 at [36]-[37].

B. SUPREME COURT CASES 2020

Bradley v Senior Constable Chilby [2020] NSWSC 145 **(Adamson J)** - *prosecution disclosure in summary matters*

Adamson J comprehensively discussed the case law on disclosure obligations of police prosecutors prosecuting summary offences and enforcement of the duty where breach is alleged pre-trial: at [46]ff.

The plaintiff, charged with AOABH, asserted self-defence. He issued a subpoena to police for production of documents - including fact sheets regarding prosecutions of the complainant - which were not produced.

Allowing the appeal, the Court held the magistrate erred in refusing the plaintiff's application for a stay of proceedings until documents were produced. The magistrate misapprehended the nature and extent as a matter of law of the duty of disclosure in finding the subpoena was a "classic fishing expedition" not in the interests of justice as it would bring the criminal justice system to a halt. The magistrate's finding that the accused *could* have a "fair" hearing without access to such documents was legally unreasonable: at [68]. The Court made orders for a temporary stay until the prosecution's duty of disclosure is complied with or otherwise remit the matter to the Local Court to be heard by another magistrate.

TR v Constable Cox & Ors [2020] NSWSC 389 **(Wilson J) -** *cultural beliefs of Aboriginal female plaintiff - applications matter be heard by female magistrate and males be excluded refused – "interlocutory orders"*

The plaintiff, an Aboriginal female aged 16, was charged with assault police.

A video of her strip search was part of the prosecution case. The plaintiff made applications to the Children's Court on the ground that observation of exposed private parts between genders was offensive to her cultural background.

The magistrate refused to order (i) the matter be heard by a female magistrate; (ii) males be excluded from the courtroom when the video is played; (iii) a change of venue with a female magistrate: at [1], [31].

The plaintiff sought leave to appeal the magistrate's "interlocutory orders" within s 53(3)(b) *Crimes (Appeal and Review) Act* 2001 (*CARA*).

Wilson J dismissed the appeal.

(i) Refusal to grant the application for a female Magistrate was not an "interlocutory order" amenable to the jurisdiction conferred on this Court pursuant to s 53(3)(b): at [99].

"Interlocutory order": There is no definition of an "interlocutory order" in *CARA* or readily applicable test. But it is clear from s 53(3)(b) that the question is to be considered narrowly, partly due to undesirability of fracturing criminal proceedings by interlocutory to appeals: at [80]–[82]. An "order" has a narrower meaning than "direction", "decision", or "judgment": at [84]; *Russell v Scott & Anor* [2017] NSWSC 1720.

(ii) The magistrate had no power to order that men be excluded, including any male magistrate or witness: statutory provisions discussed at [114]–[119]. The Children's Court could make suppression and non-publication orders regarding the video, but any orders would not prevent it being played before any male. None of the "grounds for making an order" in s 8 *Court Suppression Act* are apposite to a "blanket" gender-based order: at [111]-[112].

(iii) Application for change of venue is an interlocutory order which the Children's Court had power to make (s 20 *Children's Court Act 1987*, s 30 *Criminal Procedure Act* 1986): at [115]. However, there is no error of law in the magistrate's decision to refuse it. It was correct to conclude that, if the prosecution could not be constrained in the way it presented its case and male witnesses might view the footage, there was no utility in a change of venue even if a female magistrate was available: at [129].

Cultural and gender-based adjustments in courts The need to recognise importance of cultural and gender-based adjustments in courts are secondary to public interest in the proper administration of justice: at [135].

Practical resolution should be able to be reached. The prosecutor is prepared to ensure a female police prosecutor conducts the hearing; female court staff would be allocated to the courtroom; the matter may be listed before female magistrate: at [137].

DPP (NSW) v SB [2020] NSWSC 734 **(Walton J) -** *reasonably necessary to arrest - s 99(1)(b) Law Enforcement (Powers and Responsibilities) Act 2002*

Walton J held the magistrate erred by impliedly holding that an arrest must be objectively reasonably necessary for one or more of the reasons in s 99(1)(b) of *LEPRA*.

Validity of arrest without warrant depends upon satisfaction of three criteria:

> (i) s 99(1)(a) - The officer must suspect on reasonable grounds that the person is committing/ has committed an offence (complied with);
>
> (ii) The officer must be satisfied that it is reasonably necessary to arrest for one or more of the purposes in s 99(1)(b)(i)-(ix);
>
> (iii) s 201 LEPRA (attracted no attention in this appeal): at [61]–[63]; *State of NSW v Randall* [2017] NSWCA 88.

s 99(1)(b) focuses attention on the state of satisfaction of the officer, that is, the officer's state of mind, not upon the objective verifiable circumstances. The question under s 99(1)(b) concerns what the arresting officer thought was reasonably necessary rather than "what the judge thought": at [66]; *Randall* at [13]; *Jankovic v DPP* [2020] NSWCA 31 at [53]–[54].

The magistrate did not consider that issue through the prism of the state of mind of the arresting officer. Her Honour's assessment was whether she was "satisfied in all the circumstances, that the arrest was proportionate or necessary": at [85].

DPP v Yerbury [2020] NSWSC 905 **(Fagan J)** – *error in excluding interview pursuant to s 138 Evidence Act 1995 – reversal of onus of proof*

Fagan J allowed the DPP's appeal against the magistrate's exclusion of the respondent's record of interview. The magistrate erred by reversing the onus of proof under s 138.

The magistrate excluded the interview after finding the respondent's arrest was unlawful because the Crown had not proved police had an intention to charge at time of arrest (*NSW v Robinson* [2020] HCA 46). However, the respondent had not put to this matter to police in cross-examination, and it was raised for the first time in the respondent's closing submissions.

Fagan J said under s 138 the party seeking to exclude the evidence has the burden of showing conditions for its exclusion are satisfied. The burden then falls upon the party seeking admission to persuade the court it should be admitted: at [21]-[22]; *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494.

No evidence was adduced from police by the respondent as to whether they had intended to charge. The defendant's burden at the first stage in application of s 138 was not discharged: at [27]. The magistrate could then not proceed with an evaluation of whether the interview was admissible. Reversal of the onus of the proof as to lawfulness of arrest constituted jurisdictional error: at [52].

Fagan J set aside the magistrate's orders and remitted the matter to the Local Court.

CO v DPP [2020] NSWSC 1123 **(N Adams J)** *Background Reports mandatory in children matters*

N Adams J allowed the plaintiff's appeal on the ground the magistrate sentenced the plaintiff for Children's Court matters committed when he was 17 to an aggregate control order without a background report pursuant to s 25(2) of the *Children (Criminal Proceedings) Act* 1987. Section 25(2) provides a court shall not sentence a person to imprisonment or a control order if the person was a child when the offence was committed and under 21 when charged unless a background report has been tendered in evidence, provided to the parties, and taken into account by the court. Section 25(2) is mandatory and failure to obtain a background report will render the sentence invalid: at [28]-[29]; *CTM v R* [2007] NSWCCA 131. The Court set aside the control orders and remitted the matter to the Children's Court.

Kindermann v JQ [2020] NSWSC 1268 **(Rothman J) –** *error to order destruction of forensic swab obtained from child as a result of Interim Forensic Procedure Order*

The Children's Court magistrate set aside the Registrar's 'interim order' for a non-intimate forensic procedure made in respect of a young person, and ordered any forensic swabs be destroyed, on the basis that no interim order could be made without the young person being represented and a hearing.

Rothman J set aside the magistrate's order and remitted the matter to the Children's Court.

There is no requirement for a hearing at which a young person is entitled to be represented and entitled to test the evidence against them for the making of an interim order. The interim order subsists until the final order issues. If the final order rejects the application, then any samples obtained pursuant to the interim order must be be destroyed. It is

at a final hearing that the suspect can be heard and can test the evidence: at [40]-[41]; ss 30, 32 *Crimes (Forensic Procedures) Act* 2000.

Sullivan v DPP (NSW) [2020] NSWSC 253 **(Hamill J)** *Application to annul conviction referred to Local Court by Attorney - magistrate erred finding requirement of exceptional circumstances*

An application for annulment of conviction or sentence from the Local Court may be made to the Minister and referred back to the Local Court if satisfied a question or doubt exists as to guilt: s 5 *Crimes (Appeal and Review) Act* 2001.

The applicant was granted a s 5 application. The applicant contended that at the time of his Local Court hearing, and probably his offences, he was suffering a mental illness; and that the matter should be dealt with under s 32 *Mental Health (Forensic Provisions) Act 1990*.

Hamill J held the magistrate:

- erred by finding that s 5 requires a defendant to establish 'exceptional circumstances' where the defendant was present at the original hearing: at [37]. The only criteria is whether "having regard to the circumstances of the case, it is in the *interests of justice* to [annul the conviction]" as required by s 8(2)(c): at [37].
- failed to exercise jurisdiction by refusing the application on the basis the magistrate hearing the original case could not have exercised power under s 32 *MHFPA*. This may be a case where the condition has been treated or resolved by the time of hearing and open to the magistrate to dismiss the charge unconditionally under s 32(3)(c): at [47]-[49].

Hamill J remitted the matter to the Local Court for determination according to law.

R v Martinez; R v Tortell (No. 7) [2020] NSWSC 361 **(Johnson J)** *Costs not available for failed application for non-publication order in criminal proceedings*

The accused, who was facing a murder trial in the Supreme Court, made an unsuccessful pretrial application for orders prohibiting publication of his name under the *Court Suppression and Non-publication Orders Act* 2010. The media organisation which appeared to oppose the orders then sought a costs order against the accused. Johnson J held the Court does not have jurisdiction to award costs in such proceedings: at [28]-[34]; [41]-[44]. The costs application was withdrawn and dismissed.

C. LEGISLATION 2020

1. **Evidence Amendment (Tendency and Coincidence) Act 2020**

Commenced on 1 July 2020. Second Reading Speech

Amendments to *Evidence Act:*

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

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

The amendments do not apply:

(1) in summary proceedings - where court attendance notice was filed prior to commencement of the Act;

(2) at trial - where indictment has been presented and accused has been arraigned prior to commencement of the Act.

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

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

Rebuttable presumption

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

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

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

is presumed to have significant probative value in proceedings relating to sexual offending against a child or children.

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

The presumption recognises that:

- Such tendency has a link or connection with child sexual offence charges irrespective of any other particular similarities between tendency evidence and charged acts: CAG Paper at [3.19]ff; *Second Reading Speech*.
- Evidence of a sexual interest in a *particular* child is presumed to demonstrate or show that a person has a sexual interest in children *generally* (cf. *McPhillamy* [2018] HCA 52 at [27]): CAG Paper at [3.26]ff; [3.46]ff; *Second Reading Speech.*

Judicial discretion / legislative guidance

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

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

(a) the sexual interest or act to which the tendency evidence relates (the tendency sexual interest or act) is different from the sexual interest or act alleged in the proceeding (the alleged sexual interest or act),

(b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred,

(c) the personal characteristics of the subject of the tendency sexual interest or act (for example, the subject's age, sex or gender) are different to those of the subject of the alleged sexual interest or act,

(d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act,

(e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act,

(f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features,

(g) the level of generality of the tendency to which the tendency evidence relates.

[see Second Reading Speech - regarding intended application of sub-sections (4)-(5)]

(3) New s 94(4) – common law rules preventing similar fact / propensity not relevant

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

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

(4) New s 94(5) – court not to have regard to collusion, concoction or contamination

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

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

(5) s 98 coincidence evidence – new s 98(1A)

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

[Second Reading Speech – consistent with current position in NSW but will assist in providing clear basis for admissibility]

(6) s 101 Further restrictions on tendency evidence and coincidence evidence

s 101(2) is amended as follows (new words in italics):

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

[Second Reading Speech – the amendment mirrors wording of s 137]

2. Stronger Communities Legislation Amendment (Miscellaneous) Act 2020

Commenced 27.10.20. Except for new s.161A *CPA* commences 21.3.2021. Second Reading Speech.

Note: *This "miscellaneous" Act actually contains 2 new provisions regarding tendency / coincidence evidence.*

Criminal Procedure Act 1986

New s.29A 'Tendency or coincidence—offences to be heard together'

- Presumption in favour of joint trials where defendant charged with multiple offences and prosecution intends to rely on tendency or coincidence evidence: s 29A(1).
- Rebuttable presumption. Subject to current s.21(2) - Court has discretion counts can still be separated to ensure fair trial: s 29A(2).

> *s 29A Tendency or coincidence—offences to be heard together*
>
> *(1) A court must hear and determine together proceedings for 2 or more offences if—*
>
> *(a) the offences are alleged to have been committed by the same person, and*
>
> *(b) the offences are—*
>
> > *(i) charged in the same indictment, or*
> >
> > *(ii) listed for hearing on the same day and at the same place, and*
>
> *(c) the prosecution has given notice that it intends to rely on tendency evidence or coincidence evidence that relates to more than 1 of the offences.*
>
> *(2) This section is subject to section 21(2).*

Second Reading Speech:

- applies regardless of whether court has allowed prosecution to rely on evidence as tendency or coincidence evidence.

- applies to all criminal proceedings, not just child sexual offences, to ensure consistency and to avoid uncertainty where accused is charged with different types of offences on one indictment.
- consistent with approach for sexual offences in Victoria, NT, Tas, WA.

Transitional:

Does not apply to proceedings the hearing of which began before commencement of s 29A i.e.:

- Summary proceedings – where court attendance notice was filed prior to the commencement of s 29A.
- Trial on indictment - where indictment has been presented and accused arraigned prior to the commencement of s 29A.

Applies where court attendance notice has been filed for an offence on indictment but where indictment has not yet been presented and accused has not been arraigned: *GG v R* [2010] NSWCCA 230.

New s.161A(1)-(3) 'Direction not to be given regarding tendency or coincidence evidence'

Commencement: **1 March 2021**

- Clarifies jury must not be directed that evidence needs to be proved beyond reasonable doubt for tendency and coincidence reasoning: s 161A(1); (*Bauer* [2018] HCA 40 at [86]).
- Provision does not interfere with fundamental requirement to direct jury that elements of any charged offences must be proven beyond reasonable doubt: s 161A(2).
- s 161A(3) ensures court can still give *Shepherd* direction (*Bauer* at [86]).
- Not limited to trials for child sexual offences.

s 161A Direction not to be given regarding tendency or coincidence evidence

(1) A jury must not be directed that evidence needs to be proved beyond reasonable doubt to the extent that it is adduced as tendency evidence or coincidence evidence.

(2) If evidence is adduced as both tendency evidence or coincidence evidence and as proof of an element or essential fact of a charge before the jury, the jury may be directed that the evidence needs to be proved beyond reasonable doubt, but only to the extent that it is adduced as proof of the element or essential fact.

(3) Subsection (1) does not apply if a court is satisfied—

(a) there is a significant possibility that a jury will rely on an act or omission as being essential to its reasoning in reaching a finding of guilt, and

(b) evidence of the act or omission has been adduced as tendency evidence or coincidence evidence.

Case management of trial matters

s 150 'Notice of Alibi' - Alibi notices must now be filed 56 days prior to trial (previously 42 days) i.e. by the date of District Court readiness hearings eight weeks prior to trial.

s 140 'Pre-trial conferences' - Amends s 140 to broaden the purposes of a pre-trial conference to include: identification of key issues in dispute, any issues that require resolution before the trial begins and any other matters as directed by the court. (Previously s 140 had only one purpose - whether accused and prosecutor able to reach agreement regarding the evidence to be admitted at trial).

s 149 'Requirements as to notices' - Amends s 149(5) to require all pre-trial disclosure notices to be filed "in accordance with the timetable set by the court". (Makes clear that notices must be filed in accordance with timetable set by the court in relevant practice note, or as otherwise determined by the court. Previously s 149(5) required notices be filed "as soon as practicable after giving it, or as otherwise required by the court.")

Children's champions - Cl. 89(5A), Sch 2 - clarifies that a children's champion can be involved at all relevant stages of proceedings, including during police interview stage.

Crimes (Sentencing Procedure) Act 1999

s 25D 'Discounts for guilty plea' - ex officio indictments

Amends s 25D to clarify that offenders who plead guilty to charges on an ex officio indictment filed after the offender was discharged under s 68 *CPA* are entitled to a discount even where the ex officio charge is based on substantially the same facts or evidence served in the discharged committal proceedings.

s 182 'Written pleas'

Amends s 182 to clarify that an accused who has lodged a written plea and does not attend court is an "*absent offender*" under s 25 *CSPA* Act. The magistrate is to consider whether an adjournment is more appropriate, while retaining discretion to issue a warrant. (Amendment ensures Local Court cannot impose penalties, including imprisonment, ICO, CCO, CRO in accused's absence).

s 27 Victim impact statements now in Children's Court

Clarifies victim impact statements are admissible in Children's Court for the same offences as in the Local Court, and for strictly indictable offences.

***Crimes Act* 1900 – *Criminal Procedure Act* 1986**

ss 91P, 91Q, 91R (record or distribute / threaten to record etc. intimate image): These "revenge porn" offences are now "prescribed sexual offences" under s 3 *CPA* so victims can give evidence by special arrangements under Pt 5 *CPA* (closed court; alternative arrangements etc.).

New s 91S(1A) enables court to order removal etc. of an intimate image threatened to be distributed under s 91R. Contravention of order - 50 penalty units or imprisonment 2 years, or both.

***Evidence (Audio and Visual Links) Act* 1998**

Amends s 22C (temporary COVID-19 provision) to clarify that an accused who is not in custody is able to appear via AVL from outside NSW (as well as from within NSW).

***Bail Act* 2013**

Amends s 40 to make clear that the ability to lodge a bail stay is linked to the first time a decision to grant or dispense with bail is made by a court or authorised justice, and not the first appearance at court. (Previously bail stays were limited to bail decisions made on a first appearance by the accused. Where bail is granted or dispensed with after the first appearance—e.g. defendant has sought a brief adjournment—the prosecution could not utilise s 40 and the defendant could remain at liberty until the detention application is determined).

***Supreme Court Act* 1970**

Amends s 69D to make clear Court has power to order a sentence commence or recommence on a future day or future event (To allow for when ascertaining a specific date is not possible e.g. sentence to commence upon completion of non-parole period for another offence).

3. *Crimes Amendment (Special Care Offences) Act* 2020

Commenced on 23 June 2020.

***Crimes Act* 1900**

Under ss 73 and 73A, an adult who has a prescribed "special care relationship" (e.g. teacher-student) with a 16-17 year old person is prohibited from having sexual intercourse (s 73) or sexual touching (s 73A). The amendments clarify the relationships to which the offences apply.

s 72B definitions amended so that:

- "parent" extends to both *biological and adoptive parents and "close family member"* which has the same meaning as in s 78A (incest).
- "*performing work at a school or for an organisation*" is defined as work performed by "*an employee (paid or unpaid), contractor, volunteer or otherwise*": New s 72B(2).
- A person is under another's authority if in their "… *care, or under [their] supervision or authority*": new Note.

Two new categories of special care relationships are created:

- *an offender working for an organisation providing residential care*; and
- *an organisation providing refuge or crisis accommodation*,

but only if the victim is under the authority of the offender: ss 73(3)(f)-(g) and ss 73A(3)(f) -(g).

Previously, a special care relationship arose when an offender was a "member of teaching staff" at the victim's school. The new special care relationship now arises where:

- Offender is "*a teacher, principal or deputy principal*" (ss 73(3)(b) and 73A(3)(b)). Due to inherent authority over their students, there is no requirement to establish a young person is under such an offender's authority (Second Reading Speech).
- The *offender works at the victim's school and the victim is under the offender's authority* (ss 73(3)(b1) and 73A(3)(b1)).

Special care relationships arising from religious, sporting, musical or other instruction now have a requirement that "the victim is under the authority of the offender": ss 73(3)(c) and s 73A(3)(c).

s 73 (sexual intercourse) - New special care relationships now extends to *parents, grandparents, guardians or authorised carers and their spouses and de facto partners*. However, any person who is a "close family member" of the victim is excluded given potential liability for incest (s 78A): s 73(3)(a); Second Reading Speech.

s 73A (sexual touching) - The same categories of special care relationships are created as for s 73, but without excluding close family members because incest (s 78A) does not apply to sexual touching: s 73A(3)(a).

A young person (above 16 and under 18) does not commit the offence of incest if the other person is the person's parent or grandparent: New s 78A(1A).

4. ***Stronger Communities Legislation Amendment (Crimes) Act 2020***

Commenced 28.9.2020 Second Reading Speech

***Crimes Act* 1900**

s 316 'Concealing serious indictable offence'

New s 316(1A) makes it a 'reasonable excuse' for a person to fail to report information relating to *alleged sexual offences and domestic violence offences* to police and authorities if the alleged victim is an *adult* and the person believes on reasonable grounds the alleged victim does not wish the information to be reported.

***Crimes (Sentencing Procedure) Act* 1999** and ***Crimes (Administration of Sentences) Act* 1999**

s 3 ('Interpretation') - New ss 3(2)(d)-(e) inserted in each Act so that a reference to a condition or obligation that a person not commit any offence (which is a standard condition for all parole orders, reintegration home detention orders, intensive correction orders, community correction orders and conditional release orders) is a reference to any offence whether committed in NSW or any State or Territory.

***Children (Detention Centres) Act* 1987**

New ss 9A(3)–(5) prevents a person aged between 18 - 21 from being detained in a detention centre if the person has been in custody in a correctional centre for more than 4 weeks or has, in relation to the person's current period of custody in a correctional centre, been transferred from a detention centre to a correctional centre. (Unless by order of the Minister).

***Children (Criminal Proceedings) Act* 1987**

Inserts a Note after s 19 ('Court may direct imprisonment to be served as a juvenile offender') to clarify persons aged between 18 and 21 years are unable to be detained in a detention centre in certain circumstances as per s 9A *Children (Detention Centres) Act* 1987 (above).

***Court Suppression and Non-publication Orders Act* 2010**

New s 17(3) extends the time limit for commencing summary proceedings in the Local Court for the offence of contravening a suppression order or non-publication order, from within 6 months of date of alleged offence to within 2 years.

***Crimes (Appeal and Review) Act* 2001**

s 69 ('Effect of confirmation of sentence on good behaviour bonds, community correction orders and conditional release orders') amended to make clear that if an appeal court confirms a sentence on appeal, a community correction order or conditional release order continues to have effect according to its terms, except as the appeal court otherwise directs.

***Criminal Records Act* 1991**

s 8 'When is a conviction spent?'

New s 8(4)(c) provides that all non-conviction conditional release orders are spent when the order is successfully completed. Previously only a non-conviction CRO's subject to one or more additional conditions (not just standard conditions) was spent on satisfactory completion of the order.

s 13 ('Unlawful disclosure of information concerning spent convictions') - new s 13(4)(4AA) provides it is not an offence if a Corrective Services employee discloses a spent conviction where the disclosure is not an offence under the *Crimes (Administration of Sentences) Act* 1999 and the person does not know, and could not reasonably be expected to know, the conviction is a spent conviction.

***Law Enforcement (Powers and Responsibilities) Act* 2002**

s 9 'Power to enter in emergencies'

New ss 9(1)(c) and (1A) allow a police officer to enter premises if the officer believes on reasonable grounds that a deceased person is on premises, the person's death is not the result of an offence and no person is present on premises to consent to entry. Entry must be authorised by an officer of the rank of Inspector or higher.

***Surveillance Devices Act* 2007**

s 4 Definition of "relevant proceedings" is amended to enable protected information to be used, published or communicated in additional proceedings if necessary, so as to enable the use of lawfully obtained surveillance device material in proceedings:

- before State Parole Authority under Pt 6-7 *Crimes (Administration of Sentences) Act* 1999;
- applications to a court under *Crimes (Serious Crime Prevention Orders) Act* 2016;
- applications under *Crimes (Forensic Procedures) Act* 2000;

- proceedings before NSW Civil and Administrative Tribunal on appeal against a decision to issue a licence, permit, firearms prohibition order under the *Firearms Act* 1996.

Thus surveillance device material could be used to inform a decision to make or revoke a parole order, to make or revoke an intensive correction order or a reintegration home detention order, to make a serious crime prevention order, to order a forensic procedure and to inform an appeal against certain decisions under the *Firearms Act* 1996.

s 33 'Application for approval after use of surveillance device without warrant or under emergency authorisation'

New s 33(1A) provides an exception to the requirement that a law enforcement officer apply to a Judge for approval of the use of an optical surveillance device without a warrant in an emergency – the exception being where the officer uses the device only to observe activity, not to record.

New s 33(3B) clarifies that in person applications are not required and applications may be made by use of modern technology, such as encrypted e-mail.

Terrorism (Police Powers) Act 2002

s 24A(2) ('Police Commissioner may declare this Part applies to terrorist act to which police are responding') amended to provide that a declaration that an incident is a terrorist act applies to each location at which police officers are responding to the incident.

5. ***Stronger Communities Legislation Amendment (Domestic Violence) Act* 2020**

Commenced: 25 November 2020, unless otherwise indicated. Second Reading Speech Explanatory Note.

***Criminal Procedure Act* 1986**

New Division 5 in Ch.6, Pt 4B 'Giving of evidence by domestic violence complainants.'

The Division applies to recorded statements of domestic violence complainants: s 3 (Definitions).

New s 289T Application of Division

Applies to domestic violence offence proceedings, and AVO proceedings where the defendant is charged with a domestic violence offence.

If a prescribed sexual offence is alleged, the division applies in addition to Pt 5 relating to apprehended personal violence orders (APVOs).

New s 289U Proceedings must be held in camera when complainant gives evidence

A complainant's evidence in domestic violence proceedings must be by closed court, unless court otherwise directs. A court can only make such a direction if a party requests; and the court is satisfied there are "special reasons in the interests of justice"; or the complainant consents to giving evidence in open court.

New s 289UA Other parts of proceedings may be heard in camera

The court may direct that any other part of any proceedings not specified in s 289U, or the entire proceedings, be held in camera. A direction may be made on the court's own motion or at a party's request. The court must take into account the complainant's need to have any person excluded, the interests of justice and any other relevant consideration.

ss 289U and 289UA do not affect other particular entitlements of a complainant in giving evidence: ss 289U(4) and 289UA(6).

New s 289V Alternative means of giving evidence

Complainant for a domestic violence offence is entitled, but may choose not to, give evidence by alternative arrangements (AVL, screens etc.). The court may order that alternative means should not be used only if there are special reasons in the interests of justice.

New s 306ZR Warning in relation to lack of complaint

In a trial for a domestic violence offence, where there is evidence or suggestion of delay/absence of complaint, the judge must warn the jury that such absence/delay does not necessarily indicate the allegation is false; there may be good reasons why a complainant may hesitate in, or refrain from, making a complaint; and must not warn the jury that delay is relevant to credibility unless there is sufficient evidence to justify such a warning. (As per s 294 *CPA* warning for 'prescribed sexual offences').

The warning may be combined, or given twice, if both a domestic violence and a prescribed sexual offence are alleged: new s 294(2).

Transitional: ss 294(2) and 306ZR do not apply to proceedings the hearing of which began before the commencement of the amendments.

New s 289VA Accused unrepresented – **commences 1.9.2021 or by proclamation whichever is sooner**

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.

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

Provisional orders

Police officers may issue a provisional ADVO where there is an interim or final order already in place and provide for the provisional order to be taken to be an application under Part 10: new s27(3A).

A provisional order must not decrease the protection afforded to the protected person by any existing ADVO: new s28B.

Where conditions between multiple orders are contradictory or inconsistent, the latest in time will prevail: new s 81A.

s 79B 'Apprehended domestic violence orders may be of indefinite duration'

For an application to vary or revoke an indefinite order by the person against whom the indefinite order is made, the court may grant leave for such an application if satisfied there has been a significant change in circumstances since the order was made/last varied, or it is otherwise in the interests of justice. This does not apply for a police-initiated order where a protected person is a child and leave must be sought under s 72B: new ss 79B(5), (6).

s 39 '*Final order to be made on guilty plea or guilt finding for serious offence'* - **To commence on proclamation (date to be fixed)**

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.

Harm to animals (pets) – **To commence on proclamation (date to be fixed)**

s 7(1)(c) (definition of 'intimidation') and 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.