**RECENT DECISIONS OF THE HIGH COURT OF AUSTRALIA**

**CRIMINAL LAW CONFERENCE**

**THURSDAY 2 AUGUST 2012**

## Introduction

1. This paper concentrates on decisions of the High Court of Australia where the Court is exercising appellate jurisdiction over intermediate courts of appeal on questions relevant to criminal law. All of the judgments discussed today (and others) and the transcripts of special leave applications and arguments on hearing are accessible through www.austlii.edu.au. The High Court website also now publishes in relation to each pending case the summaries of argument, chronologies, replies and links to the special leave application hearing transcript and the judgment below: www.hcourt.gov.au. When you go to the website, click on "Cases" at the top, and you will see "Current cases-submissions". This will give you a list of matters pending, click on the relevant matter number and the items will appear. This paper endeavours to focus on plurality judgments rather than dissents. The dissenting judgments are available for your scrutiny online.

2. I was originally invited here to give a paper on a single case that raised many issues- namely ***Burns v The Queen*** **[2012] HCA Trans 99 (2 May 2012), HCA Trans 100 (3 May 2012); [2012] HCA Trans 147 (20 June).** Mrs Burns appeal was upheld by the High Court on 20 June 2012 and orders were made on that date upholding her earlier appeal to the Court of Criminal Appeal, quashing her conviction for the offence of manslaughter and ordering the entry of a verdict of acquittal. Mrs Burns had been tried for the manslaughter of Mr Hay, in the District Court, with manslaughter being left against her on two limbs, namely unlawful and dangerous act manslaughter and manslaughter by criminal negligence. As the case has not yet been the subject of published reasons, I propose to simply outline the facts and the questions of law that were raised for consideration by the Court on the papers and in oral argument.

**Involuntary Manslaughter, Culpable and Dangerous Driving Causing Death**

3. Manslaughter by criminal negligence was most recently discussed by the High Court of Australia in the latest judgment in a criminal matter: ***King v The Queen*** **[2012] HCA 24.** There the High Court considered the Victorian provisions[1] relating to culpable driving causing death and dangerous driving causing death or serious injury. In the course of their judgment, the plurality (French CJ, Crennan and Kiefel JJ) also discussed involuntary manslaughter. ***Wilson v The Queen*** (1992) 174 CLR 313, held that there are "*two categories of involuntary manslaughter at common law: manslaughter by an unlawful and dangerous act carrying with it an appreciable risk of serious injury and manslaughter by criminal negligence*" (emphasis added) The plurality confirmed in ***King*** that the criterion of risk for criminal negligence was settled in ***Wilson*** to be "*a high risk that death or grievous bodily harm would follow*" (emphasis added*)*. Please note the different and higher level of risk for manslaughter by criminal negligence than for unlawful and dangerous act manslaughter.

4. Culpable negligence giving rise to criminal liability has to show a greater degree of negligence that that in a civil case, thus the use of the words "culpable", "criminal", and "gross" to describe the degree of negligence necessary for involuntary manslaughter[2].

5. In relation to s52A *Crimes Act* (NSW), the plurality in ***King*** held[3]:

> *"**Jiminez***[4] does not support the proposition that negligence is an element of driving at a speed or in a manner that is dangerous to the public. Consistently with that view, the Court of Criminal Appeal of New South Wales in *LKP*[5] held that momentary inattention can, depending upon the circumstances of the case, constitute driving in a manner dangerous to the public for the purposes of s52A. The Court of Criminal Appeal held that ***Coventry***, ***McBride*** and ***Jiminez*** all stand together. ***Buttsworth***[6] was not referred to in that decision. Nor was it referred to by the Court of Criminal Appeal in its decision in ***Saunders***[7] in 2002. In that case an appeal against a conviction for dangerous driving causing death was allowed on the basis that the trial judge did not elucidate to the jury "the concept of dangerous driving as distinct from negligent driving". In ***Gillett v The Queen***[8]

[1] ss318, 319 *Crimes Act* 1900 (Vic), cf s52A *Crimes Act* 1900 (NSW).
[2] *King v The Queen* [2012] HCA 24 at [25].
[3] *King v The Queen* [2012] HCA 24 at [34].
[4] *Jiminez v The Queen* (1992) 173 CLR 572.
[5] (1993) 69 A Crim R 159.
[6] [1983] 1NSWLR 658.
[7] (2002) 133 A Crim R 104.
[8] (2006) 166 A Crim R 419

McClellan CJ at CL, with whom Sully and Hislop JJ agreed, in a case involving an accused who drove while suffering from the medical condition of epilepsy, said:

> "The relevant question is whether the manner of driving, the condition of the vehicle, or the condition of the driver as a matter of objective fact made the driving a danger to the public."

That is not a question which assumes that some species of criminal negligence less than that necessary to make out manslaughter is an element of driving in a manner or at a speed which is dangerous to the public."

6. The plurality held in relation to the meaning of 'dangerous' in the context of dangerous driving:

> "The ordinary meaning of "dangerous" is "[f]raught with or causing danger; involving risk; perilous; hazardous; unsafe". It describes, when applied to driving, a manner or speed of driving which gives rise to a risk to others, including motorists, cyclists, pedestrians and the driver's own passengers. Having regard to the ordinary meaning of the word, its context in s 319 (Crimes Act (Vic)) and the purpose of s 319, as explained in the Second Reading Speech, negligence is not a necessary element of dangerous driving causing death or serious injury. Negligence may and, in many if not most cases will, underlie dangerous driving. But a person may drive with care and skill and yet drive dangerously. It is not appropriate to treat dangerousness as covering an interval in the range of negligent driving which is of lesser degree than driving which is "grossly negligent" within the meaning of s318(2)(b) of the Crimes Act (Vic). The offence created by s319 nevertheless takes its place in a coherent hierarchy of offences relating to death or serious injury arising out of motor vehicle accidents. It is not necessary to that coherence that the terms of the section be embellished by reading into them a requirement for proof of some species of criminal negligence.[9]"

7. The Victorian Court of Appeal in ***R v De Montero*** **(2009) 25 VR 694** was erroneous in its assessment of the risk of harm required, resting as it did on an assumed element of negligence in the offence of dangerous driving. The description in ***R v Buttsworth*** **[1983] 1 NSWLR 658** of dangerous driving as a species of negligent driving was also questioned. The plurality held in relation to ***De Montero***:

> "The risk of harm, on the approach taken by the Court of Appeal, was to be assessed according to whether and to what extent the driver had breached a duty of care. That approach was erroneous. It may be that in many if not most cases dangerous driving is a manifestation of negligence in the sense of carelessness. It may also be a manifestation of deliberate risk-taking behaviour. It may be that in some circumstances where particular attention is required to the road and to other road users, momentary inattention will result in a manner of driving that is dangerous within the meaning of the section. The assessment of whether the manner of driving was dangerous depends on whether it gave rise to the degree

[9] *King v The Queen* [2012] HCA 24 At [38]

of risk set out by Barwick CJ in ***McBride*** **(1966) 115 CLR 44** and adopted by the plurality in ***Jiminez*** **(1992) 173 CLR 572** in relation to s52A of the *Crimes Act* 1900 (NSW)" (footnotes added).

Earlier in the judgment this criterion was set out[10]:

"In ***McBride*****,** Barwick CJ said of the criterion in s52A[54]:

> 'This imports a quality in the speed or manner of driving which either intrinsically in all circumstances, or because of the particular circumstances surrounding the driving, is in a real sense potentially dangerous to a human being or human beings who as a member or as members of the public may be upon or in the vicinity of the roadway on which the driving is taking place.'

The Chief Justice's observation was expressly approved by the plurality in ***Jiminez v The Queen***…

In Barwick CJ's discussion, in ***McBride***, of the term "speed or in a manner dangerous to the public" the Chief Justice also said:

'This concept is in *sharp contrast to the concept of negligence*. The concept with which the section deals requires some serious breach of the proper conduct of a vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others. This does not involve a mere breach of duty however grave, to a particular person, having significance only if damage is caused thereby.' (emphasis added)"

8. Justices Heydon and Bell dissented. Justice Bell, discussed several NSW cases: see at [94]-[101]. In particular Bell J[11] felt that Justice Howie's statement in ***R v Borkowski*** (2009) 195 A Crim R 1 at 15 [56] correctly reflected the nature of the hierarchy of the offences as all incorporating varying degrees of negligence where he said:

> "As the law presently stands, there is a rational, logical and cohesive hierarchy of offences concerned with the infliction of death or serious injury by the use of a motor vehicle. The offences range from negligent driving causing grievous bodily harm ... through the driving offences in the *Crimes Act* [1900 (NSW)] to manslaughter by gross criminal negligence. All of these offences involve varying degrees of negligence, however the actual conduct may be described, ranging from a lack of care and proceeding through dangerousness to culpable negligence: ***R v Buttsworth*** ... . This structure is acknowledged by s 52AA(4) that provides that on a trial for an offence of manslaughter ... a jury can return a verdict of guilty of an offence under s 52A."

[10] *King v The Queen* [2012] HCA 24 at [32]-[33]
[11] *King v The Queen* [2012] HCA 24 at [99]

Practitioners with culpable or dangerous driving cases in their practice should take careful note of the plurality judgment and consider its application in the particular circumstances of their case.

**Involuntary Manslaughter**

9. Returning to involuntary manslaughter, the High Court will consider both limbs in the matter of ***Burns v The Queen*****.** The issues there were raised in the context of a drug supply transaction, self-administration or alleged assisted administration and the subsequent death of the drug taker. The facts of the case as summarised by Mrs Burns in her High Court appeal and as published online are set out below.

10. On 9 February 2007 at about 5.30pm, the deceased, a 32 year old man, attended the unit where she lived with her husband (Burns), to obtain methadone. Mr and Mrs Burns were prescribed methadone and were permitted to take several daily doses away from the clinic for their own consumption. They also sold their methadone to others. The deceased was a friend of Burns but only an acquaintance of the appellant.

11. Ms Felicity Malouf attended the unit on 9 February 2007 to purchase methadone. When she arrived the deceased was there with Burns. The appellant was in another room. There were no indicia of ingestion of methadone by injection. Ms Malouf saw that the deceased was *'out of it'* or *'on the nod'*. (Dr Roberts gave evidence that *"on the nod"* was *"a colloquialism which means that someone is observably sleepy. That they are tired…a slight degree of drowsiness"*)[12]. Burns told Ms Malouf that the deceased had either *'wanted'* or *'had taken'* some methadone. There was no evidence that the appellant was present when this may have occurred: CCA [77], [78].

12. Ms Malouf and Burns got the deceased up and assisted him to walk in a circle five or six times: SU36. Mrs Burns was still in another room. Burns told the deceased *'We're going to call an ambulance'* but the deceased said *'No, no I'm right'* and *'I'm alright….I don't need an ambulance, I'm alright.':* SU36; CCA [78]. No ambulance was called.

[12] Dr Roberts T343.14-.15.

13. Mrs Burns then came into the room. The deceased was still *'out of it'* or *'on the nod':* CCA [78] [79], Ex N. Mrs Burns said *'he can't be here like that.'* She spoke to Burns in an angry tone. Burns said *'Come on mate, it's time to go.....'*: SU36. Burns said he would put the deceased outside and keep an eye on him: CCA [79]. The deceased got up without assistance and left. Burns followed him out: SU36; CCA [80]. The period during which Mrs Burns and the deceased were in the same room was approximately 3-4 minutes[13].

14. Ms Malouf and Mrs Burns remained in the unit: CCA [80]–[91]. Ms Malouf saw nothing to suggest the deceased had consumed methadone in the unit. She did not consider it unusual for someone to be sleepy after consuming methadone, was not overly concerned about his condition and did not consider he required an ambulance: SU38.

15. Burns discovered the deceased in a toilet block at the rear of the unit the following day: CCA [11]. To access the toilet block the deceased must have walked down a number of stairs, crossed a yard and walked up more stairs. No syringes or drug paraphernalia were found in the area of the back toilet on the day the deceased was located: CCA [12].

16. Several weeks later police installed a listening device in the Burns' home. Discussions were recorded between the Mr and Mrs Burns referring to the deceased having overdosed and the deceased being *"out of it"*. Mrs Burns was recorded saying they had to *"get rid of those things"*, that the deceased had *"told them nothing",* that *"he had the best outfit, no less"* and he had assured them *"no I'm all right. I'm all right I'm ok"*. There was also a conversation where the Mrs Burns had said *"mixing two things"* was *"exactly what happened"*. She said to Burns: *"I told you not to do him no more, you had to do it again…"* and he replied: *"I said to you Natalie, its all right, I will look after him, I'll watch him."* In another conversation she asked Burns *"…and you got to look after him, you did it again didn't you…"*: CCA [17]–[25], [29].

[13] Ms Malouf T121.48-122.2.

17. When interviewed by police, Mrs Burns said that the deceased was either drunk or *'out of it'* when he was at the unit. '*He kept nodding off. His eyes would close'*: SU 34-35; CCA [27][28]. She told police that Ms Malouf was present when the deceased had arrived and that Ms Malouf had suggested they call an ambulance but the deceased had refused: SU34. Mrs Burns said she had told Burns to ask the deceased to leave their unit. Burns had asked him to go, saying *'It's not right you coming over like this.'* The deceased said: *"Don't worry about me, I'll be right",* got up and walked out with Burns: CCA [27] [28].

18. A search of the appellant's premises a month after the deceased's death found syringes and tubes known as *"butterfly clips"* which could be used to inject methadone: CCA [31].

19. On the day of his death, the deceased had attended his psychiatrist, Dr Roberts, leaving between 4.30pm and 5pm. He was noticeably drowsy and told Dr Roberts that he had consumed Endone[14]: CCA [38]–[40]. A side effect of Endone is drowsiness[15].

20. Toxicology results confirmed the deceased had consumed clonazepam[16], cannabis, fluoxetine[17], methadone and Olanzapine[18]. Endone was not detected.

21. Dr Duflou, a forensic pathologist, was of the opinion that the deceased died from the effects of a combination of methadone and Olanzapine. Dr Duflou considered it a 'remote possibility' that Olanzapine alone caused death: SU43. Toxicology revealed Olanzapine at a high but not lethal level[19]. Neither dosage, as detected by the toxicology results was necessarily fatal but they had an additive effect on each other: SU41;CCA [54]. In combination the two drugs can cause unconsciousness and respiratory depression: CCA [59]. Both Dr Duflou and Mr Farrar, a pharmacologist, stressed that different people have different reactions to methadone. Even if

[14] Endone is a form of oxycodeine, which is a strong opiate.
[15] Endone had been prescribed to the deceased by his general practitioner.
[16] A benzodiazepine that is used as an anti-convulsant.
[17] An antidepressant.
[18] Sold under the brand name 'Zyprexa'. The deceased had been prescribed this medication. He was to take two tablets each night. An empty packet previously containing 60 tablets was found in his hotel room.
[19] Olanzapine had been found at a level of 0.5mg/L, about twenty times the expected dose. A fatal dose would be expected to be in excess of 1mg/L: CCA [59].

methadone was injected, respiratory depression could have occurred slowly over a period of time. The risk was greater if the deceased was not tolerant to methadone and if the methadone was injected. Dr Duflou said it was possible that the methadone had been injected. There was no obvious needle puncture mark, however upon dissection, he observed bleeding indicative of an injury sustained within 8 to 12 hours prior to death: CCA [14]. The level of methadone was not extremely high[20] and *"neither of the drugs on their own were necessarily fatal":* CCA [54] [60]. The CCA found that the deceased had consumed methadone either orally or by injection: CCA [58], [61], [67], [68], [157].

22. Dr Duflou observed evidence of earlier pneumonia that could have been present before the drugs were ingested or caused by the deceased's inability to breathe because of the ingestion of drugs: CCA [56]. At autopsy evidence of a prior head injury with significant brain damage was observed: CCA [55]. There was no evidence the appellant knew the deceased was an inexperienced methadone user, had suffered brain damage, had pneumonia or the nature of any other substances he had consumed.

23. Mr Farrar considered it 'very likely' that the combination of methadone and Olanzapine caused death, although he could not rule out that Olanzapine alone caused death: CCA [71]. He considered this to be *'most unlikely':* SU 43. He did not believe it was possible to establish whether either the methadone or the Olanzapine alone or solely would have been sufficient to cause death. The adverse affects of methadone are readily reversible with the administration of Narcan by an ambulance officer: CCA [72]. If it was swallowed, the methadone was a therapeutic quantity, not a toxic quantity[21]. Even assuming injection, it was not possible, in Mr Farrar's opinion, to calculate what the methadone concentration would have been at the time it was administered. The Olanzapine in the deceased's blood was consistent with a much larger dose than prescribed and could have caused drowsiness[22].

[20] The methadone level observed in the deceased was 0.2mg/L, was below the documented toxic range of 0.4 to 1.8mg/L where death could be attributed purely to methadone toxicity: Dr Duflou 320.49-.50, 321.21-.23.
[21] Summing Up (SU) 49.
[22] It was the prosecution case that this had been consumed prior to his attendance on the Burns and that it explained the deceased's drowsiness when he attended Dr Roberts' rooms earlier that afternoon.

24. The prosecution called evidence from clinic staff that clients were advised of the dangers of sharing methadone and that it was not to be injected or used in conjunction with prescription medication or sleeping medication.

25. In his closing address the prosecutor described the unlawful and dangerous act based as being supply, namely a joint criminal enterprise to supply the deceased with methadone. He then went on to say *"Now if you find that the accused and/or her husband injected [the deceased] or helped him to inject or take the drug, then criminal responsibility for the charge of the unlawful killing of David Hay on the basis of dangerous and unlawful act is established".* This was objected to as a change of case by trial counsel. The trial directions did not adopt injection (administration[23]) as the basis of the unlawful and dangerous act, rather this was said to be supply simpliciter[24], however the prosecutor's argument was repeated by the trial judge. On the criminal negligence limb both the failure to call for assistance and the ejection of the deceased from the home were relied on as criminally negligent omissions.

26. On 14 August 2009 a jury convicted the appellant on both the count of supply methadone and the count of manslaughter. Her husband Mr Burns, who had been tried separately, had also been convicted of manslaughter. He died in custody shortly after her conviction. In the Court of Criminal Appeal, Mrs Burns did not contest her conviction for supply, on the basis of being involved in a joint criminal enterprise with her husband to supply[25] methadone, however she appealed her manslaughter conviction. The Court of Criminal Appeal (McClellan CJ at CL, Schmidt J and Howie AJ) upheld that conviction on both limbs of manslaughter.

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[23] ss12-14 *Drugs Misuse and Trafficking Act* 1985 (NSW), see also definition of 'administer' in s5 DMT *Act*: "In this Act, a reference to the use or administration of a prohibited drug includes a reference to the ingestion, injection and inhalation of a prohibited drug, the smoking of a prohibited drug, the inhalation of fumes caused by the heating or burning of a prohibited drug and any other means of introducing a prohibited drug into any part of the body of a person."

[24] s25 *Drugs Misuse and Trafficking Act* 1985 (NSW), see also definition of supply in s3 DMT *Act: "**supply** includes sell and distribute, and also includes agreeing to supply, or offering to supply, or keeping or having in possession for supply, or sending, forwarding, delivering or receiving for supply, or authorising, directing, causing, suffering, permitting or attempting any of those acts or things".*

[25] Described in the written directions as: *"handing over or giving an amount of the drug to another person. It is not necessary for the Crown to prove that there was a sale, or if or when the person to whom the dug was supplied consumed it."* (WD p.4).

27. The facts of this case raised several issues for consideration. On manslaughter by gross criminal negligence- questions such as: Was there a duty of care owed by Mrs Burns to the deceased? If so, how did it arise and what was its scope? Did she breach any such duty of care? How did she breach it? By act or by omission? If by act what was that act? If by omission what was the omission? Did the act or omission involve a high risk that death or grievous bodily harm would follow? Is there any difference in the causation test depending on if it was by act or omission? What is that test? Applying that test did the act/omission of Mrs Burns cause the death of the deceased or was it his own act? Were his own actions of either taking the drug, refusing the ambulance or leaving the apartment voluntary? If so, did any of those acts sever causation? Did they need to be rational acts, as the trial judge directed? What level, if any, of knowledge of the substance that he was consuming was necessary? Did it include knowledge of its effects? What if the deceased was affected by brain injury or other drugs? What if this was the case unbeknownst to Mrs Burns?

28. There were also questions on unlawful and dangerous act manslaughter. What was the act said to be unlawful and dangerous? Was it both unlawful and dangerous? Did it carry with it the level of risk required for this limb of involuntary manslaughter (an appreciable risk of serious injury)? Did/could that act cause the death of the deceased or was it the voluntary act of the deceased himself that caused his death?

29. The issues as framed by the parties in written submissions before the High Court were as follows:

Burns v R
Concise statement of issues on the appeal

APPELLANT'S SUBMISSIONS [MRS BURNS]

1. In a case of manslaughter by criminal negligence, does a drug supplier owe a duty of care to a drug recipient? If so, what is the scope and content of that duty?

2. Were the directions on causation for both limbs of involuntary manslaughter correct? What is the test of causation in a case of criminal negligence by omission?

RESPONDENT'S SUBMISSIONS [DPP]

1. Whether the supplier who acts in concert with the recipient to effect the recipient's ingestion of a prohibited drug is liable as a principal for the unlawful and dangerous act of self-administration and liable for manslaughter where death results.

2. Whether the supplier who acts in concert with the recipient to effect the recipient's ingestion of a prohibited drug can be said to have contributed causally to the death that results from the recipient's act of ingestion.

3. Whether the supplier who by the supply of a prohibited drug and by assistance in its administration or other conduct creates, or contributes to the creation of a life threatening situation owes a duty of care to the recipient whose life is endangered by the situation created."

30. Many important authorities were raised for the consideration of the High Court. Cases of note include: ***R v Taktak*** **(1988) 14 NSWLR 226;** ***R v Stone and Dobinson*** **[1977] 2 All ER 341;** ***R v Beardsley*** **113 NW 1128 (1907);** ***R v Sinclair, Johnson and Smith*** **(1998) WL 1044437; 148 NLJ 1353 at p.6 (Court of Appeal, England);** ***R v Evans*** **[2009] 1 WLR 1999;** ***R v Lawford; R v Van de Wiel*** **(1993) 61 SASR 452;** ***R v Taber; R v Styman; R v Styman*** **(2002) 56 NSWLR 443;** ***Miller v Miller*** **(2011) 242 CLR 446;** ***CAL No 14 Pty Ltd and Another v Motor Accidents Insurance Board; CAL No 14 Pty Ltd and Another v Scott*** **(2009) 239 CLR 390 at [52]-[55];** ***R v Kennedy (No 2)*** **[2008] 1 AC 269;** ***R v Dias*** **[2002] 3 Crim App R 96;** ***MacAngus v HM Advocate; Kane v HM Advocate*** **[2009] HCJAC 8;** ***Royall v R*** **(1991) 172 CLR 379**. I intend to explore these cases in more detail in the presentation today.

31. Will the High Court answer all these questions? What will the High Court have to say about these authorities and their application in this jurisdiction? We are yet to see, however I will endeavour to outline the arguments on behalf of both the respondent DPP and the appellant on some aspects of the appeal as the judgment may have broader implications for involuntary manslaughter and causation, particularly in cases involving drug supply and perhaps some instances of assisted administration.

**Omissions and the Criminal Code (Cth)**

32. In ***CDPP v Poniatowski,*** **(2011) 244 CLR 408** the High Court considered omissions under the *Criminal Code* (Cth). Section 135.2 (1), s 4.1(2) and s4.3(a) were considered as to "an omission to perform an act". Section 4.3 (a) provides that an omission to perform an act can only be a physical element of an offence if the law creating the offence makes it a physical element of the offence. French CJ, Gummow, Kiefel and

Bell JJ held that the law creating the offence in s135.2 (1) does not make the omission of an act, in that case, a failure to advise Centrelink of her receipt of payments of commission from her employer, a physical element of the offence.

**Expert Evidence**

33. In ***Dasreef Pty Ltd v Hawchar*** **(2011) 243 CLR 181,** the High Court unanimously held that where an expert purports to give evidence not based on specialised knowledge, the evidence is inadmissible. The majority confirmed the relevance of the analysis of Gleeson CJ in ***HG v The Queen*** **(**1999) 197 CLR 414 at [41] and of Heydon JA in ***Makita (Australia) Pty Ltd v Sprowles*** (2001) 52 NSWLR 705 at [85] when determining whether the opinion of a witness is "based on specialised knowledge or belief"[26]. Heydon J, in a detailed judgment, held that for an expert opinion to be admissible at common law or under s79 *Evidence Act*, the expert must disclose the facts and assumptions on which his opinion is founded, those facts and assumptions must be proved by admissible evidence, and the expert must give a statement of reasoning to show how the facts and assumptions relate to the opinion stated so as to reveal that the opinion was based on the expert's expertise.

34. It is worth reproducing what was said by the plurality in ***Dasreef*** about s79 *Evidence Act* in paras [37]-[38]:

> "[37] The admissibility of opinion evidence is to be determined by application of the requirements of the Evidence Act rather than by any attempt to parse and analyse particular statements in decided cases divorced from the context in which those statements were made. Accepting that to be so, it remains useful to record that it is ordinarily the case, as Heydon JA said in *Makita* at [85], that "the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded". The way in which s 79 (1) is drafted necessarily makes the description of these requirements very long. But that is not to say that the requirements cannot be met in many, perhaps most, cases very quickly and easily. That a specialist medical practitioner expressing a diagnostic opinion in his or her relevant field of specialisation is applying "specialised knowledge" based on his or her "training, study or experience", being an opinion "wholly or substantially based" on that "specialised knowledge", will require little explicit articulation or amplification once the witness has described his or her qualifications and experience, and has identified the subject matter about which the opinion is proffered.

[26] *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [37]-[43].

[38] But that was not this case.[27]"

35. Unfortunately, it is not the case in many criminal trials. I would like to stress the importance of going back to basics when expert evidence is relied on in a criminal trial. Sometimes a simple (but close) analysis of very basic matters pertaining to expert evidence is absolutely crucial to arguments and determinations about admissibility of evidence.

36. Firstly, in order for evidence to be admissible under s 79, it must be established that there is a body of specialised knowledge to which the evidence is referable[28]. As Gaudron J noted in ***Velevski v The Queen*** **(2002) 76 ALJR 402** at [82][29]: *"the 'concept of 'specialised knowledge' imports knowledge of matters which are outside the knowledge or experience of ordinary persons and which is 'sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience"*[30].

37. Is there a recognised science in the area claimed to be the subject of expert opinion? If so, does the expert have specialised knowledge in that area? Does the expert give an opinion on something you have never heard of before or in an area that goes beyond his usual experience? Look into it- you may find either that there is no established 'science' or that your expert does not have the specialised knowledge to express the opinions that he/she purports to express: see for example ***Morgan v The Queen*** **[2011] NSWCCA 257** ("body-mapping"); ***Tiwary v R*** **[2008] NSWCCA 319**. What about recognised areas of expertise, such as "implement marks", some areas of ballistics, SIDS, "baby-shaking", forensic linguistics, post-mortem blood sample analysis in infants or children, bone density, low template DNA testing[31]. Is there a recognised 'science'? What is it? What

[27] In *Dasreef* the expert was a chartered chemist and a professional engineer, who failed to give a statement of his reasoning in relation to exposure to silica on a worksite sufficient to demonstrate that his opinion was wholly or substantially based on his specialised knowledge.
[28] *HG v The Queen* (1999) 197 CLR 414 at 427; *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 per Allsop J at [670]-[671].
[29] While Gaudron J was in dissent as to the body of knowledge having to be 'reliable' , Gummow and Callinan JJ appeared to accept at [154] that it must *"be established that there is a reliable body of knowledge and experience"*.
[30] See *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ, cited with approval in *HG v The Queen* [1999] *HCA 2;* (1999) 197 CLR 414 at 432 [58] per Gaudron J, and adopted in *R v Makoare* [2001] 1 NZLR 318 at 324 [23] per Blanchard J on behalf of the New Zealand Court of Appeal. See also *Osland v The Queen* [1998] HCA 75*;* (1998) 197 CLR 316 at 336 [53] per Gaudron and Gummow JJ.
[31] In relation to low template DNA testing, see DNA paper, Judge Haesler SC given on 24 March 2012 at the PD Conference and published on the Public Defender's website at the link to "Conferences"

are its limits? Has 'science' progressed in these areas? Does the expert really have the specialised knowledge to give the opinion?

38. Relevant opinions based on relevant expertise and coherent and ordered assumptions should be admitted into evidence[32]. Speculation on possible inferred facts is inadmissible, as opposed to opinion as to probable inferred facts[33]. The opinion has to be based on the specialised knowledge and not bare "ipse dixit"[34]. If a fact upon which a particular opinion was based is not established by the evidence, then the opinion may have little or no weight[35]. If an expert witness has approached his/her task with preconceptions of the guilt of an accused, seen his task as one of marshalling evidence to assist the prosecution to prove guilt, gathering evidence to enable prosecutors to bring proceedings and/or been involved too closely in investigating an offence, the consequence is that his/her opinions on controversial issues are rendered of minimal if any weight[36]. This in turn bears upon questions of admissibility under s137.

39. In NSW, the **Expert Code of Conduct**, found in Schedule 7 to the *Uniform Civil Procedure Rules* 2005 applies to evidence in criminal proceedings in the Supreme Court by virtue of Part 75 Rule 3J of the Supreme Court Rules 1970. The District Court, in s171D *District Court Act,* adopts the procedure of the Supreme Court for criminal trials unless other provision is made. In the Local Court directions frequently incorporate mandatory adoption of the Code of Conduct. The Code applies to both expert reports and oral evidence of expert witnesses. A breach of the Code may render an expert's evidence inadmissible, however there are varying appellate and single Supreme Court justice decisions on whether this is the case. In ***Wood v R* [2012] NSWCCA 21** it was held unanimously that *"Where an expert commits a sufficiently grave breach of the Code, a court may be justified in exercising its discretion to exclude the evidence under s135 or 137 Evidence Act*"[37]. This may not be surprising as the probative value of the evidence may be rendered very low by virtue of the breach.

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[32] *Evans Deakin* (above) at [679]; *ASIC v Rich* (2005) 190 FLR 242 at 308 [280] (i).
[33] *Straker v The Queen* (1977) 138 CLR 649; 51 ALJR 690 at 693 per Barwick CJ (see also pp. 694-6)
[34] s.79, *R v HG* (1991) 197 CLR 415, *R v Tang* (2006) 65 NSWLR 681 at 712, *Makita* at [87]; *R v Gray* [2003] EWCA Crim 1001 at [16].
[35] *Ramsay v Watson* (1961) 108 CLR 642 at 648-649, *Paric v John Holland (Construction) Pty Ltd* (1985) 59 ALJR 844 at 846; *ASIC v Rich* [2005] NSWCA 152 at [155].
[36] *Wood v R* [2012] NSWCCA 21 at [715]-[717], [730]; as to bias see also *Li v The Queen* (2003) 139 A Crim 281 at [71], *Haoui v R* [2008] NSWCCA 209 at [127], where evidence has been admissible despite 'bias'.
[37] *Wood v R* [2012] NSWCCA 21 at [729].

40. Subsequently, further consideration was given to expert evidence and ss135 and 137 by the High Court in ***Aytugrul v The Queen*** **(2012) 86 ALJR 474**. ***Aytugrul*** concerned the admissibility of some of the evidence led at trial about a DNA analysis, namely mitochondrial DNA testing. The evidence concerned two matters, firstly that the appellant could have been the donor of a hair found on the deceased's thumbnail and secondly how common the DNA profile found in the hair was in the community. The latter result was expressed in evidence in two ways: (1) as a frequency ratio (also known as a random occurrence ratio or a frequency estimate); and (2) as an exclusion percentage.

41. The frequency ratio was summarised by the plurality in High Court (French CJ, Hayne, Crennan, Bell JJ) as follows: *"that one in 1.600 people in the general population (which is to say the whole world) would be expected to share the DNA profile that was found in the hair"*[38].

42. The exclusion percentage was summarised as *"that 99.9% of people would not be expected to have a DNA profile matching that of the hair"*[39].

43. The exclusion percentage was the subject of challenge on the appeal. It was said that the appellant submitted on the appeal that s137 and/or s135 required the exclusion of the evidence expressed in this way in the trial. The argument that had proceeded in the Court of Criminal Appeal was described by the plurality as the appellant urging a general rule that an exclusion percentage would in every case be inadmissible. In this context the plurality held that:

[38] Trial counsel gave further content to the frequency ratio by putting to the expert an example based on a group of 16,000 people attending a football match. Trial counsel put to the expert that "on one day, with 16,000 people in the football stadium, you might have 100 people with the same mitochondrial DNA as Mr Aytugrul, to which the expert replied, "And on other days you might have none." Trial counsel then asked: "So, is it an average?", the expert replied: "Yes".

[39] *Aytugrul v The Queen* (2012) 86 ALJR 474 at [2], [16]; the jury were directed *"none of [the experts] are saying the mitochondrial DNA profile found in the hair establishes that it definitely came from him…".* One expert gave evidence that among Turkish people you would expect to find the profile in something between 1 in 50 and 1 in 100 people or less, another you would expect it in 1 in 50 or less, that is you would not expect it in at least 98% of Turkish people. (There was even less chance in the general population).

> "[20] No sufficient foundation was laid, at trial or on appeal (whether to the Court of Criminal Appeal or this Court) for the creation or application of a general rule of the kind described. It may readily be accepted that, as McClellan CJ at CL demonstrated[40], research has been undertaken into whether some "forms of expressing [DNA] statistics carry greater persuasive potential than others". It is evident that numerous articles have been published in well-respected journals setting out the opinions of authors who have undertaken study of and experiments in relation to questions of this kind. But it is important to recognise that the relevant field of study is not the law but psychology. And it was not demonstrated (whether at trial, in the Court of Criminal Appeal or on appeal to this Court) that the methods used in the studies that have been made, or the results expressed in the articles to which reference was made, are methods or results that have attained such a degree of general acceptance by those skilled in the relevant disciplines as would permit a court to take judicial notice of some general proposition about human understanding or behaviour said to be revealed by the published literature (emphasis added)".

44. That is, the point ultimately taken was not properly founded in the evidence tendered in the Courts below, nor were the methods used in the studies demonstrated to be an established or accepted "science" such as to permit the court to take judicial notice of a proposition about human behaviour or understanding. Heydon J also criticised the failure to introduce the material through expert witnesses[41].

45. The plurality also held that:

> "[22] No proof was attempted, whether at trial or on appeal, of the facts and opinions which were put forward (by reference to the published articles) as underpinning the adoption of some general rule that expressing the results of DNA analysis as an exclusion percentage will always (or usually) convey more to a hearer than the evidence allows regardless of what other evidence is given about frequency ratios or the derivation of exclusion percentages. Yet that was the basis on which it was asserted that a general rule should be established to the effect that evidence of exclusion percentages is *always* inadmissible. And absent the proof of such facts and opinions (with the provision of a sufficient opportunity for the opposite party to attempt to controvert, both by evidence and argument, the propositions being advanced) a court cannot adopt such a general rule based only on the court's own researches suggesting the existence of a body of skilled opinion that would support it (emphasis added).
>
> [23] The question that was presented for consideration in this matter must be identified with greater specificity than is permitted by general reference to how the human mind can or commonly will deal with statistical information. In this case, the question was whether (the) evidence of an exclusion percentage

[40] *Aytugrul v R* (2010) 205 A Crim R 157 at 176 [97].
[41] *Aytugrul v R* (2012) 86 ALJR 474 per Heydon J at [68]-[70], see also [71]-74] about the uses of such material and the preference for it to be presented through expert witnesses, during a pre-trial hearing to determine admissibility.

> accompanied by both reference to the relevant frequency ratio and an explanation of how the exclusion percentage was derived from the frequency ratio was evidence whose probative value was outweighed by the danger of unfair prejudice (s137) or was evidence whose probative value was substantially outweighed by the danger that it might be unfairly prejudicial to the defendant or, perhaps, be misleading or confusing."

46. So here again, we see the High Court emphasising some rigour in the admissibility and use of opinion evidence.

47. When regard was had to the specific evidence in the appeal, it was held that the exclusion percentage was not unfairly prejudicial because of: the relevant content given to the figure by the frequency ratios that were stated in evidence; the trial judge emphasising to the jury that the evidence did not and was not said to establish that the mitochondrial DNA profile definitely came from the accused; and further, in that context, there was no risk of rounding the figure up to certainty of 100 %[42].

48. The plurality overruled the approach in ***R v GK*** **(2001) 53 NSWLR 317** at 341 [100] taken by Sully J of assessing the danger of unfair prejudice only by reference to the exclusion percentage. Rather, the whole of the evidence that is to be given, particularly by the witness to whose evidence objection is to be taken is to be taken into account on a consideration of s137.

49. A glimmer of hope was left open for practitioners seeking to have such opinion evidence excluded in para [38] of the judgment:

> "[38] There may be cases where evidence given of exclusion percentages may warrant close consideration of the application of s135 or 137 (or, where applicable, equivalent common law doctrines or statutory provisions). These reasons are not to be read as suggesting to the contrary. Evidence given about the results of DNA analysis is evidence about comparisons between identified samples and one or more databases. The results of those comparisons can be expressed qualitatively or quantitatively. If expressed quantitatively there are assumptions and approximations made which often (perhaps always) require elucidation and explanation to make plain what are the limits to the opinion that is being expressed as a number or range of numbers. Just as evidence of an opinion given by an expert must, in order to satisfy the requirements of admissibility in s79(1) of the *Evidence Act*, be "presented in a form which

[42] *Aytugrul v The Queen* (2012) 86 ALJR 474 at [24].

> makes it possible to answer" the question posed by that provision[43], it will usually be important, even necessary, that the evidence provides the jury with so much of the expert's "specialised knowledge" as the jury requires properly to understand the opinion expressed – and what it can and cannot demonstrate – and that this specialised knowledge be related to the facts of the case[44]."

50. This passage may have important broader implications for expert evidence and admissibility under s79. The reference to the frequent requirement for *"elucidation and explanation to make plain what are the limits to the opinion that is being expressed as a number or range of numbers"* is very helpful authority for arguing that an expert should give evidence that makes plain the limitations of his/her opinion (emphasis added). The plurality state that s79 (1) is such that in order to satisfy its requirements, it will usually be necessary for the expert evidence to include elucidation of what *"it can and cannot"* demonstrate (emphasis added). Again, an expert, should give evidence to ensure that the opinion expressed is not misleading or overstated, what it cannot demonstrate should be made clear to the jury.

**Joint Criminal Enterprise and Accessorial Liability**

51. In **Handlen v The Queen; Paddison v The Queen (2011) 86 ALJR 145** the High Court discussed the Criminal Code (Cth) **"the Code"**, joint criminal enterprise and the difference between accessorial liability and liability pursuant to a joint criminal enterprise. Liability for an offence committed pursuant to a joint criminal enterprise is direct or primary liability[45]. Accessorial liability is ancillary. The plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) held in *Handlen* that at the date of the appellants' trial, participation in a joint criminal enterprise was not a basis for the attachment of criminal responsibility respecting a substantive offence under the laws of the Commonwealth[46]. This had also been accepted by the court below (the Court of Appeal (Qld)), however the proviso had been applied in that Court[47]. Heydon J would have dismissed the appeal.

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[43] *HG v The Queen* (1999) 197 CLR 414 at 427 [39]; *Dasreef Pty Ltd v Hawchar* (20011) 85 ALJR 694 ay 705.
[44] *Alford v Magee* (1952) 85 CLR 437 at 466.
[45] *Handlen v The Queen; Paddison v The Queen* (2011) 86 ALJR 145 at [4]; *Osland v The Queen* (1998) 197 CLR 1 at 6-7.
[46] *Handlen v The Queen; Paddison v The Queen* (2011) 86 ALJR 145 at [2], [4]-[6].
[47] *R v Handlen* (2010) 207 A Crim R 50 at [55]-[67], [72].

52. Since the trial of Handlen and Paddison, the Code has been amended by the insertion of s11.2A which now provides for criminal responsibility in circumstances involving the joint commission of a substantive offence[48]. However, at the time of their trial there was no such provision and the Code was (and is) exhaustive as to criminal responsibility: Chapter 2, s2.1, s2.2[49].

53. The relevant provision with which the appellants were said to bear criminal responsibility was 11.2 the Code, headed "Complicity and common purpose". Subsection (1) states:

"A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly."

54. Under s11.2, ancillary liability has to be proved. This was different from proof of what was referred to by the prosecution in the case as a "group exercise" to import drugs. The distinction between joint criminal enterprise an accessorial liability is important as there are different elements to an offence as accessory, there are different rules of admissibility of evidence in cases of joint criminal enterprise[50] and different uses to which evidence may permissibly be put by the prosecution. The plurality (French CJ, Gummow, Hayne Crennan, Kiefel and Bell JJ) held that:

> "[38] Proof of the existence of the group exercise to import drugs into Australia was irrelevant to proof of the appellant's guilt. No directions respecting proof of accessorial liability under s11.2 the Code were given."
>
> ….
>
> "[47] The conduct of the trial on this basis conferred an evidentiary advantage on the prosecution, leading to the admission of evidence to prove the existence and scope of the group exercise. Ultimately, the issue posed for the jury was whether the prosecution had proved that the appellants were parties to the group exercise when this was irrelevant to proof of their complicity in Reed's offences."

55. The plurality affirmed that the words "aids", "abets", "counsels" and "procures" are to be understood as having their established legal meaning[51]. The plurality held that

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[48] s11A commenced in 2010.
[49] *Handlen v The Queen; Paddison v The Queen* (2011) 86 ALJR 145 at [5].
[50] For example the acts and declarations of all participants to a joint criminal enterprise are admissible to prove the accused's participation in it's commission subject to reasonable evidence being adduced of pre-concert: *Ahern v The Queen* (1988) 165 CLR 87 at 99; *Tripodi v The Queen* (1961) 104 CLR 1 at 7; see also the terms of s87 *Evidence Act* 1995 (NSW).
[51] *Handlen v The Queen; Paddison v The Queen* (2011) 86 ALJR 145 at [6]; *R v LK* (2004) 241 CLR 177.

*"Each is used to convey the concept of conduct that brings about or makes more likely the commission of an offence"*[52]. See also the earlier decision of *R v LK* (2010) 241 CLR 177 on this point as it applies to conspiracy. The Code does not adopt the distinction made between an accessory before the fact who counsels and procures the commission of the substantive offence and accessories at the fact who aid and abet the commission of the offence- they are all taken to have committed the offence and to be punishable for it.

Pending cases on joint criminal enterprise

56. Special leave has been granted to appeal from a decision of the NSWCCA in the matter of ***Cooper v The Queen*** **[2011] NSWCCA 258**. This judgment was handed down 3 days before the judgment in *Handlen* was delivered by the High Court. In *Cooper*, the CCA held that there was no evidence to support a joint criminal enterprise for the offence of murder and that liability on this basis should not have been left to the jury (at [72]-[73]), however the proviso was applied (at [249]-[257]). At the special leave application, the Director was called on first to say why special leave should not be granted. Special leave was granted and the matter is set down for hearing on 9 August 2012.

57. The High Court has heard argument in the matter of ***Likiardopoulos v The Queen*** **[2012] HCA Trans 129 (31 May 2012)** and judgment is reserved. The issue in that case is whether derivative liability by way of counselling or procuring or being an accessory before the fact to an offence of murder is available as a mode of liability in circumstances where the "principals" asserted to be the principals in the murder trial of the accessory have pleaded guilty to either manslaughter or being an accessory after the fact to manslaughter in proceedings that do not form part of the trial. This judgment will consider the impact of an exercise of prosecutorial discretion to accept a guilty plea to lesser offences, which involves many variables additional to the state of evidence against those persons.

[52] *Handlen v The Queen; Paddison v The Queen* (2011) 86 ALJR 145 at [6]; *Giorgianni v The Queen* (1985) 156 CLR 473 at 493; 59 ALJR 461 per Mason J, citing Cussen ACJ in *R v Russel* [1933] VLR 59 at 67.

**Husbands and Wives**

58. The High Court has paid some attention to the nature of relationships between husbands and wives in two areas that are relevant to criminal law. The High Court confirmed in ***PGA v The Queen*** **(2012) 86 ALJR 623** that Hale's statements published in 1736 concerning the common law of spousal rape ("*encapsulated in the bald proposition that a husband cannot be guilty of a rape he commits upon his wife"*[53]*)* derived from the nature of marriage at a particular time in history, a time when marriage ended only with death or an act of Parliament. The plurality (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) held that from at least 1935 and probably earlier (and certainly 1963 the relevant date of the alleged rapes), at common law a husband could be guilty of a rape committed by him on his lawful wife[54]. The plurality held that conjugal rights by the 19th century, did not extend to abuse and degradation of your wife and that in the Australian colonies before 1935 conjugal rights were identified as requiring matrimonial cohabitation and no more. Heydon J dissented. He held that the common law provided an immunity for a husband as the common law as stated by Hale had was still in force in 1963. He considered that while the common law was demeaning to women, this was no reason for the husband to suffer the conviction when he was entitled to the immunity. Bell J would also have upheld the husband's appeal and agreed with Heydon's conclusion, although reasoning differently. She noted in her judgment:

> "There does not appear to have been a single case in which a husband had been prosecuted for the rape of his wife with whom he was living in any common law jurisdiction at the date of the conduct with which the appellant is charged. By that date, as will appear, the justification for the immunity may have come to rest more upon the notion that the criminal law ought not to intrude into the marital bedroom, than upon the fiction of the wife's irrevocable consent.[55]"

59. In ***ACC v Stoddart*** **(2011) 85 ALJR 66**, French CJ and Gummow J, and in a separate judgment Crennan, Kiefel and Bell JJ, held that there is no privilege against spousal incrimination, that being different from the compellability[56] of a spouse in a criminal case. Heydon J dissented and favoured the preservation of spousal immunity:

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[53] *PGA v The Queen* (2012) 86 ALJR 641 at [4].
[54] In NSW, s61T *Crimes Act* 1900 (NSW) provides that marriage is no defence to sexual assault , aggravated sexual assault, aggravated sexual assault in company, sexual assault with intent to have intercourse and attempts of those offences.
[55] *PGA v The Queen* (2012) 86 ALJR 641 at [173].
[56] Section 18 *Evidence Act* provides in relation to compellability that a spouse, de facto partner, parent or child of an accused person may object to being required to give evidence as a witness for the

> "In this age of human rights protection, arguments … might be said to require spousal privilege to be characterised as a human right. It favours liberty. It preserves a small area of privacy and immunity from the great intrusive powers of the state, and those who invoke them. It fosters human dignity. It helps maintain self-respect. It avoids what is sometimes called a "trilemma" for a wife, for example. Without the privilege, if the wife tells the truth, the husband will be punished; if, to avoid that outcome, she contrives an untrue answer to protect the husband, she will be punished; and if she seeks to avoid the first two consequences by refusing to answer, she will be punished. Many discount these considerations when the selfish interests of a claimant to the privilege against self-incrimination are involved. They have more force in the case of a spouse not wholly motivated by selfish considerations, but by considerations touching the protection of another and the maintenance of family unity."

**Sexual Assault Offences**

60. ***The Queen v Getachew* (2012) 86 ALJR 397** concerned a sleeping complainant and the Victorian statutory provisions in relation to consent, awareness or belief that a person is not or might not be consenting and not giving any thought to whether the person is not consenting or might not be consenting. The provision that defines consent in NSW (s61HA) specifically provides for a sleeping complainant in subsec (4)(b) and is not in the same terms. As such, I do not intend to further detail this case.

61. There has been a further case on the common law of propensity evidence, relevant to jurisdictions where the ***Pfennig v The Queen* (1995) 182 CLR 461** test applies (Queensland, South Australia and the Northern Territory, as opposed to other jurisdictions in Australia, in particular NSW, Vic and ACT where ss97 and 98 and 101, which are expressed in different terms): ***BBH v The Queen* (2012) 86 ALJR 357.** The majority held that evidence relied on in that case for propensity reasoning was admissible as it satisfied the *Pfennig* test.

**Fresh Evidence**

62. It may come as a surprise to many that the High Court of Australia may exercise its original jurisdiction in an appeal against a decision of the Supreme Court of Nauru (that was not a decision in the appellate jurisdiction of that Court). In ***Clodumar v Nauru Lands Committee*** [2012] HCA 22, the High Court held that in the exercise of this jurisdiction it could consider fresh evidence, that there was little that could

prosecution. If there is a likelihood that harm might be caused to the relationship and the nature and extent of that harm outweighs the desirability of having the evidence given, a person must not be required to give the evidence. There are exceptions to the application of s18 found in s19.

reasonably have been done to discover the evidence (ie. it was 'fresh'), that it was cogent and could alter the outcome in the proceedings. The appeal was allowed and it was left to the Supreme Court in Nauru to consider whether the evidence was credible. This was not a case in the exercise of criminal jurisdiction. The relevant High Court authorities pertaining to "fresh" and "new" evidence are set out in summary in the recent Court of Criminal Appeal decision of ***Wood v R*** **[**2012] NSWCCA 21 [706]-[714] (applied in ***Gilham v R*** [2012] NSWCCA 131 at [545]):

> "The general principle is that parties to litigation, including a criminal trial, are bound by the manner in which they presented their cases at first instance: *Khoury v The Queen* [2011] NSWCCA 118 at [104] (Simpson J, Davies J and Grove AJ agreeing). In a criminal trial there is an obligation on the prosecution to disclose all relevant evidence to the accused. There is no obligation on an accused person to seek out information which the prosecution is obliged to produce: ***Mallard v The Queen*** [2005] HCA 68; (2005) 224 CLR 125 at [16]-[17]; ***Grey v The Queen*** [2001] HCA 65; (2001) 75 ALJR 1708 at [23].
>
> The law makes a distinction between "new evidence" and "fresh evidence." "New evidence" is evidence that was available and not adduced at the trial. "Fresh evidence" is evidence which either did not exist at the time of the trial or, if it did, could not then have been discovered by an accused exercising due diligence: *R v Abou-Chabake* [2004] NSWCCA 356; (2004) 149 A Crim R 417 at [63] (Kirby J, Mason P and Levine J agreeing).
>
> In ***Ratten v The Queen*** [1974] HCA 35; (1974) 131 CLR 510 at 516, Barwick CJ (McTiernan, Menzies, Stephen and Jacobs JJ agreeing), in his analysis of what may constitute a miscarriage of justice, referred to a category of instances of miscarriage as including the "production of evidence not available to the appellant at his trial." His Honour said:
>
> 'The rule in relation to civil trials is that evidence, on the production of which a new trial may be ordered, must be fresh evidence; that is to say, evidence which was not actually available to the appellant at the time of the trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case. *However, the rules appropriate in this respect to civil trials cannot be transplanted without qualification into the area of the criminal law* " (emphasis added).
>
> His Honour went on to say at 517 that:
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> "It will not become an unfair trial because the accused of his own volition has not called evidence which was available to him at the time of his trial, or of which, bearing in mind his circumstances as an accused, he could reasonably have been expected to have become aware and which he could have been able to produce at the trial. *Great latitude must of course be extended to an accused in determining what evidence by reasonable diligence in his own interest he*

*could have had available at his trial, and it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence* " (emphasis added).

And later at 520:

"To sum up, *if the new material, whether or not it is fresh evidence* , convinces the court upon its own view of that material that there has been a miscarriage in the sense that a verdict of guilty could not be allowed to stand, the verdict will be quashed without more. But if the new material does not so convince the court, and the only basis put forward for a new trial is the production of new material, no miscarriage will actually be found if that new material is not fresh evidence" (emphasis added).

In ***Gallagher v The Queen*** [1986] HCA 26; (1986) 160 CLR 392 at 395, Gibbs CJ said in relation to s 6(1) of the *Criminal Appeal Act*:

"The circumstances of cases may vary widely, and it is undesirable to fetter the power of Courts of Criminal Appeal to remedy a miscarriage of justice. I respectfully agree with the statement of King C.J. in *Reg. v. Mclntee* [(1985) 38 SASR 432 at 435], that 'appellate courts will always receive fresh evidence if it can be clearly shown that failure to receive such evidence might have the result that an unjust conviction or an unjust sentence is permitted to stand.'

The authorities disclose three main considerations which will guide a Court of Criminal Appeal in deciding whether a miscarriage of justice has occurred because evidence now available was not led at the trial. The first of these, that the conviction will not usually be set aside if the evidence relied on could with reasonable diligence have been produced by the accused at the trial, is satisfied in the present case, and need not be discussed, although *it should be noted that this is not a universal and inflexible requirement: the strength of the fresh evidence may in some cases be such as to justify interference with the verdict, even though that evidence might have been discovered before the trial ...*" (emphasis added).

The Chief Justice later said at 399:

"It seems to me, with all respect, that where the trial was by jury, the accused was entitled to have the question of his guilt determined by the verdict of the jury, and that the Court of Criminal Appeal, in considering the effect of the fresh evidence, should consider what effect it might have had upon a reasonable jury. It is not enough that there is a bare possibility that a jury might have been influenced by the evidence to return a verdict of not guilty. On the other hand, it is too severe, and indeed speculative, a test, to require that the court should grant a new trial only if it concludes that the fresh evidence was likely to have produced a different result, in the sense that it would probably have done so."

There is a difference in approach between fresh evidence and relevant evidence not disclosed by the prosecution to the defence in a criminal trial. Where

> evidence has not been disclosed, the discussions in *Grey* and *Mallard* are authoritative and apply. The prosecution must disclose all relevant evidence to an accused, and a failure to do so may require the quashing of a verdict of guilty: *Mallard* at 133 [17] (Gummow, Hayne, Callinan and Heydon JJ); *Grey* at 1713 [23] (Gleeson CJ, Gummow and Callinan JJ). In relation to evidence to which this common law obligation attaches, "there [is] no reason why the defence in a criminal trial should be obliged to fossick for information of this kind and to which it was entitled": *Grey* at [23] (Gleeson CJ, Gummow and Callinan JJ).
>
> Where such evidence remains unpresented at trial, it is not the function of an appellate court to "seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to exploit forensically": *Mallard* at 135 [23]. Where evidence has a capacity to discredit the prosecution case, these matters are of significant forensic value: *Mallard* at 135 [23], 141 [42].”

63. This passage in ***Wood*** consolidates High Court authority as to both “new” and “fresh” evidence and emphasises the flexibility available in criminal cases where a miscarriage of justice has been shown.

**Proviso**

64. The proviso continues to attract the attention of the High Court, with ***Hargraves v The Queen*** **(2011) 85 ALJR 1254,** ***Handlen v The Queen*** **(2011) 86 ALJR 145 at 154-5 [47],** ***Baiada Poultry Pty Ltd v The Queen*** **(2012) 86 ALJR 459** and the soon to be argued case of ***Cooper*** addressing the proper application of s6 (1) of the *Criminal Appeal Act* 1912. ***Cooper*** raises the issue of whether the very nature of some defects in a trial may preclude application of the proviso.

**Constitutional Cases**

65. It will not have escaped your attention that the entire *Crimes (Criminal Organisations Control) Act* 2009 was declared invalid in 2011 by a majority of the High Court in ***Wainohu v The State of NSW*** (2011) 243 CLR 181 following an application from Mr Wainohu, the President of the Hells Angels Motorcycle Club for the declaration. Mr Wainohu’s application was triggered by an application to the Supreme Court for a declaration under the Act. Had the Supreme Court made such a declaration, NSW Police could then have applied for a “control order” against individual members of that organisation and certain offences such as association offences and bars to certain

employment would have applied to members. The *Crimes (Criminal Organisations Control) Act* 2012 commenced on 21 March 2012 and was amended on 29 May 2012 to include a further controlled occupation- tattoo parlours. To my knowledge there has, to date, been no challenge to this Act.

66. A complicated and lengthy decision of the Court in ***Momcilovic v The Queen*** **[2011] HCA 34** saw Mrs Momcilovic's conviction of a state offence of drug trafficking (Vic) quashed for differing reasons. The case involved a constitutional argument of inconsistency between the Victorian provision for drug trafficking under the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("the Drugs Act") and Commonwealth offence of drug trafficking under the *Criminal Code.*

**Sentencing**

**Consistency in Sentencing**

***Hili v The Queen; Jones v The Queen*** **(2010) 242 CLR 520**

67. Not so recent now, but a reminder that in this case, the High Court made important statements about consistency in sentencing, in the context of sentencing for federal offences.

> "[48] Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.
>
> [49] The consistency that is sought is consistency in the application of the relevant legal principles. And that requires consistency in the application of Pt IB of the Crimes Act. When it is said that the search is for "reasonable consistency", what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression. It is not capable of expression in tabular form."

68. The first means of achieving consistency is to apply the relevant statutory provisions. Next the judge must have regard to what has been done in other cases, however care

must be taken with this approach. A proper approach to other cases was affirmed to be as stated by Simpson J in ***DPP (Cth) v De La Rosa*** **[2010] NSWCCA 194** at [303]-[305] and in the plurality decision in ***Wong v The Queen*** **(2001) 207 CLR 584** at 606 [59]. Namely, a history of other sentences can establish a range of sentences imposed in the past. Past sentences are statements of what happened in the past and stand as a yardstick against which a sentencing judge may examine a proposed sentence. The bare statistics are not useful if there are no unifying principles which those disparate sentences may reveal. A sentencing judge should be told why those sentences were fixed the way they were fixed. In Federal sentencing there should be consistency in sentencing achieved through the work of the intermediate appellate courts of Australia. Specifically it was held in ***Hili*** that there is no "norm" for non parole periods for federal offences: [36],[37]. There can be no such mathematical or formulaic approach: [42]. Rather a sentencing judge should determine the length of sentence to be served before a recognisance release order takes effect from the principles identified by the High Court in ***Power v The Queen , Deakin v The Queen*** and ***Bugmy v The Queen***[57].

**Standard Non Parole Periods**

***Muldrock v The Queen*** **(2011) 244 CLR 120**

69. There was a paper given on ***Muldrock*** this morning by David Barrow and Craig Smith. Hopefully you had the opportunity to attend that part of the conference, as it is the most important decision from the High Court on sentencing in State offences that was delivered last year and it may have ramifications for your clients who were either: sentenced for a standard non parole period offence on the basis of the now known to be erroneous approach; or the subject of a successful Crown appeal applying that approach; or who are to be sentenced for an offence carrying a standard non parole period. I will only recap some key points as I see them from ***Muldrock***.

- The HCA concluded that the earlier decision of ***R v Way*** **(2004) 60 NSWLR 168** was wrongly decided in certain respects;

[57] *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520 at [44] referring to *Power v The Queen* (1974) 131 CLR 623, *Deakin v The Queen* (1984) 58 ALJR 367 and *Bugmy v The Queen* (1990) 169 CLR 525.

- Instead of the jurisprudence that had developed since 2002 regarding the application of the standard non-parole period legislation, the appropriate approach was to apply the intuitive synthesis method of sentencing, consistent with the decision of ***Markarian v The Queen*** (2005) 228 CLR 357 at 378;

- Earlier decisions such as ***MLP v R*** (2006) 164 A Crim R 93, ***Mencarious v R*** [2008] NSWCCA 237 and ***Hibberd*** (2009) 194 A Crim R 1 that approve a two stage approach to sentencing in SNPP cases are inconsistent with ***Muldrock***;

- The line of authority following from ***R v Knight; R v Biuvanua*** (2007) 176 A Crim R 338, including ***R v Mitchell; R v Gallagher*** (2007) 177 A Crim R 94, ***R v Cheh*** [2009] NSWCCA 134; ***R v Sellars*** [2010] NSWCCA 113 and ***R v Sutton*** [2010] NSWCCA 133, to the effect that there was a requirement on a sentencing court to precisely define where an offence fell on the range of objective seriousness is no longer viable as a ground of appeal: ***MDZ v R*** [2011] NSWCCA 243;

- The emphasis placed upon the SNPP by numerous decisions of the NSWCCA since *Way* was erroneous;

- The approach taken in ***R v McEvoy*** [2010] NSWCCA 110 to assess whether a sentence imposed for a SNPP offence is manifestly inadequate is also no longer viable;

- The decision in ***Muldrock*** has changed the understanding of what factors are relevant to an assessment of objective seriousness, removing all aspects of a case that had a connection to the particular offender;

- The factors now said to be relevant to *"an offence in the middle of the range of objective seriousness"* are substantively less: ***Muldrock*** at [27]. It was there held that *"Meaningful content cannot be given to the concept by taking into account characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending".* This means that there may have been excessive weight given to the standard non

parole period in individual cases, whether there was a guilty plea or not;

- Cases where a mid range offence was posited may also be have been affected by error;

- The decision also will have significant consequences for the sentencing of offenders suffering either an intellectual disability or a mental illness. It has been held in ***Sheen v R*** [2011] NSWCCA 259 at [165] – [166] that a statement to the effect that a sentencing judge is *"unable to find any reason for departing from the SNPP"* is an error. It is notable that the CCA intervened in *Sheen* and imposed a substantially reduced sentence.

- The decision will have significant consequences for sentencing offenders said to require treatment within a full-time custodial setting, as such a finding was held to entail error:

  > *"it was an error to determine the structure of the sentence upon a view that the appellant would benefit from treatment while in custody. Full-time custody is punitive. The non-parole period is imposed because justice requires that the offender serve that period in custody. Furthermore, the availability of rehabilitative programs within prisons is a matter for executive determination. There can be no confident prediction that an offender will be accepted into a program or that the program will continue to be offered during the term of the sentence"*: ***Muldrock*** at [57].

60. The NSWCCA is not of one voice as to the meaning of ***Muldrock.*** This morning's lecture by David Barrow and Craig Smith and the CCA paper by Chrissa Loukas have given you the relevant recent authorities. There is yet to be consideration of what, if anything is to be done in relation to persons whose sentences were substantially increased by an appellate court on the basis of the regime now held to have been contrary to law in ***Muldrock.***

**Crown Appeals against Sentence and Parity**

61. The case of ***Green v The Queen; Quinn v The Queen*** (2011) 86 ALJR 36 is an important decision on Crown Appeals against sentence and parity. In ***Green and Quinn***, Quinn, Green and Taylor were all involved in large scale cannabis cultivation. All pleaded guilty, Taylor to a lesser offence to the appellants. The sentence of Taylor was not appealed. The sentences imposed on Green and Quinn were appealed by the

DPP. A five judge bench of the CCA was unanimous that the sentences on Green and Quinn were manifestly inadequate. By majority the appeal was allowed and the sentences were increased by a substantial amount (thereby creating disparity with the sentence imposed on Taylor). The dissenting judges would have dismissed the appeal in the exercise of their discretion.

62. Where there is a Crown appeal against inadequacy of sentence in NSW, the appellate court has a discretion to decline to interfere with a sentence even though the sentence is found to be erroneously lenient. One primary purpose of a Crown appeal is to *"lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons".* This purpose distinguishes Crown appeals from offender's applications for leave to appeal against severity of sentence. The High Court affirmed part of the judgment in ***R v Borkowski*** (2009) 195 A Crim R 1 at [70], namely the statement of principle that the primary purposes of Crown appeals can, to a large extent, be achieved by a statement from the appellate court that the sentences imposed were wrong and the reasons why they were wrong (without the necessity of disturbing the erroneous sentence)[58].

63. The majority (French CJ, Crennan and Kiefel JJ) held that:

> "[2] In Crown appeals, circumstances may combine to produce the result that if the appeal is allowed, the guidance provided to sentencing judges will be limited and the decision will occasion injustice. Relevant circumstances include consequential disparity relative to an unchallenged sentence imposed on a co-offender and delay in the appeal process which may be associated with disruption of the offender's progress towards rehabilitation. In such cases it may be appropriate for a Court of Criminal Appeal, in the exercise of its residual discretion, to dismiss a Crown appeal."

And further:

> "[4] The Court of Criminal Appeal erred in failing to give adequate weight to the purpose of Crown appeals and the importance of the parity principle. It also erred in allowing the appeals partly on a basis that was never raised in argument. The sentences imposed upon Quinn and Green were, as all of the judges who heard the appeal agreed, manifestly inadequate. They were, however, as the dissenting members of the Court (Allsop P and McCallum J) said, "not derisory" and entailed "a substantial measure of punishment by full-time imprisonment." The intervention of the Court, as observed by the dissenting judges, created "unacceptable disparity" between the new sentences

[58] *Green v The Queen; Quinn v The Queen* (2011) 86 ALJR 36 at [37].

which it imposed and the sentence that stood unchallenged in respect of the co-offender, Taylor. The result, as their Honours said, was that the Court became "the instrument of unequal justice."

[5] Having regard to the disparity consequential upon allowing the appeals and the significant delays which occurred in the appellate process, the Court ought to have exercised its discretion to dismiss the appeals."

64. Importantly in relation to parity, the majority held that while ***Lowe v The Queen*** **(1984) 154 CLR 606** at 610 and ***Postiglione v The Queen*** **(1997) 189 CLR 295** at 301 were concerned with the application of the parity principle to persons charged with the same offences arising out of the same criminal conduct or enterprise:

> "Those decisions are not authority for the proposition that the principle applies only to persons so charged. The foundation of the parity principle in the norm of equality before the law requires that its application be governed by consideration of substance rather than form. Formal identity of charges against the offenders whose sentences are compared is not a necessary condition of its application." Practical difficulties and limitations "do not exclude the operation of the parity principle. The effect given to it may vary according to the circumstances of the case, including differences between the offences with which co-offenders are charged"[59].

65. On a Crown appeal, where disparity is apprehended in the event of the appeal being allowed, the discretion is enlivened, and:

> "a powerful consideration against allowing a Crown appeal would be the resultant creation of unjustifiable disparity between any new sentence and an unchallenged sentence previously imposed upon a co-offender.[60]"

66. Justices Heydon and Bell would have dismissed the appeals. Both agreed that ***R v McIvor*** (2002) 136 A Crim R 366 and ***R v Borkowski*** (2009) 195 A Crim R 1 should not have been overruled by the Court of Criminal Appeal in their statements as to the differences between Crown appeals and offender's appeals, that is, in this respect, ***Borkowski*** should be followed [61]. Justice Bell was of the opinion that the appeal turned on a consideration of ***Jimmy v The Queen*** (2010) 77 NSWLR 540 and that the Campbell JA was correct in ***Jimmy*** (2010) 77 NSWLR 540 at [117] to decide that the parity principle is not applied to correct differences in the sentences imposed on

[59] *Green v The Queen; Quinn v The Queen* (2011) 86 ALJR 36 at [30]
[60] *Green v The Queen; Quinn v The Queen* (2011) 86 ALJR 36 at [37].
[61] *Green v The Queen; Quinn v The Queen* (2011) 86 ALJR 36 at [88], [111]-[112]

offenders involved in a common criminal enterprise who are convicted of different offences[62].

67. ***Green and Quinn*** is a useful judgment for practitioners who have Crown appeals or arguments of parity between persons involved in the same criminal enterprise but not necessarily charged with the same offence.

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Dated: 30 July 2012

[62] *Green v The Queen; Quinn v The Queen* (2011) 86 ALJR 36 at [122]