CRIMINAL LAW UPDATE 2022-2023

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NSW Legal Aid Criminal Law Conference
August 2023

COVID-19 Overview

Sentence Appeals

1. *General Sentencing*
2. *Mitigating Factors*
3. *Aggravating Factors*
4. *Discounts: Plea of guilty*
5. *Discounts: Assistance to authorities*
6. *Particular Offences*
7. *Appeals*

Conviction Appeals and Other Cases

1. *Evidence*
2. *Defences*
3. *Directions*
4. *Jury*
5. *Particular offences*
6. *Procedure*
7. *Appeals*
8. *Other cases*
9. *Bail*

Annexures

A. High Court Cases 2022-2023
B. Supreme Court Cases 2022
C. Legislation 2022-2023

CONTENTS

Bugmy v The Queen - no evidence of causal link - no error failing to find moral culpability reduced - DR v R [2022] NSWCCA 151

Sentencing judge accepted Bugmy principles enlivened but failed to give proper consideration - Lloyd v R [2022] NSWCCA 18

Bugmy v The Queen properly applied - but, given psychiatric evidence, error in not reducing moral culpability in accordance with Muldrock and De La Rosa - [2022] NSWCCA 15

Five judge bench - Crimes Act 1914 (Cth), s 16A(2)(p) - hardship to family and dependants must be taken into account - previous authorities stating hardship be "exceptional" are plainly wrong - Totaan v R [2022] NSWCCA 75

Good character - not deliberately used to obtain trusted position for purpose of committing offences - school teacher – sexual intercourse with young person under special care - Fenner v R [2022] NSWCCA 48

3. AGGRAVATING FACTORS

Applicant told victim not to tell anyone about sexual assault – words constituted a threat and therefore an aggravating factor - Baker v R [2022] NSWCCA 195

Unfair to have regard to ammunition as aggravating factor where no evidence ammunition could be used with firearm - Barnes v R [2022] NSWCCA 40

Error to find previous conviction an aggravating factor in absence of reasoned explanation – whether previous conviction an aggravating factor (s 21A(2)(d)) or applicant an offender with no or no significant previous convictions (s 21A(3)(e)) - Meis v R [2022] NSWCCA 118

In company - s 21A(2)(e) CSPA - joint criminal enterprise did not form basis of applicant's liability, such that "company" was not an element of offending - R v Chandler [2022] NSWCCA 124

Where victim of offence a child – error to find offence aggravated because it occurred in 'presence of child' - s 21A(2)(ea) CSPA - Arvinthan v R [2022] NSWCCA 44

No error taking 'abuse of trust' into account - s 66C(2) offence (under authority) - s 21A(2)(k) CSPA - PC v R [2022] NSWCCA 107

Offence committed on parole - s 21A(2)(j) CSPA - Ahmad v R [2022] NSWCCA 144

4. DISCOUNTS – PLEA OF GUILTY

ss 25E(2), (3) CSPA – early guilty pleas - discount where offer later accepted - manslaughter a 'different offence' not the subject of proceedings – 25% discount applied - re-sentence not required; mathematical correction sufficient - Black v R [2022] NSWCCA 17

Utilitarian value of a guilty plea - requires separate consideration from remorse and willingness to facilitate course of justice - Doyle v R [2022] NSWCCA 81

Disputed facts, s 25F(4) – discount not reduced – care in exercise of discretion -R v Burns (No 2) [2022] NSWSC 140

Discount for guilty plea – 'first day of the trial' - vacated - non-attendance by offender – s 25C CSPA - Gurin v R [2022] NSWCCA 193

Fail to arrange timely entry of guilty plea – miscarriage of justice - strictly only 5% discount available – CCA must sentence afresh (cf. Black v R) - Green v R [2022] NSWCCA 230

Magistrate erred in not ascertaining whether plaintiff pleading guilty - s 95(4) Criminal Procedure Act 1986 - potentially deprived plaintiff of 25% discount for an early plea - Coles v DPP [2022] NSWSC 960

5. DISCOUNTS – ASSISTANCE TO AUTHORITIES

Meaning of 'undertaking to assist' - absence of a concluded agreement - s 23 CSPA - fail to specify discount within s 23(4) - Vaiusu v R [2022] NSWCCA 283

Assistance to authorities – Ellis discount – insufficient discount applied - McKinley v R [2022] NSWCCA 14

6. PARTICULAR OFFENCES

Wounding with intent to cause grievous bodily harm - Finding that injuries amounted to grievous bodily harm did not breach The Queen v De Simoni (1981) 147 CLR 383 - Maybury v R [2022] NSWCCA 233

Use offensive weapon to avoid lawful apprehension, s 33B Crimes Act – no error to find offending aggravated by fact that victims were police officers - Courtney v R [2022] NSWCCA 223

Manslaughter on basis of excessive self-defence - events leading up to confrontation not relevant to assessment of the objective seriousness - Newburn v R [2022] NSWCCA 139

Commonwealth child sex offender rehabilitation – failure to refer to mandatory considerations in s 16A(2AAA), Crimes Act 1914 (Cth) - Darke v R [2022] NSWCCA 52

Importing border controlled drug - recklessness – applicant "turned his mind" to the possibility he was importing drugs – ss 5.4, 307.1(1) Criminal Code (Cth) - Kemal v R [2022] NSWCCA 83

Maintain unlawful sexual relationship with child - s 66EA Crimes Act - fact finding by sentencing judge after jury verdict - R v RB [2022] NSWCCA 142

Extent to which undercover operation and role of an undercover operative operate to reduce culpability - Ibrahim v R [2022] NSWCCA 161

7. APPEALS

Fresh evidence – applicant with mental health issues refused lawyers to access medical records - Barnes v R [2022] NSWCCA 140

CONVICTION AND OTHER APPEALS

1. EVIDENCE

Evidence Amendment (Tendency and Coincidence) Act 2020 – transitional provisions - Bektasovski v R [2022] NSWCCA 246; *JW v R* [2022] NSWCCA 206

Interpreter's evidence that "male voice" in phone conversations was the same voice – "ad hoc" expert opinion evidence - s 79 Evidence Act 1995 - Ali v R [2022] NSWCCA 199

'Opinion' evidence - expert evidence on behavioural responses of child sexual abuse victims - conclusions drawn from research by others - ss 79, 109C Evidence Act 1995 - Aziz (a pseudonym) v R [2022] NSWCCA 76

Expert not qualified to give evidence of the behaviour of child sex offenders generally - ss 79, 109C Evidence Act 1995 – Decision Restricted [2022] NSWCCA 136

Interlocutory appeal by DPP - exclusion of parts of ERISP - accused had lack of memory due to cognitive impairment from alcohol consumption – s 90 Evidence Act - DPP (NSW) v Sullivan [2022] NSWCCA 183

Tendency direction – cross-admissibility – error to group all alleged tendency together in relation to both complainants - Kanbut v R [2022] NSWCCA 259

Tendency direction – cross-admissible charged acts need not be proved beyond reasonable doubt before use as tendency evidence - s 161A Criminal Procedure Act 1986 - JS v R [2022] NSWCCA 145

Child sexual assault complainant – unfavourable witness – error to admit complainant's statement – silence or unresponsiveness insufficient to establish denial or failure to agree or admit to substance of evidence, s 106 Evidence Act – witness not "unavailable" where "all reasonable steps" not taken by the Crown Prosecutor to compel witness to give evidence, s 65 Evidence Act - RC v R [2022] NSWCCA 281

Prior sexual activity /experience - s 293 Criminal Procedure Act 1986 (now s 294CB) - No error in refusal to allow evidence of prior sexual activity five years earlier – Elsworth v R [2022] NSWCCA 275; *No error in refusal to allow evidence of prior sexual activity/experience 18 months earlier - Cook (a pseudonym) v R* [2022] NSWCCA 282

Prior sexual experience or sexual activity - s 293(4)(c) Criminal Procedure Act 1986 - evidence of complainant's pregnancy test admissible - failure of trial counsel to seek to have evidence admitted of possibility that complainant had been raped by another male – WS v R [2022] NSWCCA 77

2. DEFENCES

Wrong test in determining appellant had not established he was mentally ill at time of alleged offence - special verdict of act proven but not criminally responsible entered - Mental Health (Forensic Provisions) Act 1990, s 38 (rep) - Masters v R [2022] NSWCCA 228

Crown appeal against acquittals - whether sexsomnia a 'mental health impairment' - s 4 Mental Health (Forensic Provisions) Act 2020 – whether Act codifies or alters common law concerning the mental illness defence - R v DB [2022] NSWCCA 87

3. DIRECTIONS

Error to direct jury they could use any doubt about a victim's evidence on one count in considering their evidence on other counts involving that victim but not in addressing any count concerning the other victim – child sexual assault - R v Markuleski (2001) 52 NSWLR 82 - Sita v R [2022] NSWCCA 90

Jury directed to "choose" between accounts by accused and principal Crown witness – failure to give Liberato direction – Haile v R [2022] NSWCCA 71

4. JURY

Fail to discharge jury – inference views of discharged juror at odds with majority - incomplete Black direction – deliberations without all jurors present constituted a material irregularity - Haile v R [2022] NSWCCA 71

Trial continued after juror discharged – inference juror in favour of acquittal - substantial miscarriage of justice - Jury Act 1977, s 53C(1)- Addo v R [2022] NSWCCA 141

Appeal against discharge of whole jury - s 53C(1)(a) Jury Act 1977 - Watson v R [2022] NSWCCA 208

Whether evidence produced by Sheriff investigation inadmissible by reason of exclusionary rule concerning evidence of jury deliberations – s 73A Jury Act 1977 - Vella v R [2022] NSWCCA 204

5. PARTICULAR OFFENCES

s 66(C)(1) prosecutions not statute-barred – s 78K prosecutions statute-barred - limitation periods repealed – Clause 82, Schedule 11 Crimes Act - Madden v R [2022] NSWCCA 196

Intentionally carrying out a sexual act "towards" a child - s 66DC(a) Crimes Act - DPP (NSW) v Presnell [2022] NSWCCA 146

"Intentionally chokes" - Crimes Act 1900, s 37(1A) - GS v R; DPP (NSW) v GS [2022] NSWCCA 65

6. PROCEDURE

Application for leave to withdraw a guilty plea before conviction - White v R [2022] NSWCCA 241

Application for trial by a judge alone less than 28 days prior to date fixed for trial - Alemeddine v R [2022] NSWCCA 219

7. APPEALS

'Miscarriage of justice' for the purposes of third limb of s 6(1) Criminal Appeal Act – error must have material effect on outcome of trial - Saunders v R [2022] NSWCCA 273

Appellate review of judge-alone finding of grievous bodily harm - Reyne (a pseudonym) v R [2022] NSWCCA 201

Crown appeal against acquittal by judge alone – error established - discretion to order retrial not exercised – acquittals affirmed – s 107 Crimes (Appeal and Review Act) 2001 - R v BK [2022] NSWCCA 51

District Court judge after correction on appeal declined for a second time to state a case - Franklin v DPP (NSW) [2022] NSWCA 58

8. OTHER CASES

State law governing committal proceedings constitutionally valid - Landrey v DPP (NSW) [2022] NSWCCA 211

Prisoners – extreme high risk restricted inmate - supervision of visits and telephone calls with legal practitioners – requirement to communicate in English – validity of Commissioner's monitoring policy - Hamzy v Commissioner of Corrective Services NSW [2022] NSWCA 16

9. BAIL

Section 22B Bail Act 2013 - DPP v Day [2022] NSWCCA 173 at [20], [23]; *DPP v Van Gestal* [2022] NSWCCA 171; *DPP v Duncan* [2022] NSWSC 927; *R v Isaac* [2023] NSWSC 22

Jurisdiction of CCA to hear bail application – no substantive proceedings pending - Dedeoglu v R [2022] NSWCCA 74

A. HIGH COURT CASES

Intensive correction order - Whether sentencing judge undertook assessment of community safety in accordance with s 66 CSPA - failure to comply with s 66(2) amounted to jurisdictional error - Stanley v Director of Public Prosecutions (NSW) [2023] HCA 3

Internet inquiries by juror - juror misconduct, s 53A(1)(c) Jury Act 1977 (NSW) – inquiry for purpose of obtaining information about matters relevant to trial, s 68C(1) Jury Act – trial judge took verdicts which jury indicated they had reached unanimous verdict on before discharging juror - Hoang v The Queen [2022] HCA 14

Function of Court of Criminal Appeal - appeal against conviction on unreasonableness ground following trial by judge alone - Dansie v The Queen [2022] HCA 25; 96 ALJR 728

s 80AF Crimes Act 1900 (NSW) - uncertainty about time when child sexual offence occurred - s 80AF did not operate with respect to trials that had already commenced when the provision came into force and it could not be invoked after the commencement of a trial - Stephens v The Queen [2022] HCA 31; 96 ALJR 871

ss 97, 101 Evidence Act 1995 – murder - tendency evidence of prior harm of deceased and victim's complaints of harm admissible - no general rule that requires 'close similarity' between conduct evidencing tendency and the offence - TL v The King [2022] HCA 35; 96 ALJR 1072

B. SUPREME COURT CASES

Defence of mental health impairment - Exception to defence if impairment caused solely by temporary effect of ingesting substance or substance use disorder - Onus and burden of proof - Onus on Crown to prove exception to defence on balance of probabilities - Mental Health and Cognitive Impairment Forensic Provisions Act 2020, ss 4(3), 28 - R v Miller [2022] NSWSC 802**;** *R v Sheridan* [2022] NSWSC 1669

Fitness for trial – "will not become fit" for trial - s 20 Mental Health and Cognitive Impairment Forensic Provisions Act 2020 - R v Woodham [2022] NSWSC 1154

Meaning of "reasonably necessary" in s 230 Law Enforcement (Powers and Responsibilities) Act 2002 - DPP (NSW) v Greenhalgh [2022] NSWSC 980

Appeal against new non-parole period (NPP) following Commonwealth parole revocation - Tran v DPP (Cth) [2022] NSWSC 778 (Rothman J)

Procedural fairness – conviction in absence of prosecutor - DPP (NSW) v Peckham [2022] NSWSC 713

C. LEGISLATION

Confiscation of Proceeds of Crime Legislation Amendment Act 2022

Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Act 2022

Dedicated Encrypted Criminal Communication Device Prohibition Orders Act 2022

Crimes Amendment (Protection of Criminal Defence Lawyers) Act 2022

Criminal Procedure Legislation Amendment (Prosecution of Indictable Offences) Act 2022

Crimes (Administration of Sentences) Amendment (No Body, No Parole) Act 2022

Crimes Legislation Amendment (Assaults on Frontline Emergency and Health Workers) Act 2022

Crimes (Sentencing Procedure) Amendment Act 2022

Crimes Amendment (Prohibition on Display of Nazi Symbols) Act 2022

Bail Amendment Act 2022

Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021

Crimes Legislation Amendment (Loss of Foetus) Act 2021

Modern Slavery Act 2018 - amended before commencement by *Modern Slavery Amendment Act* 2021

SENTENCE APPEALS

COVID-19

Fail to take into account Covid-19 pandemic – reasons handed down two months after sentence hearing

SF v The Queen [2022] NSWCCA 216 (7 October 2022)

The CCA allowed the applicant's appeal where the sentencing judge indicated his intention to take into account the likely impact of the Covid-19 pandemic on the applicant's conditions of imprisonment and intended to give it "*significant weight*" but it could not be inferred from Remarks that the judge did so.

The fact that the sentence was handed down two months after the hearing was relevant to whether it could reasonably be assumed that the judge had taken thar factor into account: at [81]; *Church v R* [2012] NSWCCA 149 per Button J at [35], [36].

The CCA said the relevant circumstances are that the sentence was handed down two months after the sentence hearing, the Remarks make no reference to the applicant's likely conditions of imprisonment, either generally or consequent to the impact of the Covid-19 pandemic on the prison system and, in particular, it is not one of the bases that were identified in finding special circumstances: at [92].

Whether error in finding risk of widespread COVID-19 infection in prison system diminished

Wass v R [2022] NSWCCA 143 (29 June 2022)

The sentencing judge stated COVID-19 was "a complication that had gone away with the effluxion of time." The applicant submitted the judge erred in finding the risk of widespread COVID-19 infection in the prison system had diminished.

The CCA dismissed the appeal. The judge's comment was not referable to the COVID-19 pandemic itself but to the prospect of widespread infection in prisons, and was a statement of the generally known position, not a factual finding on evidence: at [66]-[68].

Neither party placed evidence before the sentencing court as to the incidence or absence of infection amongst prisoners. The position regarding the pandemic is not unchanging. There must be current and reliable evidence of any adverse consequence; it is not enough to point to the existence of the virus generally: at [71].

1. GENERAL SENTENCING

Commonwealth mandatory minimum penalties – ss 16AAB, 16AAC Crimes Act 1914 (Cth)

Rex v Taylor [2022] NSWCCA 256

Section 16AAB *Crimes Act 1914* (Cth), subject to s 16AAC, prescribes a mandatory minimum sentence of imprisonment where a person is convicted of a Commonwealth child sexual abuse offence and has been convicted previously of a child sexual abuse offence.

The Crown appealed the respondent's sentence of imprisonment for 3 years with recognizance release order after 18 months for Commonwealth child sexual abuse offences. The respondent had prior child sexual abuse offence convictions.

The Crown submitted, inter alia, that the sentencing judge erred by imposing a sentence that did not reflect the sentencing principle that the mandatory minimum head sentence of 4 years' imprisonment was for the least serious category of offending as set out in ***Delzotto v R*** [2022] NSWCCA 117; and by imposing a sentence that was only available for the least serious category of offending when the judge did not find the offending was in the least serious category, which finding was not open on the facts found by the judge.

The CCA dismissed the appeal.

- Nothing in ***Delzotto v R*** [2022] NSWCCA 117 adopts the proposition that unless an offence is found to be within the least serious category of offending that the mandatory minimum term or higher must – as a matter of law – be imposed. There is no legislative prescription that the mandatory minimum penalty can only be imposed where the offence is characterised as "within

the least serious category of offending": at [54]-[56]; [67]-[70]; [72]; [78]; *Bahar v The Queen* (2011) 45 WAR 100 at [58].

- The mandatory minimum is observed as part of the sentencing process, from the outset. It does not operate as a check after an assessment of a "just and appropriate sentence". The prescription of a mandatory minimum term imports an additional constraint into the evaluation of proportionality, but it does not eliminate proportionality as an important sentencing consideration. The prescribed sentence does more than fix a boundary above or below which the sentence imposed may not go; it operates as a guide to the seriousness with which the legislature views the offences: at [61]-[66]; [71]; *Bahar v The Queen* at [54]; *R v Delzotto* at [32].

- It does not follow, however, that, unless an offence is found to be "within the least serious category of offending", the minimum term can never be imposed. That will be a matter within the discretion of the sentencing judge determined on established principles: at [67].

In ***Delzotto v R*** [2022] NSWCCA 117 the CCA allowed the Crown sentence appeal. The sentencing judge failed to approach mandatory minimum terms in accordance with *Bahar v R* [2011] WASCA 249.

s 25AA(2) CSPA (repealed, see now s 21B)[1] ***– SNPP at time of offence applies – where earlier transitional provisions provided retrospectivity of increased 8 year SNPP for s 61M(2)***

GL v R [2022] NSWCCA 202

The applicant was sentenced in 2019 for offences committed in 2007 under s 61M(2) (aggravated indecent assault, repealed).

In 2007, the SNPP for s 61M(2) was 5 years.

In 2008, the SNPP for s 61M(2) was increased to 8 years with retrospective effect, pursuant to Schedule 1, clause [16] of the *Crimes (Sentencing Procedure) Amendment Act 2007*.

In 2018, s 25AA *CSPA* commenced. Section 25AA(2) requires an offender for a child sexual offence to be sentenced "in accordance with sentencing patterns and practices at the time of sentencing." However, s 25AA(2) provides the SNPP to be applied is the SNPP at the time of the offence, not sentencing. The transitional provisions for the 2018 amendments provide that the SNPP as in force prior to the 2018 amendment continued to apply in respect of offences against s 61M(1)-(2) committed before the 2018 amendment: cl 91 of Sch 2 *CSPA*; *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018.*

The CCA held the sentencing Judge erred in applying the SNPP of 8 years. The applicable SNPP was 5 years.

It is more appropriate to apply the plain language in the critical provisions of the amending legislation (s 25AA), rather than to apply a clause of the transitional provisions: at [208].

In the absence of clear statutory language, the construction of penal statutes should favour the liberty of the subject. The fact that s 25AA was enacted later than the 2007 amendment means s 25AA should prevail: at [209].

Uncertainty when offending occurred - s 80AF Crimes Act - error applying standard non-parole period (SNPP) for s 61M(2) offence

Smith v R [2022] NSWCCA 88

New sexual assault provisions and amendments commenced on 1 December 2018:

- s 66DB (sexual touching of a child) replaced s 61M(2) (aggravated indecent assault). Both offences have a maximum penalty of 10 years imprisonment.

[1] Sub-sections 25AA(1), (2) and (4) were repealed and replaced by s 21B on 18.10.2022 (by the *Crimes (Sentencing Procedure) Amendment Act* 2022). The main change was that s 25AA was limited to *child sexual offences*, whilst s 21B applies to *all offences*. Like s 25AA, ss 21B requires a court to sentence an offender according to sentencing patterns and practices at the time of sentencing, not the time of the offence (s 21B(1)), and that the standard non-parole period is the one that applied at the time of the offence, not sentencing (s 21B(2)).

- s 61M(2) had a SNPP of 8 years; s 66DB has no SNPP. Schedule 2, cl 91 *CSP Act* 1999 provides that the 8 year SNPP continues to apply to s 61M(2) offences committed "before that amendment" i.e. 1 December 2018. Section 25AA(2) *CSPA* (repealed; see now s 21B(2))[2] provided that the SNPP for a child sexual offence is the SNPP that applied "at the time of the offence", not sentence.
- Section 80AF(1), (2) *Crimes Act* provides that if it is uncertain as to when sexual conduct has occurred, and because of a change in the law the alleged conduct would have constituted more than one offence, then a person may be prosecuted under "*whichever of those sexual offences has the lesser maximum penalty."*

The applicant was convicted of s 61M(2). There was uncertainty as to when the alleged conduct constituting the offence occurred. The offence was charged as having been committed between 15 October 2018 and 19 December 2018.

The CCA held the sentencing judge erred in applying the SNPP for the s 61M(2) offence. The SNPP could not be made applicable by either:

- Sch 2, cl 91 *CSPA* - given that the prosecution was unable to show the offence was "committed before that amendment", that is, before 1 December 2018; nor
- s 25AA(2) *CSPA* - given that the prosecution did not prove whether "the time of the offence" was prior to or after the amendment.

Thus where the conduct has been charged under s 61M(2) in reliance upon s 80AF and may have been committed on either side of the date from which the SNPP was removed, neither cl 91 of Sch 2 nor s 25AA(2) is engaged in a way that would make that SNPP applicable: at [70]-[71].

s 80AF

By s 80AF(2), it was open to the Crown to prosecute the conduct charged under either s 61M(2) or s 66DB. The two provisions prescribe the same maximum penalty. The words in s 80AF, "*whichever of those sexual offences has the lesser maximum penalty*", should be interpreted as referring equally to both offences where the maximum penalties are the same: at [65]-[66].

Principles – challenging aggregate sentence

Burke v R [2022] NSWCCA 6

The applicant submitted that his aggregate sentence was unreasonable and unjust, as opposed to relying on any patent error in the appointment of the aggregate sentence or in sentencing reasons, including any error in application of totality principles. The applicant put his submission on two bases: (1) the sentences indicated for various counts were excessive relative to other counts; and (2) findings of objective seriousness resulted in an unjust sentence.

The CCA dismissed the appeal. After setting out the principles regarding an appeal based on manifest excess (at [30]), Fullerton J (McCallum JA and Walton J agreeing) added:

- In an appeal alleging manifest excess in the aggregate sentence, the focus is whether the sentence fairly reflects the totality of the criminality, that is, whether the aggregate sentence can be shown to be unreasonable and plainly unfair having regard to the totality of the criminality comprehended by the sentence, after taking into consideration all factors bearing upon the ultimate imposition of sentence (authorities referred to).
- Where an aggregate sentence is challenged as manifestly excessive, and the Court's attention is directed to alleged severity of the indicative sentences, the focus will not be on whether one or more of the indicative sentences is excessive per se, but whether the applicant has established that after principles of totality are applied the aggregate sentence is

[2] Sub-sections 25AA(1), (2) and (4) were repealed and replaced by s 21B on 18.10.2022 (by the *Crimes (Sentencing Procedure) Amendment Act* 2022). The main change was that s 25AA was limited to *child sexual offences*, whilst s 21B applies to *all offences*. Like s 25AA, ss 21B requires a court to sentence an offender according to sentencing patterns and practices at the time of sentencing, not the time of the offence (s 21B(1)), and that the standard non-parole period is the one that applied at the time of the offence, not sentencing (s 21B(2)).

unreasonable or plainly unjust (*JM v R* (2014) 246 A Crim R 528 at [40]; *Chaouk v R* [2017] NSWCCA 295). It is only where nomination of an indicative sentence(s) suggests error in the appointment of the aggregate sentence that a ground of manifest excess may be made out. Where that argument has been successful, it is because the Court is satisfied that the relative severity of the individual sentences called for a greater degree of notional concurrency in the imposition of the aggregate sentence: at [31]-[33].

In the present case, the sentencing judge correctly made a degree of accumulation in each "cluster" of robberies with notional concurrency between offences committed against different people at the same premises. Thus even were the applicant be able to show that one or more of the sentences indicated is excessive by applying comparative analysis, that would not inevitably support the conclusion that the aggregate sentence is excessive. As a matter of principle, even if there might be a lack of uniformity in the indicative sentences for similar offences of the same objective seriousness, that will not necessarily lead to the conclusion that the aggregate sentence is manifestly excessive: at [34].

Aspects of indicative sentences resulted in manifestly excessive aggregate sentence

Stevenson v R [2022] NSWCCA 133

The CCA allowed the appellant's appeal on the ground of error in the nomination of an indicative sentence which "served to infect the aggregate sentence": at [124]. The sentencing judge nominated an indicative sentence of imprisonment for 8 years on a count of sexual touching of a child aged 10-16 (Maximum penalty 10 years' imprisonment). The CCA found error in that the conclusion was discordant with the finding of objective seriousness of that offence and the complete absence of a standard non-parole period to operate as a guidepost on sentence: at [123]; ***Burke v R*** [2022] NSWCCA 6; *Noonan v R* [2021] NSWCCA 35; *Lee v* R [2020] NSWCCA 244.

Comparison between undiscounted aggregate sentence and other sentences

Sharma v R [2022] NSWCCA 190

The sentencing judge applied a discount of 25% to the applicant's indicative sentences and imposed an aggregate sentence.

The CCA stated that the applicant's submission that manifest excess was demonstrated by considering the undiscounted aggregate sentence and sentences imposed in other similar cases is contrary to principle: at [72].

The applicant relied on *Chartres-Abbott v R* [2021] NSWCCA 239 where Brereton JA acknowledged that while a discount for a plea of guilty is applied to the indicative (not aggregate) sentence, it did not follow that, for case comparison purposes, consideration of an undiscounted aggregate sentence was impermissible. However, in *BB v R* [2021] NSWCCA 283, Wilson J observed that it is difficult to see how such an approach could be useful in sentencing appeals: at [72]-[73].

The CCA said it is not necessary to resolve these two approaches. Even if the applicant's approach were permissible, it is of no utility given the comparative cases relied upon were distinguishable from the present case on various bases: at [72]-[74].

Beech-Jones CJ at CL observed that it was difficult to see the relevance of comparing aggregate sentences, especially where they included different offences. Even if there were a pool of aggregate sentences, a comparison would at most only reveal how the totality principle was applied in another case: at [6].

Whether aggregate sentence can be imposed for Commonwealth offences

Patel v R [2022] NSWCCA 93

The applicant was sentenced to an aggregate sentence with non-parole period for Commonwealth drug offences. The CCA (Brereton JA, N Adams J agreeing with additional comments, Lonergan agreeing with Brereton JA) allowed his appeal in relation to a sentencing error.

On re-sentence, the CCA expressed doubt as to whether an aggregate sentence under State sentencing law (s 53 *CSPA*) can be imposed for Commonwealth offences based on whether s 53A was "picked up" by s 68 *Judiciary Act* 1903 (Cth). Given these doubts, the CCA determined to impose separate terms of imprisonment, on the basis prescribed by s 19(2) *Crimes Act 1914* (Cth) (where person convicted of two or more federal offences at the same sitting and is sentenced to imprisonment

for more than one, the court must direct when each sentence commences, but so that no sentence commences later than the end of the sentences the commencement of which has already been fixed or of the last to end of those sentences).

In ***Delzotto v R*** [2022] NSWCCA 117 at [2] Beech-Jones CJ at CL, referring to ***Patel v R***, observed that existing authority in *DPP (Cth) v Beattie* [2017] NSWCCA 301 has held that an aggregate sentence can be imposed for Commonwealth offences, and that this Court is entitled to act on what was found in *Beattie* until the contrary is held either by the High Court or this Court: at [2]. See also ***Ibrahim v R*** [2022] NSWCCA 161 at [121].

Applicant did not give instructions to enter pleas of guilty – miscarriage of justice

Stuart v R [2022] NSWCCA 182

The CCA found a miscarriage of justice where the applicant's solicitor entered guilty pleas in the Local Court on the applicant's behalf without instructions. The pleas were not a true admission of guilt and integrity of the plea was affected: at [91]; *Maxwell v The Queen* (1996) 184 CLR 501, *Sagiv v R* (1986) 22 A Crim R 73, applied.

The applicant was not asked in the Local Court or District Court (on sentence) personally to confirm his pleas. The charges were not read out to him prior to the sentencing judgment. Nothing in the *Criminal Procedure Act* 1986 or *Criminal Procedure Regulation* 2017 expressly requires charges to be read to the accused. However, the model explanation required by Regulation 9A includes that: "[t]he Magistrate will ask you whether you plead guilty or not guilty to *each* offence proceeding" (emphasis added). That looks forward to what will occur before a magistrate after a case conference. It is difficult to see how a magistrate could ask an accused whether they pleaded guilty or not guilty to each offence proceeding without identifying each offence: at [9].

A court is entitled to rely on what is said by a legal practitioner for their client. Requiring public acknowledgement by the accused reflects solemnity of what is occurring and may assist avoiding claims a plea was not properly entered: at [15].

The solicitor communicated to the prosecution that the applicant would be pleading guilty, undermining the applicant's statutory ability to negotiate pleas: at [35]; *CPA* case conference provisions, ss 70(2), 75(1)(b)-(d), 77.

Intensive Correction Order (ICO) - failure to take pre-sentence custody into account – re-sentencing: burden of further shorter ICO

Shavali v R [2022] NSWCCA 178

The applicant was sentenced to an aggregate sentence of 3 years' imprisonment to be served by way of ICO for firearms offences. On appeal, the Crown conceded that the sentencing judge failed to take into account pre-sentence custody of 438 days.

The CCA found re-sentencing posed difficulties as the applicant had completed the community service component of the ICO and supervision. The applicant was warned that, even if a lesser sentence was imposed, he could be subject to greater restrictions on his liberties than those presently applying: at [69]; *Parker v DPP* (1992) 28 NSWLR 282.

Difficulties on resentence were:

- An ICO must commence on the date on which it is made (s 71(1) *CSPA*). An ICO by the CCA on resentencing must date from the date on which the new sentence is imposed. The term of an ICO can be reduced, but not backdated, to take account of pre-sentence custody: at [6], [57]; *Mandranis v R* (2021) 298 A Crim R 260.
- An aggregate sentence of imprisonment, taking into account time served in custody and spent subject to an ICO, would require the applicant to enter into full-time custody, albeit for a short period: at [71].
- An ICO must be made subject to the "standard conditions" including to submit to supervision (s 73(2)(b) *CSPA*)). As the applicant has already completed supervision, a further ICO will have subject him to constraints on liberty that do not presently apply: at [75].
- s 10A *CSPA* is not properly available as the offences are too serious: at [70].

The CCA concluded that no other sentence is warranted in law. To impose a meaningful, less severe sentence would involve imposition of restrictions on the applicant's liberty that he does not presently face. The appeal was dismissed: at [79].

s 58 CSPA Crimes (Sentencing Procedure) Act 1999 – Stated Case

R v Perrin [2022] NSWCCA 170

Section 58 *CSPA* provides that: The Local Court, or District Court on appeal, may not impose a "new sentence" to be served consecutively or part-consecutively with an "existing sentence" if the "new sentence" ends more than 5 years after the "existing sentence" began.

"Existing sentence" is defined in s 58(4).

The applicant had served two expired sentences of imprisonment for two offences. He remained in custody on remand for a third offence. For that third offence, he was sentenced to imprisonment part-cumulative with the two expired sentences. The total sentence for all three offences was 5 years 11 months. The applicant appealed his third sentence to the District Court. To comply with s 58, the District Court appeal judge reduced the third sentence and commenced it from an earlier date so that the total sentence for all three offences was 5 years.

The DPP requested the judge state the following two questions:

> Does s 58 *CSPA* constrain the length of a sentence of imprisonment that may be imposed by the Local Court, or District Court on appeal, if the offender is not serving any sentence of imprisonment:
>
> (1) at the time of sentencing?; or
> (2) at the time of sentencing but the sentence to be imposed is made cumulative or partly cumulative on a sentence that has been served?

The CCA answered "No" to both questions. Section 58 did not apply. The sentence was quashed and the matter remitted to be dealt with according to law.

Section 58 only operates if there was an earlier sentence that was "existing", in the sense of unexpired, at the time the Court imposes the new sentence. Whether there is an "existing sentence" is to be determined as at the date of imposition of the new sentence, not at the time the "new sentence" commences: at [80]-[81].

Section 58 does not constrain the length of the new sentence if the sentence on which the new sentence is made wholly or part-cumulative has expired at the date of imposition of the new sentence because it is not an "unexpired sentence" and thus not an "existing sentence" for the purposes of the section: [83].

"a convicted inmate of a correctional centre" - error applying s 56 Crimes (Sentencing Procedure) Act 1999

Hraichie v R [2022] NSWCCA 155

Sections 56(1)-(2) *CSPA* provide that for a sentence of imprisonment imposed for an assault offence committed while the offender is a "*convicted inmate* of a correctional centre" and subject to another sentence that is yet to expire, the sentence is to be served consecutively with the other sentence.

The applicant had become entitled to release on parole for unrelated sentences but continued to be held in custody on remand (bail refused) in respect of the index assault offences.

The CCA held the applicant was not a "convicted inmate of a correctional centre" within s 56(2). The sentencing judge erred in applying s 56.

The applicable definition in this case of "convicted inmate" (in 4(1)(a) *Crimes (Administration of Sentences) Act*) does not apply to "a person who is on release on parole": at [132]-[133], [144]-[146].

The CCA imposed a revised aggregate sentence for the index assault offences to commence 12 months prior to the expiry of the last non-parole period for the unrelated sentences.

Crown appeal - additional offending after offender served earlier gaol sentence for similar offending committed at around the same time

R v Obbens [2022] NSWCCA 109

The sentencing judge imposed an 18-month CCO for indecently assault child under authority (s 61E(1A) (rep)) committed in 1989. The reason the sentencing judge imposed this 'lenient disposition' was that

the respondent had already served 3 years full-time imprisonment imposed in 2016 by Judge F for similar offences committed between 1987-1989, around the same time as the subject offences. The subject offences were unknown at the time of the 2016 sentence.

The Crown appealed, submitting the sentencing judge failed to properly apply the totality principle and that the sentence is manifestly inadequate.

The CCA dismissed the Crown appeal. The real question, which might be more a question of proportionality rather than totality, is whether the total sentencing outcome (that is the 3-year full-time sentence imposed by Judge F together with the 18-month CCO under appeal) could encompass the whole of the criminality: at [18]; authorities cited.

In cases of undisclosed sexual offending, delay will not automatically operate in mitigation (*R v Cattell* [2019] NSWCCA 297). However, it is different where additional offending comes to light after imprisonment, as the delay is unlikely to be a period in which the offender went about life freely. Further, a subsequent prosecution is an additional disruption, and return to prison likely to involve greater punishment than if the first term of imprisonment had been longer if all offences had been dealt with together: at [20].

The question in this case was whether, having regard to the option of a CCO and the whole of the circumstances, the only appropriate sentence was imprisonment. A CCO is lenient in a case such as this but there are times when such an order is in the best interests of all (*Boulton v R* (2014) 46 VR 308 at [113]-[115]). Given the punishment of the 2016 sentence, the respondent's experiences in gaol, personal circumstances, rehabilitation, and extensive period of not offending, this was such a case. The CCO represented a "flexibility of approach" (*Mill v The Queen* (1988) 166 CLR 59): at [25]-[26].

Denial of procedural fairness - judge rejected applicant's evidence in psychological report – no indication that issue was to be taken

Edmonds v R [2022] NSWCCA 103

The applicant was denied procedural fairness where the sentencing judge indicated that defence counsel was not required to address on the psychological report relating to the offender's deprived background, however, subsequently made adverse findings that he did not accept the report because of an absence of independent and supporting evidence.

The judge foreclosed defence counsel from making submissions as to why the applicant's account to the psychologist should be accepted or reconsidering his decision not to call the applicant: at [28].

Where the report of a mental health professional is admitted without objection, no principle of law requires the sentencing judge to exercise "very considerable caution" before relying on it absent evidence from the offender: at [27]; citing ***Lloyd v R*** [2022] NSWCCA 18 at [47].

Parity – where co-offender sentenced for multiple other offences

Wood v R [2022] NSWCCA 84

The applicant was sentenced to 4 years imprisonment, NPP 2 years 6 months for robbery in company armed with an offensive weapon (s 97(1) *Crimes Act*). The applicant and co-offender, L, attended a brothel each armed with machetes and L also carried an axe. They obtained $1500 from staff and $15k from the business safe forced open by L. L pleaded guilty to the common armed robbery offence, a further armed robbery and police pursuit, with ten offences on a Form 1. The same sentencing judge imposed an aggregate sentence of 5 years 3 months, NPP 3 years 2 months. L's indicative sentence for the common offence was 4 years 3 months. L was serving a sentence for other robbery and firearms offences. L's total effective sentence was 6 years 1 months, NPP 4 yrs.

The CCA allowed the appeal. The applicant had a justifiable sense of grievance when compared against L's aggregate sentence. L's total effective sentence encompasses the criminality involved in numerous offences. Although the applicant does not have a justifiable grievance simply based on L's indicative sentence for the common offence, the application of the totality principle resulted in significant leniency being extended to L with no corresponding amelioration of the sentence imposed on the applicant: at [43]-[45], [56]; *Postiglione v The Queen* (1997) 189 CLR 295.

Failure to exercise jurisdiction to vary automatic period of driving disqualification

Pearce v R [2022] NSWCCA 68

The applicant was sentenced to 6 years' imprisonment for aggravated driving causing GBH (s 52A(4) *Crimes Act*) and disqualified from holding a driver's licence for 5 years - the automatic disqualification period for the offence: s 205(3)(d)(i) *Road Transport Act* 2013.

The CCA allowed the appeal on the ground that the sentencing judge failed to exercise jurisdiction to consider whether or not to vary the automatic disqualification period under s 205(3)(d)(ii) which allows variation of the automatic disqualification period to not less than 2 years. The judge was not aware of the power to do so and made no determination. If the judge had turned his mind to the question of whether or not to depart from the automatic 5 years, a significant consideration would have been that, upon doing so, the applicant would by s 206B(4) have received credit for the 11 months and 16 days of suspension that had already run, towards the minimum period of 2 years. The sentence was not manifestly excessive but is at the high end. Reduction of the automatic period of 5 years disqualification is justified to avoid double or super-added punishment: at [56]-[61].

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

Monteiro v R [2022] NSWCCA 37

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

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

The CCA allowed the appeal and reduced the applicant's sentence. The sentencing judge may have implicitly considered the seriousness of the index offences which gave rise to the supervision orders, instead of only considering the breach of the supervision order itself. The judge erred in assessment of the breaches as mid-range or just below mid-range. The offending was well below mid-range: at [41].

The CCA noted:

- The important distinction between ESO breaches pointing to planning or commission of serious sexual or violence offences, and other types of breaches: at [36].
- Here, the breaches are breaches of conditions that facilitate supervision (use of different name, electronic equipment etc). Compliance with conditions is important, but where breaches were not related to serious offending, the breach may be assessed as mid-range, but that will be uncommon: at [39]-[40].
- If the breach gave rise to an increased risk of the commission of a serious offence of the kind for which the ESO was imposed, that would impact upon objective seriousness: at [42].
- Sentences for a breach of an ESO range from fines to imprisonment. *As the applicant is subject of an ESO,* a Community Services Order or an Intensive Corrections Order is not appropriate as it may not result in any punishment. A fine may be far more effective than a non-full-time prison sentence. However, because the offences in question go to the heart of the supervision process, no penalty other than imprisonment is appropriate (s 5 *CSP Act):* at [43]-[44].

2. MITIGATING FACTORS

Remorse - conflated with inability to explain offending, rehabilitation and risk of re-offending – no separate finding made despite unchallenged evidence – s 21A(3)(i) CSPA

Pritchard [2022] NSWCCA 130

The judge erred in failing to make an express separate finding of remorse under s 21A(3)(i), but rather dealt compendiously with remorse, risk of re-offending, and rehabilitation: at [95], [102].

The judge had misgivings about remorse given the applicant's inability to remember or explain his conduct. It was open to the judge to have such doubts, however, failure to remember or explain one's

conduct is not mutually exclusive with a finding of genuine remorse: at [97]. At sentence, remorse was put forward by the applicant by letter of apology to the court, psychologist report and giving evidence. That evidence was unchallenged and the Crown had conceded remorse was a mitigating factor: at [91]-[94], [100]-[102].

Remorse – error not to take into account - s 21A(3)(i) CSPA

Care v R [2022] NSWCCA 101

Section 21A(3)(i) *CSPA* states that remorse is a mitigating factor if the offender (i) has provided evidence that s/he has accepted responsibility for their actions, and (ii) has acknowledged any injury, loss or damage caused or made reparation. Precondition (ii) had been met in this case.

As to precondition (i), the CCA held it was an error not to take into account remorse where the judge accepted the applicant's remorse contained in an affidavit which was unchallenged and uncontroverted. There was also the unchallenged psychologist's evidence regarding remorse and acceptance of responsibility: at [97]-[101]. The judge was required to give the offender the benefit of remorse if the offender provided evidence of acceptance of responsibility, and acknowledged injury, loss or damage, or made reparation.

Precondition (i) does not require the Court to accept the evidence, or require evidence of all of the particulars of the offender's role or co-offenders, that evidence be in any particular form, from any particular source, nor deal with any particular aspect of the criminal conduct (*Butters v R* [2010] NSWCCA 1). However, a Court may determine that remorse has not been shown as a consequence of limited evidence of responsibility: at [76], [94]–[95].

Personality disorders fall within De La Rosa (2010) 79 NSWLR 1 – error to find that lack of criminal convictions assumes less significance in context of domestic violence offending

R v Wornes [2022] NSWCCA 184

The applicant was sentenced for wounding with intent to cause GBH and other Form 1 offences, in the context of serious domestic violence.

The CCA held that the sentencing judge erred in finding that as a "matter of law" the applicant's personality disorder fell outside the scope of the principles in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 and was not relevant to moral culpability. Personality disorders can be taken into account on sentence in the manner described in *De La Rosa*, in the same way as other mental or psychiatric conditions: at [25]-[30]; *DPP (Cth) v De La Rosa*; *Brown v R* (2020) 62 VR 491, applied.

The sentencing judge's alternative approach that personality disorder did not reduce moral culpability was not supported by unchallenged expert evidence that the applicant's disorder and personality style led to distorted views of relationships and impaired emotional responses. This evidence was to be considered in the light of a childhood marred by dysfunction. The evidence was relevant to assessment of moral culpability and weight given to personal and general deterrence: at [31]-[32].

The judge erred in finding that lack of prior convictions "assumes less significance in the context of domestic violence offending" thus denying the applicant the leniency to which she was entitled. The absence of criminal history was a significant factor and mitigating feature under s 21A(3)(e) *CSPA*: at [34]-[37].

Delay – lost opportunity of being sentenced in Children's Court – childhood offending

Young (a pseudonym) v R [2022] NSWCCA 111

The CCA allowed the applicant's appeal against sentence for historical child sexual assault offences committed in 2003-2004 when aged 14-16 against his niece, aged 9-11.

The sentence imposed was unreasonable and plainly unjust having regard to:

- the numerous ways in which delay resulted in lost opportunities for the applicant;
- he was 14 when offending commenced;
- the context in which the offences were committed;
- *Bugmy v The Queen* (2013) 249 CLR 571 factors; and
- that he was also a victim at the time (raised in a dysfunctional environment and abused).

Not only was the *fact* of delay relevant, so too was the *extent* of it: at [35]. The applicant lost the opportunity of being dealt with in the Children's Court. This meant that:

- Being sentenced as an adult in the District Court meant rehabilitation was no longer the primary sentencing principle and sentencing options were limited: at [38].
- He did not have a criminal history at the time of the offences, a mitigating factor, but had a criminal history by the time of sentence. Although unable to demonstrate progress towards rehabilitation, he was also denied the opportunity to come before the court as a person of good character: at [45].
- If he had been sentenced before the 2018 sexual offences legislative amendments, he would have been able to be sentenced more leniently based on two factors:
  (i) being sentenced according to principles and patterns at the time of offending (*MPB v R* [2013] NSWCCA 213; cf s 25AA *CSPA*); and
  (ii) it would have been open to the judge to impose a suspended sentence or an ICO: at [46]–[49].

Application of Bugmy principles in domestic violence matters

Kennedy v R [2022] NSWCCA 215

The applicant was sentenced for detaining and assaulting his female partner (s 86(2)(b) *Crimes Act*).

The sentencing judge found **'***Bugmy* issues and *Fernando* type issues' were established to a significant degree; and that, in accordance with *'Munda',* sentencing for domestic violence must take general deterrence into account in a "significant way" and there was a real need for specific deterrence given it was not an isolated occasion involving the same victim: at [32]-[33]; *Bugmy v The Queen* (2013) 249 CLR 571; *R v Fernando* (1992) 76 A Crim R 58; *Munda v State of WA* (2013) 249 CLR 600.

The CCA rejected the applicant's submission that the judge erred by confining consideration of *Bugmy* and *Fernando* issues to the finding of special circumstances when these factors were relevant to the sentence as a whole.

The judge properly found that the applicant had suffered significant childhood deprivation which had contributed to offending, and that general and specific deterrence were entitled to significant weight: at [45]. The reference to *Munda* was sufficient to explain why although *Bugmy* factors may lessen the significance of general deterrence, they did not have that effect in this case. The judge took into account childhood deprivation (*Bugmy* and *Fernando* factors) in a number of respects: that it contributed to the offending conduct and when addressing general deterrence, specific deterrence, the need for rehabilitation, the risk of re-offending and special circumstances: at [42]-[44].

The submission implied that had *Bugmy* factors been taken into account on general deterrence, the judge would have regarded general deterrence as of lesser weight. Although childhood deprivation *may* lead to a reduction in moral culpability and *may* make the offender an unsuitable vehicle for general deterrence, it will not necessarily do so. *Bugmy* factors do not mitigate a sentence such that victims of domestic violence at the hands of offenders who themselves have suffered childhood deprivation are less worthy of protection. General deterrence is a signal to potential offenders but also maintains public confidence in the administration of justice: at [43]; *Munda* at [54]; *Markarian v The Queen* (2005) 228 CLR 357 at [82].

Bugmy v The Queen - no evidence of causal link - no error failing to find moral culpability reduced

DR v R [2022] NSWCCA 151

The CCA held the sentencing judge did not err by failing to find moral culpability reduced by deprived upbringing (*Bugmy v The Queen* (2013) 249 CLR 571) where the applicant's psychiatrist did not express any opinion as to a causal nexus between deprived upbringing and offending. Applicant's counsel had submitted to the sentencing judge that whilst disadvantaged upbringing did not reduce moral culpability, it remained a matter to be taken into account as part of the subjective case: at [38].

The CCA stated that the authorities establish that:

> (1) A causal link between disadvantaged background and offending will inevitably support a finding that moral culpability is reduced.

(2) Even where there is no such causal link, and thus no reduction in moral culpability, a disadvantaged background remains a factor which must be given full weight in the process of instinctive synthesis: at [37]; *Bugmy v The Queen*; *Dungay v R* [2020] NSWCCA 209.

The judge's conclusion that, in the absence of evidence of the necessary nexus between upbringing and offending, the *Bugmy* principles had no application was open and consistent with the authorities. Importantly, it is clear the judge took into account disadvantaged background as part of the instinctive synthesis: at [39]-[40].

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

Lloyd v R [2022] NSWCCA 18

The CCA allowed the applicant's appeal where the sentencing judge found the *Bugmy* principles were enlivened thereby accepting that a background of childhood deprivation was established on the evidence, but then failed to consider whether the applicant's deprived upbringing contributed to the cause of his offending or otherwise reduced moral culpability: at [48]. The judge did not discuss the effects of childhood deprivation, moral culpability and made no reference to the parts of the expert report of a mental health professional regarding impact of background. That report was not challenged by the prosecutor and had been accepted by the judge: at [36]-[48].

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

Williams v R [2022] NSWCCA 15

The CCA allowed the applicant's appeal (rob in company) on the ground the sentencing judge failed to determine how the applicant's mental condition should be reflected in his sentence.

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

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

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

Totaan v R [2022] NSWCCA 75

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

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

Previous authority that any such hardship had to be "exceptional" before it could be taken into account was "plainly wrong" and should not be followed: at [77] (see *R v Sinclair* (1990) 51 A Crim R 418; *R v Togias* [2001] NSWCCA 522; *R v Hinton* [2002] NSWCCA 405).

Section 16A(2)(p) should be applied according to its terms. There is no textual support for 'exceptional circumstances' to be shown before hardship may be taken into account in s 16A or the *Crimes Act* generally: at [78], [82], [93]; *DPP v Ip* [2005] ACTCA 24, *R v Zerafa* [2013] NSWCCA 222 at [139]–[141]; *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194 at [49]–[60] approved.

Good character - not deliberately used to obtain trusted position for purpose of committing offences - school teacher – sexual intercourse with young person under special care

Fenner v R [2022] NSWCCA 48: The CCA held the sentencing judge erred in not taking the applicant's good character into account in sentencing for sexual intercourse with young person under special care (s 73 *Crimes Act*). The applicant was a teacher of the 17 year old female student-complainant.

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

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

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

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

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

The CCA reduced the applicant's term of imprisonment.

3. AGGRAVATING FACTORS

Applicant told victim not to tell anyone about sexual assault – words constituted a threat and therefore an aggravating factor

Baker v R [2022] NSWCCA 195

The CCA held the sentencing judge did not err in finding sexual assault offences aggravated by the applicant's "threats" that the victim not tell anybody what happened. On appeal, the applicant submitted it was not open to characterise his conduct as a "threat" since he did not express that failure to comply would have any consequence.

The CCA said that whether a form of words amounts to a threat depends not only on the words but on the surrounding circumstances. In the context of the sexual assault, the edict that the complainant not tell anyone, including her father and the police, is capable of being regarded as a threat that there would be consequences if she told anyone in authority. Because the applicant's conduct was criminal, the statement carried the implication of adverse consequences if he she told anyone. For a statement to amount to a threat, it is not necessary for precise consequences to be spelled out, or the words "or else" to be added. All that is necessary is that there be something to indicate that non-compliance will bring adverse consequences: at [59]-[61].

Unfair to have regard to ammunition as aggravating factor where no evidence ammunition could be used with firearm

Barnes v R [2022] NSWCCA 40

The applicant was sentenced for possess shortened firearm. The CCA held the sentencing judge erred by stating the firearm was not loaded but the offence was aggravated by "rounds of ammunition found with it " where there was no evidence the firearm was working and thus no basis to find the ammunition could be used with the weapon.

That the weapon was not loaded meant the offence was not as serious as the converse case. However, ammunition will ordinarily increase seriousness of the offending. Where the firearm was in possession of the police, and having regard to capacity of the police to test the item, there is particular unfairness in having regard to ammunition as an aggravating factor when there was no evidence the ammunition could be used with the firearm. The judge erred in taking this matter into account in a manner that elevated assessment of objective seriousness: at [59]-[60]; (see *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [36]).

Error to find previous conviction an aggravating factor in absence of reasoned explanation – whether previous conviction an aggravating factor (s 21A(2)(d)) or applicant an offender with no or no significant previous convictions (s 21A(3)(e))

Meis v R [2022] NSWCCA 118

The applicant was sentenced for manufacturing drug and supplying the same drug. The sentencing judge treated as an aggravating factor under s 21A(2)(d) (previous convictions) a 10 year old drug supply conviction for which the applicant had received a good behaviour bond.

The CCA allowed the appeal. Although use of the previous conviction was not erroneous, the judge failed to give a reasoned explanation for treating the previous offence as an aggravating factor, particularly bearing in mind that s 21A(2)(d) is to be proved beyond reasonable doubt: at [47]-[48].

An issue arose as to whether the previous conviction was an aggravating factor under s 21A(2)(d) or whether the applicant was an offender with no, or no significant, previous convictions under s 21A(3)(e). A factual issue may therefore arise: is a record of previous convictions to be treated as significant?: at [30], [37], [47].

On resentence, the CCA treated the applicant's criminal history as neutral: at [52]. The significance of the conviction must be assessed in the context of its relevance for present sentencing purposes. Even if the previous conviction is "not insignificant", s 21A(2)(d) construed in accordance with the principles in *Veen (No 2)* is inapplicable. A continuing attitude of disobedience of the law is established by the present manufacturing offence being committed over a period of time, not the previous conviction. Nor does the previous conviction illuminate moral culpability, show a dangerous propensity or need to impose punishment for the purposes of specific or general deterrence: at [51]; *Veen v The Queen (No 2)* (1988) 164 CLR 465.

This does not mean that s 21A(3)(e) applies. The applicant is not to be treated as having no (or no significant) record of previous convictions (in the sense that such a finding might point to a reduction in any sentence that otherwise would be imposed). Rather, his criminal history is to be treated as neutral: at [52].

In company - s 21A(2)(e) - joint criminal enterprise did not form basis of applicant's liability, such that "company" was not an element of offending

R v Chandler [2022] NSWCCA 124

The applicant pleaded guilty to discharge firearm with intent to cause grievous bodily harm (s 33A *Crimes Act*). He committed the offence with his co-offender who pleaded guilty to fire firearm in manner likely to injure (s 93G(1)(c)) on the basis of a joint criminal enterprise.

The CCA held the judge did not err in finding the applicant's offence aggravated by being committed "in company" pursuant to s 21A(2)(e) *CSPA*.

The applicant submitted both he and his co-offender were participating in a joint criminal enterprise to shoot and injure the victim, and the fact that the applicant was in company could not constitute an additional aggravating factor as it was integral to the offence (*Tabbah* [2019] NSWCCA 324): at [26].

However, unlike the co-offender (who lured the victim to a position where the applicant could shoot him), principles of joint criminal enterprise did not form the basis of the applicant's liability. He harboured animosity towards the victim, arranged the meeting where the victim was shot, brought the rifle and called out to the victim and shot him. It was open to find that his conduct was aggravated by being "in company" of his co-offender: at [27]-[28].

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

Arvinthan v R [2022] NSWCCA 44

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

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

No error taking 'abuse of trust' into account for s 66C(2) offence (under authority) - s 21A(2)(k) CSPA

PC v R [2022] NSWCCA 107

The applicant was sentenced for aggravated sexual intercourse of a child 10-14, his daughter, under s 66C(2) *Crimes Act*, the aggravating circumstance being the complainant was 'under authority' (s 61H(2)).

Section 21A(2)(k) *CSPA* provides that it is an aggravating factor if the offender abused a position of '*trust or authority*.'

Section 21A(2) provides the court is not to have additional regard to an aggravating factor if it is an element of the offence.

The applicant submitted the sentencing judge erred in determining that the offences were aggravated by an 'abuse of trust' (s 21A(2)(k) *CSPA*) where an element of the s 66C(2) offence is that it occurred 'under authority'.

The CCA dismissed the appeal.

In a sexual assault of a child by a father, the position of authority will have been abused, but this does not make 'abuse of authority' an element of the offence in the strict sense. There is a distinction between 'abuse of authority' and 'abuse of trust'. The concepts are treated distinctly in s 21A(2)(k), although they will often overlap, hence caution is needed that a person is not punished twice: at [72]-[73]; *MRW v R* [2011] NSWCCA 260.

An abuse of trust is not prevented from being taken into account as an aggravating factor where under authority is an element of the offence. Each case will depend on the relationship between offender and child and circumstances of offending. "Abuse of trust" is not an element of s 66(C)(2) and is not precluded from being taken into account by s 21A(2): at [76].

The judge placed express emphasis on breach of trust and the particular circumstances of the daughter's age and innocence that aggravated the offending committed by the father in a position of authority: at [81]-[83].

Offence committed on parole - s 21A(2)(j) CSPA

Ahmad v R [2022] NSWCCA 144

The applicant was on parole at the time he committed offences for which he was sentenced. The CCA held the sentencing judge did not err in finding the offence aggravated by the applicant being 'on conditional liberty' (s 21A(2)(j) *CSPA*).

The CCA rejected the applicant's submission that he was 'unlawfully at large', under s 171(4) *Crimes (Administration of Sentences) Act* 1999 which provides that an offender's sentence is extended by the number of days they were at large after a parole revocation order took effect and before they were taken into custody (ss 171 (2), (4)). "At large" in s 171(4) is "simply a reference to the person not being in custody". Section 17(4) extends the term of a sentence prospectively, by reference to the number of days the offender was at large after the revocation order takes effect. It does not operate to alter, retrospectively, the status of the offender who is in the community on conditional liberty at a time before the revocation order is made: at [30]-[31].

4. DISCOUNTS – PLEA OF GUILTY

ss 25E(2), (3) CSPA – early guilty pleas - discount where offer later accepted - manslaughter a 'different offence' not the subject of proceedings – 25% discount applied - re-sentence not required; mathematical correction sufficient

Black v R [2022] NSWCCA 17

Section 25E *CSPA* provides for a discount where a guilty plea offer is made for a 'different offence' and refused.

Section 25E(2) provides, relevantly, that for an offer which is later accepted, a discount applies where:

(a) the offender made an offer recorded in a negotiations document, and

(b) that offence (the *different offence*) was not the offence the subject of the proceedings when the offer was made…..

Section 25E(3)(a) provides that for an offer to plead guilty to a 'different offence', a 25% discount applies if made before the offender was committed for trial.

The applicant was charged with murder. He offered to plead guilty to manslaughter before committal. The offer was rejected but later accepted by the Crown during negotiations before trial.

The CCA held the sentencing judge erred in applying a 10% discount (s 25D(2)(b)(ii)) on the basis that, because manslaughter was identified in the charge certificate and the case conference certificate as an alternative to murder, it was 'the subject of the proceedings when the offer was made' (s 25E(2)(b)): at [26]-[27].

The CCA held the correct discount is 25% within s 25E(3)(a). Manslaughter was a "different offence" - it was 'not the offence the subject of the proceedings when the offer was made' within s 25E(2)(b). The 'offence the subject of the proceedings' was murder: at [31]-[36]; *R v Holmes (No 7)* [2021] NSWSC 570**,** followed.

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

Resentence not required; mathematical correction sufficient

The error can be addressed by simple mathematical correction. The error does not affect exercise of the sentencing discretion (*Kentwell v The Queen* (2014) 252 CLR 601; *Lehn v R* (2016) 93 NSWLR 205). No complaint was made by the parties of the approach by the sentencing judge or that the sentence, before discounting, was affected by error: at [53].

Utilitarian value of a guilty plea - requires separate consideration from remorse and willingness to facilitate course of justice

Doyle v R [2022] NSWCCA 81

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

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

The *CSPA* now explicitly differentiates between utilitarian value of a guilty plea (s 25D), remorse (a mitigating factor under 21A(3)(i)) and/or a willingness to facilitate the administration of justice (s 22A). The two latter considerations are to be taken into account separately from the utilitarian value of an early guilty plea: at [16]-[17].

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

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

Section 25F(4) CSPA provides that the court may determine not to apply a sentencing discount because the utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender.

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

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

The Court observed that while there will be cases in which s 25F(4) has work to do, care must be taken not to exercise the discretion it confers to introduce unfairness or subvert the object of the EAGP scheme to reduce delays. A contested fact hearing will often produce a small delay compared with a

trial. If all contested fact hearings were taken too readily to erode utilitarian value of a plea of guilty, there would be a risk of eliminating incentive for some to plead guilty at all: at [38].

Discount for guilty plea – 'first day of the trial' – vacated - non-attendance by offender – s 25C CSPA

Gurin v R [2022] NSWCCA 193

25C(1) *CSPA* provides that the 'first day of the trial of an offender' means the first day fixed for trial or, if that day is vacated, the next day fixed for the trial.

A 10% discount applies where the offender pleaded guilty at least 14 days before the first day of the trial: s 25D(2)(b)(i).

The applicant failed to appear on his adjourned trial date in accordance with his bail undertaking. The trial was aborted. He was re-arrested nine months later and entered a plea of guilty. No new date for trial had yet been fixed. The sentencing judge allowed a 5% discount in accordance with s 25D(2)(c).

On appeal, the applicant submitted the 10% discount under s 25D(2)(b)(i) should have applied.

The CCA dismissed the appeal. The term "vacated" within s 25C(1) means adjourned before the commencement of the trial, and is not applicable in circumstances where the trial was aborted because the applicant absconded: at [27], [32]; *R v A2; R v Magennis; R v Vaziri* (2019) 269 CLR 507.

Where the first day of trial is properly vacated, the clock is reset. Section 25C provides an offender another opportunity to enter a plea of guilty 14 days *before* the next day fixed for trial. But once a trial commences, the opportunity for a 10% reduction is lost. A plea of guilty entered after the commencement of a trial attracts the reduction of 5% (s 25D(2)(c)). This is so whether the trial is aborted before empanelment, the jury is discharged after empanelment, a new trial is necessary because the jury are unable to reach a verdict, or even after a successful conviction appeal to the CCA where a guilty verdict is set aside and a new trial directed: at [29].

Fail to arrange timely entry of guilty plea – miscarriage of justice - strictly only 5% discount available – CCA must sentence afresh (cf. Black v R)

Green v R [2022] NSWCCA 230

The CCA found a miscarriage of justice where the applicant gave instructions to plead guilty well in advance of trial, but the District Court was only notified of the plea one day after the 14 day cut off for a larger sentencing discount and gave a 5% discount (s 25D(2)(c)).

The CCA found that a 10% discount is available only once the plea is entered or a formal notice is provided 14 days before the trial date (s 25C(2) *CSPA).* The applicant both at first instance and on appeal, is only entitled to the 5% discount under s 25D(2)(c): at [45]-[48].

Accordingly, the CCA could not remedy the miscarriage by simply increasing the level of discount and was required to sentence afresh. This case is to be distinguished from cases where the mathematical error has been corrected without re-exercising the sentencing discretion (cf. ***Black v R*** [2022] NSWCCA 17). The sentencing Judge may have taken a different approach to relevant sentencing consideration had he known of the applicant's earlier instructions to plead guilty. Further, evidence tendered "on the usual basis" was significant in the re-sentencing exercise: at [49]-[61].

Magistrate erred in not ascertaining whether plaintiff pleading guilty - s 95(4) Criminal Procedure Act 1986 - potentially deprived plaintiff of 25% discount for an early plea of guilty

Coles v DPP [2022] NSWSC 960

The Court held that the Local Court Magistrate erred in not ascertaining whether the plaintiff was pleading guilty to the offences - as mandated by s 95(4) *Criminal Procedure Act* 1986 - before committing the plaintiff to trial.

Committal for trial to the District Court impacts upon the sentencing discount available. Failure to undertake the inquiry under s 95(4) *Criminal Procedure Act* potentially deprived the plaintiff of a 25% discount for an early plea of guilty, as the discount available is mandatorily reduced by s 25D(2)(b) *CSPA* once the matter is committed to the District Court for trial: at [26]-[29].

5. DISCOUNTS – ASSISTANCE TO AUTHORITIES

Meaning of 'undertaking to assist' - absence of a concluded agreement - s 23 CSPA - fail to specify discount within s 23(4)

Vaiusu v R [2022] NSWCCA 283

Meaning of 'undertaking to assist'

The CCA considered whether there was an 'undertaking to assist' authorities within s 23 *CSPA*. The applicant, sentenced for possess firearms and other offences, stated he was only in possession of items for the purposes of surrendering them to police in exchange for favourable treatment to his brother in custody. The sentencing judge found that there was no undertaking as there was no concluded arrangement or agreement between the applicant and police for the handover of anything.

The CCA held the judge was correct to find that in the absence of a concluded agreement the applicant was not entitled to a discount for assistance. What is required is an inference that the applicant had unequivocally indicated his intention to surrender items to police. There was never any suggestion of an unconditional surrender. Rather, surrender was contingent on resolution of negotiations acceptable to the applicant. While an undertaking may not be an agreement, the applicant sought an agreement as a contingency for the making of any undertaking. Even on a broad view of the meaning of "undertaken to assist" in s 23, the applicant had not undertaken to assist authorities: at [67]-[68].

Failure to specify discount within s 23(4) *CSPA*

The sentencing judge did give a discount for other assistance but failed to specify the discount in accordance with s 23(4) *CSPA*. The judge indicated that the matter had been taken into account, but there is a lack of transparency as to the significance given to what matters impacted on the discount, and quantum of any discount: at [85]; *CC v R; R v CC* (2021) 289 A Crim R 453, distinguished.

The CCA dismissed the appeal as no lesser sentence was warranted.

Assistance to authorities – Ellis discount – insufficient discount applied

McKinley v R [2022] NSWCCA 14

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

The applicant pleaded guilty to armed robbery and four other offences. When arrested for unrelated matters, the applicant disclosed his involvement in four out of the five offences in a police interview.

The CCA allowed the appeal. The judge erred in applying a 40% combined discount for the early pleas of guilty and assistance relating to four offences, and a 35% combined discount for the remaining offence. The CCA applied a 55% combined discount.

The judge applied a discount for the plea of guilty and assistance to authorities more in line with the usual assistance provided from time to time, not the rare circumstances associated with the *Ellis* discount. Insufficient discount was provided, particularly as law enforcement agencies assessed the assistance as of high value, and was in relation to offences which law enforcement agencies investigating but were unaware of the applicant's involvement: at [61]-[62].

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

6. PARTICULAR OFFENCES

Wounding with intent to cause grievous bodily harm - Finding that injuries amounted to grievous bodily harm did not breach The Queen v De Simoni (1981) 147 CLR 383

Maybury v R [2022] NSWCCA 233

The applicant was originally charged with causing grievous bodily harm with intent to cause grievous bodily harm (s 33(1)(b) *Crimes Act*). This charge was not proceeded with and the applicant was convicted by a jury of wound with intent to cause grievous bodily harm (s 33(1)(a)).

The CCA held that, in sentencing for the s 33(1)(a) offence, the sentencing judge did not breach the *De Simoni* principle by finding the victim's injuries amounted to grievous bodily harm. The sentencing judge's finding that "the nature and extent of the injuries clearly amount[ed] to grievous bodily harm" did not mean that the applicant was erroneously sentenced for s 33(1)(b): at [123].

The seriousness of an offence of wounding with intent to cause grievous bodily harm will depend upon the nature and extent of the wounding and related injuries, the manner and intention with which the wounding was inflicted and other circumstances surrounding the wounding. The sentencing judge was required to make findings of fact on those matters, provided they were consistent with the jury's verdict and, if findings against the offender, established beyond reasonable doubt. The sentencing judge's findings were consistent with the jury's verdict and open on the evidence: at [130]-[134].

Use offensive weapon to avoid lawful apprehension, s 33B Crimes Act – no error to find offending aggravated by fact that victims were police officers

Courtney v R [2022] NSWCCA 223

The CCA held that for an offence of use offensive weapon with intent to prevent lawful apprehension pursuant to s 33B *Crimes Act*, the sentencing judge did not double count by taking into account that the offence involved a police officer.

In enacting s 33B, Parliament did not intend to specifically protect the police: at [44]; authorities cited.

Conduct covered by s 33B is the use of an offensive weapon to avoid apprehension or detention. The exercise of the power to apprehend or detain is not limited to police officers A person can be lawfully apprehended or detained by a range of persons other than police: at [51]-[52], [56]; *Sharpe v R* [2006] NSWCCA 255.

That the offending involved police officers was not an inherent characteristic of s 33B: at [57]; *R v Yildiz* [2006] NSWCCA 97.

Manslaughter on basis of excessive self-defence - events leading up to confrontation not relevant to assessment of the objective seriousness

Newburn v R [2022] NSWCCA 139

The CCA allowed the applicant's appeal against sentence for manslaughter on the basis of excessive self-defence.

Section 421(1) *Crimes Act* applies if the person's conduct is not a reasonable response in the circumstances as they perceive them, but the person believes the conduct is necessary to defend themselves or another person.

After an earlier altercation, the deceased approached the applicant's house with a broken golf club making threats. The applicant stabbed the deceased. The sentencing judge found the applicant's response to the threat he perceived "*very significantly exceeded a reasonable response*".

The CCA held the judge erred in consideration of objective criminality. The events which led to the confrontation were relevant only insofar as they provided context to the actual offence. By contrast, those events formed the basis of the judge's assessment of the seriousness of the offending as "objectively grave": at [40]-[41]; *Patel v R* [2019] NSWCCA 170.

The unchallenged evidence was that when the deceased returned to the house, the applicant was afraid he and the householder would be hurt. In that state of mind, he took the weapon and a fight ensued. Having regard to medical and behavioural issues and drug addiction, his emotional deficits made it likely he was more sensitive to the real or perceived threats and had a diminished capacity to think of alternative courses of action. Having regard to the fear he felt and the perceived threat and,

that the Judge found the intention was not to kill but to cause grievous bodily harm, it was not open to find that the response was one which "*very significantly exceeded a reasonable response*": at [43]-[47].

Sentencing principles for manslaughter by excessive self-defence

The CCA summarised relevant principles:

1. Manslaughter based on a finding of excessive self-defence carries the implication that the offender perceived it was necessary that they act in order to defend themselves: *Smith v R* [2015] NSWCCA 193 at [44]; *Patel v R* [2019] NSWCCA 170 at [14];

2. Central to the sentencing exercise is the identification of:

    1. the circumstances as the offender (rightly or wrongly) perceived them to be; and
    2. what, precisely, the conduct was that the offender believed was necessary in order to defend themselves: *Smith* at [44]-[45]; *Patel* at [14];

3. The offender's perception of the circumstances is relevant to the determination of what they believed was necessary: s 421(1)(c) *Crimes Act* 1900; *Smith* at [45];

4. An offender's perception is also integral to reasonableness of their conduct: s 421(1)(b) *Crimes Act*; *Smith* at [45], [56], [58];

5. Both questions are assessed by reference to the offender's subjective perception regardless of whether that was objectively reasonable, taking into account any intoxication: *Smith* at [45]; and

6. The anterior conduct of the offender, including reasons for attendance at the scene of the crime and for entering into a confrontation, forms no part of the actual offence and is not directly relevant to the assessment of the gravity of the offending: *Patel* at [14].

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

Darke v R [2022] NSWCCA 52

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

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

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

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

The CCA resentenced to 3 years imprisonment with release on 1 year recognisance after 2 years. Given the applicant was not provided with any custody-based programs, and lack of clarity as to success of past counselling in terms of rehabilitation, rehabilitation is furthered by conditions to undertake programs to assist in addressing offending behaviour and alcohol misuse. Conditions included to undertake treatment or rehabilitation including psychological counselling, EQUIPS (Addiction) or similar program and specific sex offender treatment programs: at [70]–[73].

Import border-controlled drug - recklessness – applicant "turned his mind" to possibility he was importing drugs – ss 5.4, 307.1(1) Criminal Code (Cth).

Kemal v R [2022] NSWCCA 83

The CCA dismissed the applicant's appeal against sentence for importing a border-controlled drug (methamphetamine) contrary to s 307.1(1) *Criminal Code* (Cth).

It was accepted at sentence that the applicant acted recklessly. Section 5.4(1)(a) *Criminal Code* (Cth) defines recklessness as a person being aware of a substantial risk the substance was a border-controlled drug, and that, having regard to the circumstances known to him, it was unjustifiable to take the risk.

At sentence, the applicant gave evidence that he was told the suitcase he was bringing into Australia contained concealed documents and money and, while he wanted to believe this, he thought there "*could*" be drugs inside it.

The CCA held the judge did not misapply the test for recklessness by stating the evidence established the applicant had "turned his mind" to the possibility he was carrying a border-controlled drug but went ahead. The applicant's plea of guilty constituted an admission to all elements of the offence, including that he had acted recklessly according to the Code definition: at [10], [60]. The judge was required to assess criminality, and level of recklessness. The judge was paraphrasing, for the purposes of her assessment of criminality, what the applicant had said about his state of mind: at [62]-[63].

Simpson AJA: Where recklessness was admitted by the guilty plea, and a given, the judge was not required to determine whether the applicant was reckless (and thus to apply a "test for recklessness"). The judge's task was to determine, for the purposes of the assessment of objective gravity, the degree of recklessness in the applicant's conduct: at [10]-[11].

Maintain unlawful sexual relationship with child - s 66EA Crimes Act - fact finding by sentencing judge after jury verdict

R v RB [2022] NSWCCA 142

The CCA allowed the Crown appeal against sentence for an offence of persistent sexual abuse of a child under s 66EA *Crimes Act* (in force from 1 December 2018).

The CCA held that the sentencing judge erred in determining the respondent should be sentenced on the basis of the two least serious (i.e. the most favourable) unlawful sexual acts, applying *Chiro v The Queen* (2017) 260 CLR 425. *Chiro* is inapplicable to s 66EA. (*Chiro* held, under the then South Australian provision, that the jury must reach unanimity as to the same two or more sexual acts and that it could be taken from a guilty verdict that two or more such acts were the subject of findings made unanimously): at [42], [78].

Section 66EA provides, relevantly:

- An unlawful sexual relationship is defined as a "a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period": s 66EA(2).
- The prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence, but must "allege the particulars of the period of time over which the unlawful sexual relationship existed": s 66EA(4).
- The jury must be satisfied beyond reasonable doubt that the evidence establishes an unlawful sexual relationship existed but "is not required to be satisfied of the particulars of any unlawful sexual act …": s 66EA(5).

The CCA held that s 66EA does not require the jury to find unanimously that the same unlawful sexual acts took place to constitute the maintained relationship. All jurors had to be individually satisfied that at least two acts had been committed but did not have to agree upon which acts those were (s 66EA(5)(c)). The guilty verdict on s 66EA does not reflect a unanimous finding upon any of the large number of unlawful sexual acts particularised, or any findings that any one of the alleged acts was committed: at [42]-[45].

Section 66EA requires a jury would have to be satisfied that (at [62]-[63]):

- for some duration the accused committed multiple unlawful sexual acts with a degree of continuity and habituality as to constitute an ongoing association or connection with respect to sexual activity: at [62]; *R v CAZ* [2011] QCA 231.
- the accused maintained the relationship, inferred from the inherent nature of adult sexual activity with a child, the recurrence of sexual acts and from the imbalance of influence.

Sentencing judge's task

As the jury needs to be only unanimous as to the maintenance of a sexual relationship, and not any specific sexual acts, there has been no determination of the facts of what the offender is to be punished for. A sentencing judge must decide where the case stands on a scale up to the worst category. A judge will be required to determine the facts of the offending, applying the principles in *The Queen v Olbrich* (1999) 199 CLR 270*, Cheung v The Queen* (2001) 209 CLR 1 and *R v Isaacs* (1997) 41 NSWLR 374: at [66], [72].

The CCA observed that s 66EA leaves everything of substance to be decided by judge alone at sentence. The only prerequisite is a guilty verdict that is obscure as to scope of the wrongful conduct that constituted the relationship and lacking unanimous jury acceptance of even one or two specific alleged acts: at [77].

The present case does not demonstrate any practical utility in the laying of a charge under s 66EA. It illustrates how the section has worked a less than transparent shift of decision-making, on very significant questions of criminal culpability, from jury to judge: at [75].

The matter was remitted to the District Court for sentence.

Extent to which undercover operation and role of an undercover operative operate to reduce culpability

Ibrahim v R [2022] NSWCCA 161

The applicant was sentenced for Commonwealth offences involving tobacco importation and conspiracy to import MDMA.

The sentencing judge found that the applicant would not have committed the offences without the undercover operative (UCO); and that culpability was diminished but "*not substantially*" because, although there was a degree of encouragement and enticement by the UCO, no coercion or pressure was applied. The applicant was not a reluctant or unwilling participant: at [44], [54]-[58], [65].

The CCA held the judge did not err in his findings.

To challenge a sentencing judge's assessment of culpability, it is necessary to point to an error in the *House v The King* sense. Assessment of culpability is part of the instinctive synthesis. There are inherent problems with a ground than can only challenge the weight given to culpability: at [45]-[47], [49]; authorities cited.

The applicant sought to identify specific error by asserting that the judge created a dichotomy between coercive and non-coercive behaviour, and that the conclusion that diminution was not substantial derives from the finding of non-coercive behaviour: at [46].

The judge had been assisted by *Haval Kada* [2017] VSCA 339. The Victorian Court of Appeal did not consider there is any dichotomy between coercive behaviour and encouragement or inducement. Rather, there was a "spectrum along which that impact is to be assessed". Coercion or pressure would be an additional factor, but the authorities do not require pressure or coercion for the principles associated with police involvement to apply. The judge did not adopt a different approach by creating the asserted dichotomy: at [59], [61]-[64]; *Haval Kada*, applied.

The finding that diminution was "not substantial" was open on the judge's analysis of the applicant's involvement and relationship with the UCO: at [53], [61]-[63]. (The CCA allowed the appeal on the ground of manifest excess).

7. APPEALS

Fresh evidence – applicant with mental health issues refused lawyers to access medical records

Barnes v R [2022] NSWCCA 140

The CCA allowed the applicant's sentence appeal (strangling being reckless, s 37(1) *Crimes Act*) where the applicant, who had mental health issues, had not allowed his lawyers to access his Justice Health records and a psychiatric report stating he was assaulted in custody. The sentencing judge concluded that a custodial sentence would not weigh more heavily as a result of his mental health.

The CCA held the circumstances were exceptional for the evidence to be admissible as fresh evidence. The judge's conclusion could not have been reached if the medical evidence had been admitted. "Unique psychological factors" and unusual circumstances led the applicant to refuse access to the health records. No deliberate or forensic decision was made not to review and use the health records. Evidence of a similar nature has been admitted in previous cases: at [44].

Contrary to the judge's findings, the applicant's experience in custody is more onerous than inmates without such mental illnesses (schizoaffective/schizophrenic illnesses). The sentence proceedings miscarried and a less severe sentence is warranted: at [70]-[73].

CONVICTION AND OTHER APPEALS

1. EVIDENCE

Evidence Amendment (Tendency and Coincidence) Act 2020 – Transitional provisions

The *Evidence Amendment (Tendency and Coincidence) Act 2020* commenced on 1 July 2020. The amending Act made the test for admissibility for tendency evidence *less* stringent under new ss 97 and 101 *Evidence Act* 1995.

The transitional provisions in cl 28, Schedule 2, *Evidence Act,* provide that the amendments do not apply to "*proceedings the hearing of which began before the commencement of the amendment*".

Bektasovski v R [2022] NSWCCA 246

The CCA held that "*proceedings the hearing of which began before the commencement of the amendment"* refers to proceedings on indictment from the time an accused is first arraigned in the court which goes on to hear the substantive trial of the accused: at [51]; *Stephens v The Queen* [2022] HCA 31; *R v Adamcik* (NSWCCA, 22.11.1996, unreported).

The Crown had argued the hearing of the proceedings began when the trial commenced on 18 January 2021, when the applicant was arraigned for a second time, so that the amended s 101 applies.

However, the CCA accepted the applicant's argument that the hearing of the proceedings commenced when first arraigned on 16 March 2020, thus the previous version of s 101 applied: at [40].

JW v R [2022] NSWCCA 206

The 2020 amending Act commenced after the appellant had been committed for trial but before the commencement of his 'special hearing' under the *Mental Health (Forensic Provisions) Act 1990* (NSW) (repealed).

The CCA held that the 2020 amending Act applied.

- Where application of the transitional provisions is in issue, it will be necessary to identify the relevant "hearing" of the proceedings, and to determine when it began: at [54]; *GG v R* (2010) 79 NSWLR 194.

- The "special hearing" (s 19 *MHFPA* 1990) is the relevant "hearing". At the time of the commencement of the 2020 amending Act, the special hearing had not yet begun. Thus the 2020 amendments applied: at [60]; *GG v R* (2010) 79 NSWLR 194; other authorities cited.

The appeal was dismissed as the error was favourable to the applicant and did not give rise to a "substantial miscarriage of justice": at [61]; s 6(1) *Criminal Appeal Act*.

Interpreter's evidence that "male voice" in phone conversations was the same voice – "ad hoc" expert opinion evidence - s 79 Evidence Act 1995

Ali v R [2022] NSWCCA 199

An interpreter's evidence that a "male voice", spoken in Hindi on intercepted phone conversations, was *the same voice* was admissible as expert opinion evidence (s 79 *Evidence Act* 1995). It was the Crown case that the "male voice" belonged to the accused.

The evidence was admissible as that of a "ad hoc" expert. The CCA emphasised aspects of the interpreter's unchallenged evidence:

- particular familiarity with the Hindi language, in which the calls were made
- reliance on pitch, tone and accent specific to the Hindi language
- the interpreter's highly specialised evidence taking into account volume, pitch and modulation, accent and speed of speech: at [53]-[56]; *R v Leung* (1999) 47 NSWLR 405.

It is not the case that the interpreter was in no better position than the jury to make her determination - she was familiar with the language to a sufficient degree to bring a greater understanding to voice comparison than a person without that skill. Not being qualified or formally trained in voice recognition is not to the point: at [57]; *R v Leung*.

The trial judge also gave a lengthy direction on identification evidence, including suggestions of shortcomings in the interpreter's evidence, and the jury being told the interpreter was "no more or less qualified" than the jury to express an opinion as to whether the male voice was the same: at [59].

That the evidence was admitted without objection infers absence of any objection was a deliberate forensic decision by trial counsel: at [58].

'Opinion' evidence - expert evidence on behavioural responses of child sexual abuse victims - conclusions drawn from research by others - ss 79, 109C Evidence Act 1995

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

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

Dr Shackel has qualifications in law and psychology, and expertise on trauma responses of children to sexual assault. Her evidence was based on her report containing her assertions supported by referencing articles or research by others, not her own clinical research.

The CCA held that in the circumstances of this case, Dr Shackel's evidence met the requirements of ss 79(1) and 108C(1) *Evidence Act* 1995 as opinion evidence based wholly or substantially on her specialised knowledge based on her training, study or experience. Each assertion is an 'opinion', being a conclusion or an inference drawn from "observed and communicable data". The essence of "specialised knowledge based on … training, study or experience" is that it draws on accumulated sources of information and the product of others' research recorded in professional publications: at [64]-[72], [79]; authorities cited.

This does not mean Dr Shackel's evidence will meet the admissibility test in every case. Seeking a ruling on admissibility of evidence by reference to a 57-page report places a trial judge in an impossible position. If not done by the parties, it would be wise that a judge require the Crown to identify parts for which it seeks to adduce oral evidence: at [93]-[94].

Expert not qualified to give evidence of the behaviour of child sex offenders generally - ss 79, 109C Evidence Act 1995

Decision Restricted [2022] NSWCCA 136

The CCA held that evidence by the prosecution "expert" with tertiary qualifications in psychology and law about "patterns of offending behaviour" by perpetrators of child sexual assault should not have been admitted as opinion evidence pursuant to ss 79(1) and 108C(1) *Evidence Act* 1995.

Based on review of various studies, the expert gave evidence as to what the "research" indicated was the typical response of child victims to sexual assault. The expert also gave evidence that child sexual abuse "often occurs" in a "brazen" setting.

The CCA held the expert was qualified by reason of her study to give evidence of responses of child victims but was not qualified to give evidence of the behaviour of child sex offenders generally.

Interlocutory appeal by DPP - exclusion of parts of ERISP - accused had lack of memory due to cognitive impairment from alcohol consumption – s 90 Evidence Act

DPP (NSW) v Sullivan [2022] NSWCCA 183

The CCA allowed, in part, the DPP interlocutory appeal against the trial judge's exclusion of parts of the accused's ERISP and entire walkthrough pursuant to s 90 *Evidence Act* 1995.

The respondent was charged with manslaughter. The trial judge ruled it would be unfair to allow the Crown to use parts of the respondent's ERISP as admissions because, due to cognitive impairment from alcohol consumption on the evening of his alleged fight with the deceased, the respondent was "not fully capable of recalling everything at the time of the ERISP". The trial judge also excluded the walkthrough in its entirety.

The CCA held the judge did not err in excluding parts of the ERISP, however, set aside the order regarding the walkthrough and remitted for determination admissibility of the walkthrough.

Parts of ERISP

It was open to the trial judge pursuant to s 90 to conclude that, having regard to the circumstances in which the admission was made, it would be unfair to the respondent to "use" the evidence of his admissions. The respondent's answers were unreliable because the respondent was only hypothesising about certain aspects of his alleged fight with the deceased. The unfairness arises from the combination of an actual finding of a lack of recollection, an indication by the respondent during the ERISP of that lack of recollection, and the use which the prosecution sought to make of the admission: at [49]-[54].

The walkthrough

The trial judge did not address s 90 which was the principal basis of the respondent's application. Exclusion of the entire walkthrough was inconsistent with exclusion of parts of the ERISP: at [63]-[65].

Tendency direction – cross-admissibility – error to group all alleged tendency together in relation to both complainants

Kanbut v R [2022] NSWCCA 259

The CCA allowed the applicant's conviction appeal against four Commonwealth slavery offences (s 270.3(1)(a) *Criminal Code*) and money laundering, involving two Thai nationals, X and Y. A retrial was ordered.

The trial judge's tendency directions were erroneous. The direction identified every particular of the conduct of the applicant said to satisfy the definition of slavery and the four slavery offences in relation to both complainants and no other conduct. It grouped the various particulars of conduct together in relation to both complainants: at [61]-[63].

For example, the direction stated that there was evidence that "the accused required [X] and [Y] to work at various brothels for long hours on most days of the week" and that this could show the "accused ha[d] a tendency to act in a particular way, namely… to require [X] and [Y] to work at various brothels in Sydney for long hours on most days of the week". The judge stated that "[i]f you find that none of the acts occurred then you must put aside any suggestion that the accused had the tendency advanced by the Crown."

A proper tendency direction in a case such as this enables the jury to utilise its acceptance of the evidence of one of the complainants to accept the evidence of the other. But by grouping the conduct engaged in against X and Y together and then formulating the alleged tendency in a manner specific to both, the direction wholly failed to achieve that purpose: at [65].

The tendency direction was misleading. It meant that, unless the jury were satisfied of each of the precise acts relied on in relation to both complainants, then they could not be satisfied that the corresponding tendency has been established. If the jury could not find that any of those acts occurred, they would not just dismiss tendency reasoning, they were obliged to find the applicant not guilty: at [66]-[68].

Other statements by the judge were confusing: see at [69-[71].

The tendency direction gave rise to a miscarriage of justice. The tendency direction failed to give the jury a pathway of reasoning from accepting the evidence of one of the complainants to accepting the other; and was capable of misleading the jury about what use could be made of their evidence and otherwise most likely confused as to tendency reasoning. There is the very real possibility that it affected the jury's acceptance of the complainants' evidence: at [76].

Tendency – direction that cross-admissible charged acts need not be proved beyond reasonable doubt before use as tendency evidence – s 161A Criminal Procedure Act 1986

JS v R [2022] NSWCCA 145

The CCA dismissed the applicant's appeal against convictions on two counts of sexual intercourse with a single complainant, his nephew, aged 4 – 6 years.

The Crown adduced as tendency evidence:

- each charged act in support of the other charged act (cross-admissibility); and
- an uncharged act of sexual touching against the complainant.

The trial judge directed the jury that they did not need to be satisfied beyond reasonable doubt as to each of the three items of tendency evidence before being entitled to take it into account in determining whether, with respect to each count, they were satisfied beyond reasonable doubt of guilt: at [35].

The CCA held that the jury was properly directed on the use of the charged and uncharged acts as tendency evidence: at [50]-[51].

A jury should not ordinarily be directed that, before they may act on evidence of *uncharged* acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt (*The Queen v Bauer* (2018) 266 CLR 56 at [86]). In principle, the same reasoning applies to cross-admissible evidence of charged acts: at [36]-[39].

However, as such a direction could undermine general directions concerning proof beyond reasonable doubt in respect of each charge, the judge should stress that the jury cannot find the accused guilty of any charged offence unless satisfied of guilt for that offence beyond reasonable doubt (*Bauer* at [86]). To similar effect, such a direction may be necessary in relation to cross-admissible charged acts: at [40]-[42].

The proper approach is to have regard to all evidence relied on in proof of the tendency as evidence of the tendency alleged. To the extent a jury is satisfied of the existence of the tendency, the tendency may be relied on in proof of the charge. Thus, it is preferable not to direct a jury to make findings as to the conduct relied on in proof of a charge. Rather the jury should be directed with respect to finding the alleged tendency: at [43].

s 161A *Criminal Procedure Act* 1986

Section 161A *Criminal Procedure Act* 1986 now provides that a jury must not be directed that evidence needs to be proved beyond reasonable doubt to the extent it is adduced as tendency evidence or coincidence evidence. Although this provision was not referred to at trial, the direction given by the judge conformed with s 161A: at [146].

Child sexual assault complainant – unfavourable witness – error to admit complainant's statement – silence or unresponsiveness insufficient to establish denial or failure to agree or admit to substance of evidence, s 106 Evidence Act – witness not "unavailable" where "all reasonable steps" not taken by the Crown Prosecutor to compel witness to give evidence, s 65 Evidence Act

RC v R [2022] NSWCCA 281

The applicant was convicted of sexual assault offences against his nieces and nephews.

The CCA held the trial judge erred in admitting the police statement of complainant CG under s 106 *Evidence Act* as a prior inconsistent statement and under s 65 on the basis CG was an "unavailable witness" because CG was silent or unresponsive when questioned by the Crown as an unfavourable witness (s 38). The CCA quashed the applicant's convictions and ordered a new trial.

Section 106 – exception to credibility rule

Section 106(1)(a) provides an exception to the credibility rule if in cross-examination

> (i) the substance of the evidence was put to the witness, and
> (ii) the witness denied, or did not admit or agree to, the substance of the evidence.

Section 106(1)(a)(i) requires the substance of the evidence to be put to the witness in cross-examination. Although portions of the statement were read to CG, certain crucial parts of it were not put to CG at all: at [61].

Regarding s 106(1)(a)(ii), it is not accepted that CG denied, or did not admit or agree to, the substance of the evidence in respect of the alleged sexual misconduct. CG remained silent or became argumentative when contents of the statement relating to the sexual allegations were put to her. CG did not deny the contents of the statement insofar as the contents dealt with the specific allegations, did not give an inconsistent account, nor say that she could not remember. CG gave no account at all in the trial about the specific alleged acts. It cannot be inferred that CG, by her silence or unresponsiveness, was denying, or failing to admit or agree to, the substance of the evidence. The only proper inference was that she was reluctant to give evidence because she wanted to re-establish contact with family and feared giving evidence would strain relationships: at [84]-[104]; *Col v R* [2013] NSWCCA 302; *Lee v The Queen* (1998) 195 CLR 594; *R v Rose* [2002] NSWCCA 455 considered.

s 65 – exception to hearsay rule

CG's statement was not admissible under s 65 because she was not an "unavailable witness". A person is taken not to be available to give evidence about a fact if "all reasonable steps" have been taken by the party seeking to prove the person is not available to compel the person to give the evidence, but without success (see pt 2, cl 4(g) *Evidence Act*): at [108]. There was no evidence as to the steps taken by the Crown Prosecutor to compel CG to give evidence. The mere fact that a witness refuses to answer questions, without more, will not always satisfy the requirements of cl 4(g). While attempts had been made to cross-examine CG, there was no evidence of attempts to talk to CG about her concerns in the luncheon adjournment, to warn CG of the risk that she may become subject to contempt proceedings, or to give opportunity to speak to a Witness Assistance Officer: at [105]-[120].

Prior sexual activity /experience - s 293 Criminal Procedure Act 1986 (now s 294CB)

Section 293(3) provided that 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.

Section 293(3) does not apply if, inter alia, the evidence:

- is of sexual experience or sexual activity, or lack thereof, at or about the time of the commission of the alleged sexual offence (s 293(4)(a)(i)); and is of events alleged to form part of a connected set of circumstances in which the alleged sexual offence was committed (s 293(4)(a)(ii)); or
- if the relevant evidence relates to a relationship that was existing or recent at the time of the offence, being a relationship between the accused and complainant (s 293(4)(b)).

Elsworth v R [2022] NSWCCA 275: ***No error in refusal to allow evidence of prior sexual activity five years earlier***

The CCA upheld the trial judge's decision refusing the applicant's application to admit evidence regarding the complainant's "prior sexual activity /experience" five years earlier.

The applicant sought to lead evidence including the complainant's statement to police that she suffered post traumatic stress disorder (PTSD) since a sexual assault five years earlier, and a conversation in which the complainant told him she had engaged in sexual conduct with others to "escape" the earlier sexual assault.

The evidence of what had happened to the complainant five years previously, or of what she said about it, did not fall within the exception to s 293(3); nor was it relevant to the issues the jury had to decide: at [127].

The "sexual experience" and "sexual activity", or lack thereof, cannot encompass a complainant's memory of some past experience or activity, because the memory is held at or about the time of the charged the act, or is connected to the charged act because past experience informed present conduct: at [119].

An experience of five years prior cannot be regarded as having occurred "at or about the time of" the incident because it was part of the complainant's continuing sexual experience. It is not an available construction: at [117]-[118]; *Jackmain (a pseudonym) v R* [2020] NSWCCA 150.

The distinction between "sexual experience" and "sexual activity" is an issue here. In the conversation that the applicant said the complainant had with him, she supposedly recounted an activity of five years before. Such evidence could not meet the temporal element in s 293(4)(a)(ii): at [123]; *GEH v R* (2012) 228 A Crim R 32 at [63]-[65].

The supposed conversation took place after the offence, not before it. The conversation could have had no bearing on the commission of the sexual act by the applicant, or upon the applicant's knowledge or belief as to whether or not the complainant consented. It was not relevant to the facts in issue and not admissible pursuant to s 55 *Evidence Act 1995*, even as s 293 also excluded it: at [124]; *Decision Restricted* [2021] NSWCCA 51.

Cook (a pseudonym) v R [2022] NSWCCA 282: ***No error in refusal to allow evidence of prior sexual activity/experience 18 months earlier in Queensland***

The applicant was convicted of child sexual offences against the victim when she was aged 9-11 in 2011-2014. The CCA (Adamson J; Bellew J agreeing, Beech-Jones CJ at CL dissenting) upheld the trial judge's ruling as inadmissible the victim's disclosures to the applicant in 2009 (and later to police and courts) that she was sexually abused when aged 6-7 in 2008-2009 by another family member in Queensland.

The time period of approximately 18 months between the Queensland offences and subject offences does not fall within the statutory wording, "at or about the time" (s 293(4)(a)(i)): at [115], [137]. "Connected set of circumstances" in s 293(4)(a)(ii) does not include the reporting of the Queensland offences or the administration of justice in Queensland in respect of those offences - otherwise, circumstances could be "connected" merely because proceedings relating to previous circumstances were still on foot: at [117], [138].

The CCA majority also rejected the applicant's submission that the complainant's evidence of the Queensland offences *related to* her relationship with the applicant (s 293(4)(b)) because she chose to confide in / disclose to him the Queensland offences and he became a prosecution complaint witness in the Queensland proceedings. Although the words "relate to" are wide, the disclosure cannot be said to "relate to" the relationship between the complainant and applicant: at [119]-[121].

The appeal was allowed on a separate ground.

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

WS v R [2022] NSWCCA 77

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

(i) the accused does not concede the alleged sexual intercourse occurred, and
(ii) the evidence is relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged;

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

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

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

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

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

2. DEFENCES

Wrong test in determining appellant had not established he was mentally ill at time of alleged offence - special verdict of act proven but not criminally responsible entered - Mental Health (Forensic Provisions) Act 1990, s 38 (rep)

Masters v R [2022] NSWCCA 228

The CCA quashed the applicant's convictions by judge-alone for culpable driving offences, substituting special verdicts of acts proven but not criminally responsible under the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020.

The issue at trial was whether the appellant should be found not guilty by reason of mental illness pursuant to then s 38 *Mental Health (Forensic Provisions) Act* 1990 (rep), which then applied.

The CCA found that the trial judge applied the wrong test in determining that the appellant had not established that he was mentally ill at the time of the alleged offence. The trial judge had found that "the accused was disabled or incapable or quite incapable or that it was impossible for him to reason or consider with some degree of composure and reason or with some moderate degree of calmness that what he was doing was wrong". The trial judge overstated the rigour of the test, which does not require that the accused be "disabled" or "quite incapable". It suffices that by reason of the disease of the mind the accused cannot reason with some moderate degree of calmness in relation to the moral quality of what he is doing so that he does not know that what he is doing is wrong. This involves a lack of ability to reason with moderate composure, not a total incapacity to recognise that the conduct is wrong: at [146]; *R v M'Naughten* (1843) 10 CL & Fin 200; 8 ER 718; *R v Porter* (1933) 55 CLR 182; *Sodeman v R* (1936) 55 CLR 192.

The CCA found, in accordance with s 7(4) *Criminal Appeal Act* 1912, that the applicant was mentally ill so as not to be responsible, according to law, for his actions and special verdicts of not guilty by reason of mental illness should have been entered. Two experts gave evidence that the applicant's schizophrenia symptoms of persecutory delusions, thought disorder, disorganised behaviour and distress affected him so that he was not able to reason with a moderate degree of sense and composure that his act of driving into the victim's car was morally wrong at [16]-[163].

The CCA allowed the appeal, quashed the convictions, substituted special verdicts of acts proven but not criminally responsible under the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (Sch 2, cl 5(3)). The appellant was discharged on condition he comply with his Community Treatment Order.

Crown appeal against acquittals - whether sexsomnia a 'mental health impairment' - s 4 Mental Health (Forensic Provisions) Act 2020 (rep) – whether Act codifies or alters common law concerning the mental illness defence – 'sane automatism'

R v DB [2022] NSWCCA 87

Section 4(1) *Mental Health (Forensic Provisions) Act 2020 (MHFPA) (rep)* provides:

s.4 Mental health impairment
(1) For the purposes of this Act, a *person has a mental health impairment* if—
(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and
(b) the disturbance would be regarded as significant for clinical diagnostic purposes, and
(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

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

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

The Crown appealed on grounds that the trial judge erred:

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

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

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

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

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

Per Brereton J:

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

3. DIRECTIONS

Error to direct jury they could not use doubt about a victim’s evidence in addressing any count concerning other victim – child sexual assault - R v Markuleski (2001) 52 NSWLR 82

Sita v R [2022] NSWCCA 90

The CCA allowed the applicant’s appeal against conviction for child sexual assault offences. Of ten counts involving two different victims, the applicant was acquitted of nine counts. He was convicted on one count (count 8) involving one victim, supported by evidence from the other victim.

The judge gave a *Markuleski* direction:- in cases of multiple counts of sexual offences concerning the one complainant, it was appropriate to supplement the usual direction to treat each count separately to indicate that, if the jury has a reasonable doubt about the complainant’s credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts: at [36]-[37]; *Markuleski* (2001) 52 NSWLR 82 at [90]-[91].

The judge directed the jury that if they had a doubt about the reliability of either victims’ evidence on a count pertaining to themselves, that doubt could be used regarding the other counts relating to them, but that any doubt *“could not… affect your assessment of a count that involves the other… complainant*.”

The direction was erroneous. The general direction about how the jury should use any doubts about a complainant’s evidence on a particular count was contradicted by a very specific direction that precluded using any such doubt in the assessment of that complainant’s evidence that related to a count concerning the other victim: at [40]. The direction had a “real chance” of affecting the verdict: at [42]; *Hofer v The Queen* (2021) 95 ALJR 937.

Jury directed to "choose" between accounts by accused and principal Crown witness – failure to give Liberato direction

Haile v R [2022] NSWCCA 71

The CCA quashed the applicant's murder conviction and remitted the matter for retrial.

Liberato direction

The judge erred by giving repeated directions in terms of the jury having to "choose" or "decide" between the accounts by the accused and principal Crown witness, creating a clear risk the jury may have understood they were required to choose between the competing accounts.

The judge further erred in refusing to give a *Liberato v The Queen* (1985) 159 CLR 507 direction in terms that:

(i) a preference for the evidence led by the Crown is not a sufficient basis for a finding of guilt;
(ii) the jury must not convict the accused unless satisfied, beyond reasonable doubt, of the truth of the evidence relied upon by the Crown;
(iii) if the accused's account is accepted, a verdict of not guilty must follow;
(iv) if the accused's account is not accepted, but the jury consider that it might be true, a verdict of not guilty must follow;
(v) if the accused's account is not accepted, it should be put to one side, and the question will remain whether the Crown, on the basis of the evidence that is accepted, has proved the guilt of the accused beyond reasonable doubt; and
(vi) even if evidence given by an accused is not positively believed, the jury must nevertheless acquit the accused if that evidence gives rise to a reasonable doubt about his or her guilt.

4. JURY

Fail to discharge jury – inference views of discharged juror at odds with majority - incomplete Black direction – deliberations without all jurors present constituted a material irregularity

Haile v R [2022] NSWCCA 71

The CCA quashed the applicant's murder conviction and remitted the matter for retrial.

Fail to discharge whole jury

The trial judge discharged a juror at a relatively early stage of the appellant's trial. The trial judge subsequently discharged two other jurors on the basis of the stress and anxiety associated with the trial. The trial judge then refused an application to discharge the whole jury following the discharge of the third juror. A verdict of guilty followed virtually immediately following the discharge of the third juror. The CCA held there was a clear inference that the views of the third juror were at odds with the majority and that there was a risk of miscarriage of justice arising from the refusal of the trial judge to discharge the jury (*BG v R* (2012) 221 A Crim R 225).

The CCA further held that the trial judge, in giving an "adaptation" of a *Black* direction to the jury, departed from the model direction and omitted a material part. The judge's direction contributed to the miscarriage of justice which arose from the subsequent failure to discharge the jury.

Irregular jury deliberations where not all jurors present

Two periods of separation where the jury deliberated without all members present constituted a material irregularity which materially contributed to the risk of a miscarriage of justice.

The trial judge had not made any order for separation of the jury. The CCA made observations as to the importance of making orders allowing a jury to separate during deliberations, and directing juries at the commencement of, and during, the trial that deliberations must only be undertaken when all members of the jury are present.

Trial continued after juror discharged – inference juror in favour of acquittal - substantial miscarriage of justice - Jury Act 1977, s 53C(1)

Addo v R [2022] NSWCCA 141

The CCA allowed the applicant's appeal where the trial continued with 11 jurors and it could later be inferred that the juror who was earlier discharged (Juror G) was in favour of acquittal.

The case fell within the category of case where it can be inferred, but only with the benefit of hindsight, that the juror who was discharged would have voted for an acquittal – thus giving rise to a risk, if the trial continues with the remaining jurors, of a substantial miscarriage of justice: at [144]-[147]; *BG v R* (2012) 221 A Crim R 225.

After the jury had indicated to the trial judge they were unable to reach unanimous verdicts and would consider majority verdicts, Juror G sent a note to the judge that his blood pressure was increasing to dangerous levels. Juror G failed to attend court the next day and could not be contacted. The trial judge discharged Juror G and determined the trial continue with 11 jurors (pursuant to s 53C(1) *Jury Act*), rejecting the applicant's application to discharge the jury. Guilty verdicts were returned shortly after.

There was little doubt Juror G was a "dissentient juror". First, the jury had indicated they were unable to reach unanimous verdicts. Second, the judge, shortly after, received a note from Juror G regarding the stress he was under. The overwhelming inference is that the stress was due to Juror G dissenting from the majority: at [149].

Because the circumstances which may give rise to a substantial miscarriage of justice are difficult to define, it is similarly difficult to formulate rigid rules governing the circumstances in which it may be necessary to discharge a jury because the risk of a substantial miscarriage of justice has arisen (***Decision Restricted*** [2022] NSWCCA 71). By 'substantial miscarriage of justice' what is meant is that the possibility cannot be excluded beyond reasonable doubt that the appellant has been denied a chance of acquittal, which was fairly open to him or her or that there was some other departure from a trial according to law that warrants that description (*Filippou v The Queen* (2015) 256 CLR 47 at [15]). This definition applies to a determination under s 53C(1) *Jury Act*, the overriding consideration being the parties' entitlement to a fair trial: at [144]-[145]; *Phan v R* [2018] NSWCCA 225 at [128].

Appeal against discharge of whole jury - s 53C(1)(a) Jury Act 1977

Watson v R [2022] NSWCCA 208

The CCA allowed the applicant's appeal (pursuant to s 5G *Criminal Appeal Act* 1912) against the trial judge's decision to discharge the whole jury in his murder trial.

Section 53C(1)(a) *Jury Act 1977* provides that, if a juror is discharged in the course of a criminal trial, the trial judge must discharge the remainder of the jury if they are "of the opinion that to continue the trial … would give rise to the risk of a substantial miscarriage of justice".

The trial judge granted the Crown's application for discharge of a juror ('the witness juror'), and for discharge of the whole jury pursuant to s 53C(1)(a). The witness juror had communicated to the Court by note concerns about his mental health and alleged conduct of other jurors. The judge found that the allegations, particularly that a number of jurors laughed about the evidence of a Crown witness, impermissibly disclosed an aspect of jury deliberations to the parties, and there was "a real risk that counsel may tailor their submissions to the jury in a manner consistent with or responsive to" the jury note. Further, that a number of jurors had disregarded his directions.

Irregularities must be "material" and there should be a "high degree of necessity" before a jury will be discharged. But not every irregularity or departure from the ideal conduct of a jury trial will result in discharge. An inquiry into whether there is a risk of a substantial miscarriage of justice focuses principally upon the impact of any irregularity on an accused person's ability to obtain a fair trial: [68]–[69], [36]–[41]; authorities cited.

There was no high degree of necessity for the jury to be discharged in this case. The matters relied upon by the Crown were either not breaches of any directions by the trial judge or not of any materiality: at [77].

Whether evidence produced by Sheriff investigation inadmissible by reason of exclusionary rule concerning evidence of jury deliberations – s 73A Jury Act 1977

Vella v R [2022] NSWCCA 204

The applicant, convicted of child sexual offences convictions, submitted a miscarriage of justice occurred due to (a) reasonable apprehension of bias by one juror; and (b) a juror's consideration of irrelevant material. The applicant sought to rely on the Sherriff's investigation Report conducted under s 73A *Jury Act* 1977. The Sheriff's Report indicated one juror was influenced by their own sexual assault experience, and that some jurors considered that a juror had "made up their mind on the first day."

The CCA dismissed the appeal. The following issues were addressed:

(i) Whether notes of juror interviews prepared by the Sheriff for a s 73A investigation were inadmissible because they disclosed juror deliberations?

> The 'exclusionary rule' as stated in *Smith v Western Australia* (2014) 250 CLR 473 is that "evidence of a juror or jurors as to the deliberations of the jury is not admissible to impugn the verdict". That rule is not abrogated or modified where evidence of deliberations is obtained from a Sheriff investigation under s 73A *Jury Act*; although material produced by s 73A investigation can in some circumstances be admitted and relied on as part of a challenge to a conviction without infringing the exclusionary rule. *Smith* confirms that evidence of most, if not all, forms of improper misconduct will not be rendered inadmissible by the operation of the exclusionary rule: at [101]-[104]; *Smith v WA; Petroulias v The Honourable Justice McClellan* [2013] NSWCA 434 applied.

(ii) Whether evidence that one juror relied on their own experience of sexual assault and disclosed that to other jurors was admissible?

> The evidence is rendered inadmissible by the exclusionary rule. The process by which jurors disclose to other jurors their "individual experience" and their assessment of the evidence "in that light" is at the very heart of jury deliberations: at [105]-[106].

(iii) Whether evidence that one juror perceived another juror to have "made up their own mind from day one" was admissible?

> The evidence was rendered inadmissible by the exclusionary rule. The exclusion of such material preserves the secrecy of jury deliberations to ensure deliberations are free and frank. The evidence discloses juror communications about the effect of the evidence adduced at trial: at [107], [138].

(iv) Whether there was a reasonable apprehension of bias on the part of one juror in utilising experience of being sexually assaulted in her deliberations and disclosing it to other jurors?

> There was no evidence to support a reasonable apprehension of bias. Even if there were evidence that they had relied on that experience it would not give rise to an apprehension of bias. Jurors are entitled to evaluate evidence by reference to their own experiences: at [109], [116], [137]-[138].

(vii) Whether there was a reasonable apprehension of bias on the part of one juror by reason of a perception held by another juror that they had "made up their mind on day one"?

> The perception of one juror that another juror had made up their mind on the first day of the trial falls far short of giving rise to a reasonable apprehension that a juror had not discharged their task impartially and had pre-judged the case: at [133]-[136], [110], [138].

5. PARTICULAR OFFENCES

s 66(C)(1) prosecutions not statute-barred – s 78K prosecutions statute-barred - limitation periods repealed – Clause 82, Schedule 11 Crimes Act

Madden v R [2022] NSWCCA 196

The applicant challenged his convictions under s 78K (rep) and s 66C(1) *Crimes Act* on the ground the charges were statute-barred by s 78T (rep) and s 78 (rep), respectively.

Sections 78 and 78K were repealed in 1992 by the *Criminal Legislation (Amendment) Act* 1992.

Until 2 May 1992, s 78T provided a 12-month limitation period on the prosecution of an offence under s 78K (rep) (homosexual intercourse male 10-18) where the complainant was aged 16-18.

From 23 March 1986 - 2 May 1992, s 78 provided a 12-month limitation period on the prosecution of an offence under s 66C(1) (sexual intercourse child 10-16) where the complainant was aged 14-16.

On 1 December 2018, clause 82 was inserted into Schedule 11 *Crimes Act* by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018.* Clause 82 provides:

> "Retrospective operation of repeal of section 78 limitation period
>
> The repeal of section 78 by the *Criminal Legislation (Amendment) Act* 1992 is taken to have repealed that section retrospectively as if that section had never been enacted and

consequently that section cannot be relied on to prevent any prosecution for an offence even if the offence occurred before that repeal."

s 78K convictions quashed

The CCA quashed the applicant's three convictions under s 78K. The s 78K counts were statute-barred by s 78T. The repeal of s 78T was not retrospective: at [245].

s 66C(1) convictions not statute-barred

The prosecution of the three s 66C(1) counts were commenced after the 12 month limitation period and one complainant was over 14.

The applicant's three convictions under s 66C were not statute-barred under s 78.

The presumption against retrospectivity of a penal statute and the principle of fairness is subject to the legislative intention of Parliament that a statute operate retrospectively: at [265]-[267]; *Rodway v R* (1990) 169 CLR 515*; Siganto v R* (1998) 194 CLR 656; *Xerri v R* [2021] NSWCCA 268 at [80]-[82].

Clause 82 makes clear the retrospective legislative intent of the new provision and unambiguously displaces the presumption. The words "as if that section had never been enacted" means s 78 must be treated as if that provision had never been included in the principal Act. The words "that section cannot be relied on to prevent any prosecution for an offence" are of wide ambit. There is no reason to interpret those words as not applying to a prosecution commenced prior to the introduction of the amending 2018 Act. Further, the NSW Government has articulated an intention to address shortcomings identified by the Royal Commission into Institutional Responses to Child Sexual Abuse: at [270]-[272]; *Explanatory Memorandum to Criminal Legislation Amendment (Child Sexual Abuse) Act 2018.*

Intentionally carrying out a sexual act "towards" a child - s 66DC(a) Crimes Act

DPP (NSW) v Presnell [2022] NSWCCA 146

An offence of intentionally carrying out a sexual act "*towards"* a child under s 66DC(a) *Crimes Act* could not be established where the child was lying on a bed fully clothed facing the wall, unaware of the respondent sitting on a chair beside the bed and masturbating in a direction away from the child.

The CCA held:

(1) s 66DC(a) creates two separate offences of committing a sexual act "with" *or* "towards" a child (rather than one offence of committing a sexual act "with or towards" a child).

(2) (By majority) For a sexual act to be "towards" another, there must be an intention to engage the other person. An act may be "towards" another where the other person is engaged by being made aware of the act; or where unaware of the act, the first person physically engages the other person. While physical proximity is relevant, the question is not answered by physical proximity alone.

The act was not "towards" the child given the child's lack of awareness, physical positions of the parties and the directions they were facing supported the judge's conclusion that the respondent was hiding his act from the child.

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

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

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

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

Despite the "broad range of conduct" prohibited by s 37(1A), the CCA did not accept that any manual pressure on the neck, no matter how slight, and no matter where on the neck applied, may amount to "intentional choking". "Intentionally chokes" should not be ascribed a narrow meaning. Section 37(1A) does not require proof of injury or other outcome as a result of the choking. Nevertheless, the conduct prohibited must still be capable of being described as "intentional choking": at [60]-[63].

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

6. PROCEDURE

Application for leave to withdraw a guilty plea before conviction

White v R [2022] NSWCCA 241

The applicant repeatedly instructed his legal representatives that he intended to plead not guilty to murder. At arraignment, he unexpectedly entered a guilty plea. His application for leave to withdraw the guilty plea shortly after it was entered was refused by the primary judge. The accused was convicted and sentenced.

The CCA held that the primary judge applied the wrong legal test to the applicant's application to withdraw his guilty plea *prior to conviction*. The test to be applied where an accused seeks leave to withdraw a guilty plea prior to conviction is whether the "interests of justice" require that course to be taken. The test where an applicant seeks to go behind a guilty plea for the first time on appeal, following conviction and sentence, is whether a miscarriage of justice would occur if the guilty plea was not permitted to be withdrawn: at [60]–[63]; *Maxwell v The Queen* (1996) 184 CLR 501; *Hura v R* (2001) 121 A Crim R 472; [2001] NSWCCA 61; *R v Chiron* [1980] 1 NSWLR 218.

The "interests of justice" test is broader than the "miscarriage of justice" test. The former may focus on matters beyond the integrity of the plea. A non-exhaustive list of factors affecting the interests of justice is set out at [65]; *R v Martin* (1904) 21 WN (NSW) 233; *Maxwell v The Queen* (1996) 184 CLR 501.

The accused's onus of persuading a judge to permit the withdrawal of a plea of guilty is not a "substantial" or "heavy onus". There is no principled basis for this Court to treat that onus as any "heavier" than in other circumstances where a party seeks to persuade a court to exercise a discretion in the interests of justice: at [69].

The CCA set aside the applicant's conviction and sentence, remitting the matter to the Common Law Division.

Application for trial by judge alone less than 28 days prior to date fixed for trial

Alemeddine v R [2022] NSWCCA 219

Section 132A *Criminal Procedure Act* 1986 provides that an application for an order under s 132 for a Judge alone trial must be made not less than 28 days before trial, except with the leave of the court.

Section 132(2) provides that the court must order a judge alone trial if both the accused and prosecution agree to the application.

The CCA allowed the appeal (s 5F(3) *Criminal Appeal Act*) by the two co-accused against the judge's refusal to grant leave pursuant to s 132A. The judge refused leave because of the need to avoid any "appearance" of judge shopping. However, the judge failed to consider that one of the accused could not apply earlier because the other accused did not consent, whilst also accepting that the trial judge was unknown at the time of the application. The judge failed to take into account a "material consideration" to the exercise of power to grant leave under s 132A (*House v King* (1936) 55 CLR 499): at [28].

The CCA further held that even where the Crown consents to the making of an order under s 132, a grant of leave under s 132A(1) is still required if the application is made less than 28 days before the trial date: at [23], [27].

7. APPEALS

'Miscarriage of justice' for the purposes of third limb of s 6(1) Criminal Appeal Act – error must have material effect on outcome of trial

Saunders v R [2022] NSWCCA 273

The CCA (Simpson AJA; Hamill J agreeing with additional reasons; Ierace J agreeing) considered what constitutes a 'miscarriage of justice' for the purposes of the third limb of s 6(1) *Criminal Appeal Act.*

The third limb of s 6(1) provides that in a conviction appeal under s 5(1) the court shall allow the appeal if satisfied "that on any other ground whatsoever there was a miscarriage of justice, and in any other

case shall dismiss the appeal; provided that … it considers that no substantial miscarriage of justice has actually occurred."

Weiss v The Queen (2005) 224 CLR 300 at [18] stated that a "miscarriage of justice" for the purposes of the third limb of s 6(1) is: "… *any* departure from trial according to law, regardless of the nature or importance of that departure."

However, the blanket rule that any departure, no matter how inconsequential, from rules of law, evidence or procedure, will constitute a miscarriage of justice for the third limb of s 6(1) (and before resort to the proviso) is no longer applicable. To establish a miscarriage of justice for the purposes of the third limb of s 6(1), it is necessary that an appellant establish, not only error, but also that the error was prejudicial in the sense that it "had the meaningful potential or tendency to have affected the result of the trial"; that the error did, or might have had, a prejudicial effect on the accused's prospects of acquittal: at [83]-[93]; *Hofer v The Queen* (2021) 95 ALJR 937 at [41], [118], [123]; ***AK v R*** [2022] NSWCCA 175 per Beech-Jones CJ at CL at [2]; ***Tomlinson v R*** [2022] NSWCCA 16 per N Adams J at [122]-[140]; *Zhou v R* [2021] NSWCCA 278 per Beech-Jones CJ at CL (with whom Davies and Wilson JJ agreed) at [22].

In this case, the applicant appealed his sexual assault convictions on the ground that the trial judge erred in giving a direction that there was evidence of a tendency by the applicant to assault his domestic partners when intoxicated.

The CCA dismissed the appeal, refusing leave under Rule 4 (no objection taken at trial). But even if leave was given, the ground was also rejected under the third limb of s 6(1).

The mistaken reference by the trial judge to intoxication of the applicant in the context of the tendency evidence could not have had any material effect on the outcome of the trial: at [94]-[95].

Appellate review of judge-alone finding of grievous bodily harm

Reyne (a pseudonym) v R [2022] NSWCCA 201

The CCA quashed the applicant's conviction by judge alone for recklessly causing grievous bodily harm and entered a verdict of acquittal on the ground that the evidence did not establish that the victim's skull fracture was occasioned in the essential timeframe.

The CCA rejected a second appeal ground that the skull fracture suffered by the victim was not grievous bodily harm because the injury healed and no serious harm eventuated.

The CCA discussed appellate review of a judge-alone finding of grievous bodily harm.

A judge-alone finding is "treated as if it were the same as a jury's finding of guilt" and reviewed by an appellate court in the same manner as a jury's finding of guilt: at [112]-[113]; *Filippou v The Queen* (2015) 256 CLR 47; *Dansie v The Queen* (2022) 96 ALJR 728

The question whether an injury is grievous bodily harm is within the province of the jury. That determination is subject to review by this Court, but a different view would only be taken where the jury verdict was "unreasonable". This Court is to determine whether it was "open to the jury to be satisfied beyond reasonable doubt that the accused was guilty" by forming our own view as to whether the injury amounted to grievous bodily harm and then determining whether it was open to the jury to come to a different view. This does not mean open as a matter of law but open in the sense used in *M v The Queen*: at [99]-[113]; *The Queen v Baden-Clay* (2016) 258 CLR 308; *M v The Queen* (1994) 181 CLR 487.

There was no contest as to the injury or its effects, and the trial judge had no (or at best, only slight) advantage in assessing the injury: at [100]. The fact the victim's skull fracture subsequently healed does not mean that at the time of admission to hospital it was not a "really serious injury". It was open to the judge to find the skull fracture amounted to grievous bodily harm despite the fact that some potential, more long-term serious harm did not eventuate: at [132]-[139].

Crown appeal against acquittal by judge alone – error established - discretion to order new trial not exercised – acquittals affirmed – s 107 Crimes (Appeal and Review Act) 2001

R v BK [2022] NSWCCA 51

The CCA (by majority) dismissed the Crown appeal pursuant to s 107 *CARA* against BK's acquittal by trial judge alone of child sexual abuse offences. Although the trial judge erred by failing to explain what use was made of tendency evidence in reaching his verdict, because of his clear finding that he was

not satisfied beyond reasonable doubt of BK's guilt, the CCA held that discretion not be exercised to direct that the acquittals be quashed, and that a new trial not be ordered.

Section 107 does not provide any automatic consequence from the appellant (either the DPP or the Attorney General) establishing an error of law in the judgment leading to an acquittal. Sub-sections 107(5) and (6) provide respectively this Court "may affirm or quash the acquittal" and "may order a re-trial" (cf. ss 6(1), (2) *Criminal Appeal Act* 1912). The discretion in s 107(6) whether to order a new trial is "unconstrained by specific wording" (*R v BA* [2021] NSWCCA 191 at [69]): at [278], [281].

Here, the "public interest" in prosecution of offenders and the strong case against the respondent are weighty considerations in favour of quashing the acquittal and ordering a retrial. On the other hand, the alleged offences were committed over 35 years ago, and since acquitted, the respondent has moved interstate, suffers deteriorating health and is attempting to move on with his life. Those matters are entitled to some weight but would not outweigh the public interest in the respondent being tried according to law for very serious offences. The critical factor in the exercise of the discretion is that the trial Judge, on the trial evidence, was left with a reasonable doubt as to guilt. While the trial Judge erred by failed to expose his approach to the tendency evidence, his finding on the critical issue was quite clear. In the light of that finding, and the nature of the error established, it would be wrong to put the respondent to trial again. The appropriate order is to affirm the verdict of not guilty: at [285]-[289]; s 107(5) *CARA*; *R v BA* at [31]-[32]; *Lazarus v R* (2017) 270 A Crim R 378 per Bellew J at [157].

District Court judge after correction on appeal declined for a second time to state a case

Franklin v DPP (NSW) [2022] NSWCA 58

The applicant was convicted in the Local Court of common assault. On appeal, the District Court Judge refused the applicant leave to tender a case note report, dismissed the appeal and refused the applicant's request to state a case (under s 5B *Criminal Appeal Act 1912*). The Court of Appeal in *Franklin No 1* [2021] NSWCA 83 found that admissibility of the case note report was a question of law, set aside the Judge's decision and remitted the matter to the District Court to be dealt with according to law.

The Judge declined for a second time to state a case to the Court, finding that admission of the report would have made no difference to the outcome of the applicant's conviction appeal. The applicant sought judicial review of the Judge's second decision under s 69 *Supreme Court Act 1970*. There is no right to judicial review of a determination of the District Court on an appeal from the Local Court unless jurisdictional error is shown (*District Court Act 1973*, s 176). The issue on appeal was whether the Judge fell into jurisdictional error by denying procedural fairness or in declining to exercise the function of a District Court judge under s 5B *Criminal Appeal Act 1912*.

By majority, (Basten JA and Macfarlan JA; Brereton JA dissenting) the Court dismissed the appeal.

Basten JA: Section 5B does not confer a statutory right of appeal: at [3]–[4]. The statute confers on the appeal judge the determination of materiality, it is not a matter for the reviewing court: at [17]. The Judge did not misconceive his function. There is no legal basis upon which to reject the Judge's finding. No jurisdictional error has been established: at [19]-[20].

Macfarlan JA: The Judge did not deny procedural fairness. The fair-minded lay observer would not have any reasonable apprehension that the Judge would not reconsider the application on its merits, as directed by the Court of Appeal; nor any reasonable basis for thinking that the Judge refused the second stated case application 'for the purpose of avoiding the Court of Criminal Appeal having the opportunity to determine whether he had erred in law on the principle of admissibility of business records': at [32]-[35].

No jurisdictional error was established: at [46]. The words "may submit" in s 5B confers discretion to be exercised as part of the court's jurisdiction. If the judge is assumed to have made an error, he had jurisdiction to do so and judicial review of his decision is not available. For an error to be a jurisdictional error, there must be some further factor present, e.g. that an inferior court must take into account or to disregard some matter, as an "essential condition of the existence of [its] jurisdiction with respect to a particular matter": at [40], [45]-[46].

8. OTHER CASES

State law governing committal proceedings constitutionally valid

Landrey v DPP (NSW) [2022] NSWCCA 211

The Court of Appeal dismissed the applicant's proceedings challenging the constitutional validity of Ch 3, Pt 2 *Criminal Procedure Act 1986*, which govern the procedures and powers of the Local Court in conducting committal proceedings for offences to be prosecuted on indictment.

Ch 3, Pt 2 was amended by the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* introducing a new scheme for committal proceedings. The applicant submitted that a magistrate is required to rubber-stamp the assessment of the merits of the prosecution case, with the magistrate's traditional function of assessing evidence now conferred on the prosecutor. The main issue was whether Ch 3, Pt 2 thus contravenes the constraint imposed on State legislative power by Ch III of the Commonwealth Constitution by substantially impairing the institutional integrity of the Local Court: *Kable v Director for Public Prosecutions (NSW)* (1996) 189 CLR 51.

The CCA held that Ch 3, Pt 2 does not infringe the *Kable* doctrine and is constitutionally valid. The 2017 Amendment Act removed a key element of the traditional function of committals so that there is now no assessment of the merits of the prosecution case made by the magistrate. The present purpose of committal proceedings is to ensure proper case management of charges for indictable offences. Committal proceedings are an administrative process and do not involve exercise of judicial power. It is well-established that powers of case management are ancillary to the judicial function and, accordingly, are constitutionally valid when exercised by the trial court. Committal proceedings do not substantially impair the institutional integrity of the Local Court: at [32], [38], [61]-[73].

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

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

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

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

The Court of Appeal held:

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

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

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

9. BAIL

Section 22B *Bail Act* 2013 (commenced 27 June 2022)

Section 22B *Bail Act* 2013 provides that for a detention application made following a conviction but before sentencing "for an offence for which the accused person will be sentenced to imprisonment to be served by full-time detention", a court must not grant bail unless special or exceptional circumstances exist.

Clause 45 *Bail Regulation* 2021 provides that s 22B applies to any bail decision made after its commencement.

"will be sentenced to imprisonment to be served by full-time detention"

- "*Will*" means "realistically inevitable" not "state of absolute certainty". "*Will*" be sentenced to full-time imprisonment involves a *state of satisfaction*, as opposed to the *fact*. As this is an evaluative judgment of a future matter and not a fact to be proved, proof on the balance of probabilities is not the relevant standard: ***DPP v Day*** [2022] NSWCCA 173 at [20], [23]; ***DPP v Van Gestal*** [2022] NSWCCA 171 at [13]-[19], [43]-[45]. Section 22B sets a high bar for the degree of satisfaction to be reached by the Court to engage the limitation on the power to make a bail decision under this provision: ***DPP v Van Gestal*** [2022] NSWCCA 171 at [42].

- In its assessment, the Court will have regard to:
  (i) offence(s) for which the accused is convicted, bearing in mind sentencing principles and laws, including alternatives to full-time imprisonment;
  (ii) materials and submissions relevant to the future disposition of the sentence; and
  (iii) abbreviated nature of the application, especially, that the application is not a pseudo or abridged sentencing hearing: ***DPP v Day*** at [23]; ***DPP v Van Gestal*** [2022] NSWCCA 171 at [45].

- Notwithstanding the theoretical availability of an alternative to full-time imprisonment, the Court could reach the degree of satisfaction required by s 22B(1) if satisfied that no other sentence than full-time imprisonment could realistically be imposed by the sentencing court: ***DPP v Day*** at [23]; ***DPP v Van Gestal*** [2022] NSWCCA 171 at [47].

- The Court, as a bail authority, should avoid expressing a view as to the merits of foreshadowed arguments on sentence: at ***DPP v Day*** at [31].

"special or exceptional circumstances"

- There is no reason that "special or exceptional circumstances" means different things in different parts of the *Bail Act*: ***DPP v Van Gestal*** [2022] NSWSC 973 (Garling J); ***R v Isaac*** [2023] NSWSC 22 (Yehia J) at [10]-[11] citing *Bobbi v R* [2021] NSWCCA 44 "there was '…. no fetter on the things that might constitute 'special or exceptional circumstances'" (Bail granted on the basis of 'special and exceptional circumstances').

Application

- s 22B applies notwithstanding that it became operative after an offender's release. Section 22B does not operate retrospectively and therefore does not offend the common law presumption against retrospectivity: ***DPP v Duncan*** [2022] NSWSC 927 at [36]; ***DPP (NSW) v Van Gestal*** [2022] NSWCCA 171 at [40]; Cl 45 *Bail Regulation* 2021.

Jurisdiction of CCA to hear bail application – no substantive proceedings pending

Dedeoglu v R [2022] NSWCCA 74

The CCA did not have jurisdiction to hear the applicant's release application prior to the hearing of his application for leave to appeal where the applicant had filed a Notice of Intention to Appeal his conviction but the Notice had lapsed, and a subsequent application for leave to appeal and appeal grounds and submissions were filed out of time. The Court has power to hear a release application where proceedings for an offence are "pending in the Court", being 'substantive proceedings' (ss 61, 59 *Bail*

Act 2013). A notice of appeal must be filed within 28 days of conviction or sentence (s 10 *Criminal Appeal Act* 1912*)*. The life of the applicant's future proceedings depends on, at some future time, the Court granting him leave to file his appeal out of time. That decision should be made by the court hearing the appeal: at [21]-[23]; *Mashayekhi v R* [2021] NSWCA 55 at [18].

A. HIGH COURT CASES

Intensive correction order - Whether sentencing judge undertook assessment of community safety in accordance with s 66 CSPA - failure to comply with s 66(2) amounted to jurisdictional error

***Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3**

Appeal from NSW.

The appellant was sentenced in the Local Court to aggregate sentence of 3 years imprisonment, NPP 2 years for firearms offences. On sentence appeal in the District Court, the appellant asked that her sentence be served by way of ICO. Section 66(1) *CSPA* provides that community safety must be the "paramount consideration" when deciding whether to make an ICO. Section 66(2) provides that, when considering community safety, the court is to assess whether making the ICO or serving the sentence by way of full-time detention is more likely to address the risk of reoffending. The District Court dismissed the appeal, making no express reference or findings as to an assessment under s 66(2). The appellant appealed to the Court of Appeal. By majority, the Court of Appeal held that non-compliance with s 66(2) was not a jurisdictional error of law and dismissed the application for review (*Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1).

Held: By majority, appeal allowed. Set aside order of District Court dismissing the appellant's appeal, and order the District Court to determine the appeal according to law.

- Three steps are to be undertaken by a sentencing court prior to the final order by which a sentence of imprisonment is imposed under the *CSPA*, or confirmed or varied on a sentencing appeal: first, a determination that the threshold in s 5(1) is met; second, determination of the appropriate term of the sentence of imprisonment; and third, where the issue arises, consideration of whether or not to make an ICO: at [59].
- s 66 imposes specific mandatory considerations upon the decision maker to make, or refuse to make, an ICO: at [72]ff.
- While aspects of community safety underpin some of the general purposes of sentencing, such as specific and general deterrence and protection of the community from the offender, those aspects will have been considered in deciding whether to impose a sentence of imprisonment (ie, before considering an ICO). Community safety is required to be considered *again* and in a different manner under s 66 when considering whether to make an ICO. At this third step, community safety in s 66(1) is given its principal content by s 66(2), namely, the safety of the community from harms that might result if the offender reoffends, whether while serving the term of imprisonment that has been imposed or after serving that term of imprisonment: at [77].
- The jurisdiction to make an ICO calls for a subsequent and separate decision to be made *after* a sentence of imprisonment is imposed: at [82].
- The failure to consider the paramount consideration in s 66(1) by reference to the assessment of community safety in s 66(2) demonstrates a misconception of the function being performed when deciding whether to make an ICO by failing to ask the right question within jurisdiction: at [88].
- The District Court failed to undertake the assessment required by s 66(2) and thereby fell into jurisdictional error. As there is a duty to consider whether to grant an ICO in cases where the power is engaged, this duty remains unperformed: [116]-[117].
- Failure to undertake the assessment in s 66(2) did not invalidate the sentence of imprisonment: at [98].

Jury - internet inquiries by juror - juror misconduct, s 53A(1)(c) Jury Act 1977 (NSW) – inquiry for purpose of obtaining information about matters relevant to trial, s 68C(1) Jury Act – judge took verdicts before discharging juror

Hoang v The Queen [2022] HCA 14; 96 ALJR 453

Appeal from NSW.

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

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

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

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

- The judge erred in taking the ten verdicts before discharging that juror. Section 68C(1) *Jury Act* (Inquiries by juror about trial matters prohibited) read with s 53A(1)(c) (Mandatory discharge of juror for misconduct) meant the juror engaged in misconduct by making an inquiry for the purpose of obtaining information about a matter relevant to the trial: at [11].
- The question prescribed by s 68C(1) is whether the juror's inquiry was "for the purpose of obtaining information about…any matters relevant to the trial". What is a "matter relevant to the trial" will vary from trial to trial. It includes a juror acquiring information about matters of evidence given or addresses to the jury: at [32]-[34].
- The mental element is not concerned with the juror's motive for making the inquiry. It is the fact of the inquiry, and that the *purpose* of the inquiry was to obtain information about a particular matter relevant to the trial, which is prohibited. Evidence was given about the Working with Children Check, defence counsel made submissions about that evidence, and referred to in the judge's summing up. It was irrelevant the juror had been a teacher and was curious about why they did not have a Working with Children Check: at [33]-[38].
- From the trial record, the judge was satisfied there had been misconduct and was required to immediately discharge the juror before taking the verdicts: at [41].
- **Inadvertent searching**: Section 68C(1), read with s 68C(5)(b), does not extend to what might be called 'inadvertent searching'. Section 68C(1) is directed to a juror making an inquiry *for the purpose* of obtaining information about a matter relevant to trial. Any concern for the safety and propriety of a jury trial arising from an inadvertent search undertaken by a juror may be addressed by the trial judge under s 53A(1)(c) read with sub-s (2)(b) or, alternatively, s 53B: at [35].

Function of Court of Criminal Appeal - appeal against conviction on unreasonableness ground following trial by judge alone

Dansie v The Queen [2022] HCA 25; 96 ALJR 728

Appeal from SA.

The appellant was convicted of murder by judge alone. The SA CCA (by majority) dismissed his conviction appeal, applying *M v The Queen* (1994) 181 CLR 487, reasoning that the inferences drawn, and the weight to be given to those inferences, were primarily matters for the trial judge as the trier of fact. In the High Court, the appellant argued that the majority in the SA CCA misinterpreted and misapplied the approach required to be taken to the unreasonable verdict ground under the *Criminal Procedure Act* 1921 (SA), s 158(1)(a).

Held: Appeal allowed. The matter was remitted to the SA CCA.

- The SA CCA misapplied the test in *M v The Queen.* Each member of the Court of Criminal Appeal, in order to apply the test in *M v The Queen* in the circumstances of this case, needed

to ask whether he was independently satisfied as a result of his own assessment of the whole of the evidence adduced at trial that the only rational inference was that the appellant deliberately pushed the wheelchair into the pond with intent to drown his wife and, if not, whether the satisfaction arrived at by [the trial judge] could be attributed to some identified advantage which [the trial judge] had over [the appeal judge] in assessment of the evidence: at [38].

- Undue attention to the factual findings on which the trial judge relied in returning a verdict of guilty can distract the Court of Criminal Appeal from the proper assessment required by s 158(1)(a): at [7]. Where the trial was by judge alone, their reasons must be approached by the court of criminal appeal with circumspection lest findings of fact by the trial judge divert the court from undertaking requisite independent assessment of the evidence. The question for the court will remain whether the court's assessment of the totality of the evidence leaves the court with a reasonable doubt as to guilt which the court cannot assuage by having regard to advantage the trial judge had by having seen and heard the evidence at trial: at [16].

s 80AF Crimes Act 1900 (NSW) - uncertainty about time when child sexual offence occurred - s 80AF did not operate with respect to trials that had already commenced when the provision came into force and it could not be invoked after the commencement of a trial.

Stephens v The Queen [2022] HCA 31; 96 ALJR 871

Appeal from NSW.

The appellant was convicted at trial of multiple sexual assault offences. At the appellant's first arraignment, 3 counts were brought under alternative, historical offences (ss 81, 78K *Crimes Act*, repealed) due to uncertainty as to dates of some offences and which provision applied.

On 1 December 2018, two days after the first arraignment, s 80AF *Crimes Act* commenced without transitional provisions.

Section 80AF provides that where there is uncertainty about the offence date, the prosecution can rely on the offence carrying the lesser maximum penalty (in this case, s 81) for the entire charge period.

The Crown sought to take benefit of s 80AF and was granted leave to amend the indictment and substitute the alternative counts with three amended counts under s 81.

Section 81 had been repealed at a time during the relevant charge period. A practical effect of s 80AF was to enlarge the period during which s 81 was in force. The Crown thus removed uncertainty about whether the appellant could be convicted of an offence under s 81 or s 78K if it could not prove beyond reasonable doubt when the alleged conduct occurred: at [9].

The NSWCCA, by majority, held there was no error in granting the prosecution leave to amend the indictment, and allowing the trial to proceed, for the three counts against s 81. Section 80AF applied and did not offend the principles concerning retrospectivity: *Stephens v R* [2021] NSWCCA 152.

The appellant appealed to the High Court.

Held: By majority, appeal allowed. Convictions for the three counts against s 81 quashed and acquittals entered.

- s 80AF does not operate with respect to trials that had already commenced when the section came into force. On its terms, s 80AF may be invoked only at the commencement of a trial, not after the trial has already commenced: at [45]-[46].

- The underlying principle concerning how to interpret the temporal operation of legislation is based on reasonable expectations of the public, giving rise to a presumption against interpreting enactments of Parliament to conflict with recognised principles that Parliament would be prima facie expected to respect. The more fundamental the rights and the greater the extent to which they would be infringed, the less likely it is that such an intention will be ascribed to Parliament: at [33]-[34].

- To construe s 80AF as being *completely* retroactive would significantly disturb reasonable expectations about the manner in which the law is implemented. It would not only mean that the law concerning s 81 was altered retroactively for future trials. It would have the effect of

changing that law for extant proceedings, including those that commenced before s 80AF came into force such as the appellant's trial, where forensic decisions including a plea of guilty or not guilty or the scope of cross-examination of witnesses may have been made in reliance upon the previous law. And without any indication in the text, context, or purpose of s 80AF that this was intended: at [38].

- It is likely that there will be such uncertainty in many historic sex offence prosecutions and it may be that prosecution reliance upon s 80AF will become an almost invariable approach. But an interpretation of s 80AF which restricts its retroactive effect, by requiring that the Crown elect to take advantage of a provision making a change in the law before the trial commences, is supported by textual indications as well as reasonable expectations: at [47].

ss 97, 101 Evidence Act 1995 – murder - tendency evidence of prior harm of deceased and victim's complaints of harm admissible - no general rule that requires 'close similarity' between conduct evidencing tendency and the offence

TL v The King [2022] HCA 35; 96 ALJR 1072

Appeal from NSW.

The appellant was convicted of the murder of his two year old daughter by blunt force trauma to the abdomen. The appellant's case was that the Crown could not exclude the reasonable possibility that the victim was killed by the victim's mother or his nephew.

The trial judge admitted the following tendency evidence pursuant to ss 97 and 101 *Evidence Act*:

- Ten days before her death, the victim had burns after being bathed by the appellant which the appellant claimed were an accident ("the burns evidence")
- The victim complained on three occasions to family the appellant had harmed her ("the complaints evidence")

The NSW CCA dismissed the applicant's appeal.

The appellant appealed to the High Court on the sole ground that the NSW CCA erred in failing to hold that the tendency evidence lacked sufficient probative value, not having a "close similarity" between the conduct evidencing the tendency and the offence.

Held: Appeal dismissed.

- There is no general rule that demands or requires close similarity between the conduct evidencing the tendency and the offence. Such a rule is not required by the text of s 97: at [3], [29]; *Hughes v The Queen* (2017) 263 CLR 338.

- The observation in *Hughes* as to the general requirement for "close similarity" where identity is the relevant fact in issue should be understood as postulating a situation in which there is little or no other evidence of identity apart from the tendency evidence, and the identity of the perpetrator is "at large". Here, there was important evidence of identity, including that the appellant was one of only three persons who had opportunity to inflict the fatal injuries and evidence pointing against likelihood that the mother or nephew was the perpetrator. It could not be assumed that "close similarity" between the conduct evidencing the tendency and the offence was required to meet the threshold of significant probative value: at [30].

- In this case, the issue is whether the tendency evidence could rationally make it more likely, to a significant extent, that the appellant inflicted the blunt force trauma (or that the mother and nephew did not). That question requires consideration of: (1) the extent to which the evidence supports the asserted tendency; and (2) the extent to which the asserted tendency makes more likely the fact or facts sought to be proved by the evidence: at [31]; *Hughes v The Queen* at [41]; *McPhillamy v The Queen* (2018) 92 ALJR 1045 at [26], [34].

- The tendency was sufficiently striking and capable of being important to a conclusion that the appellant was the perpetrator and, accordingly, the burns and complaint evidence had requisite significant probative value for admissibility under s 97(1)(b). First, the tendency to deliberately and violently inflict serious physical harm on the victim concerned acts directed to a single

person, suggesting hostility by the appellant to the victim. Secondly, that tendency in relation to a young child is abnormal and unlikely to be shared by others with opportunity to inflict the injuries. Thirdly, the probative value of the evidence was increased by the close proximity in time (one month) of the charged offence, burns incident and complaints: at [37].

- The threshold of significant probative value was capable of being met without the close similarity insisted on by the appellant. Apart from the burns and complaint evidence, there was strong evidence identifying the appellant as the perpetrator: at [38].

- The tendency asserted in the notice was too general. Reformulation of a tendency without providing a notice under s 97(1)(a) may render evidence inadmissible. The insufficient particularisation of the asserted tendency in the amended notice, subsequent reformulation of that tendency absent formal amendment, absence of a separate tendency notice for the complaint evidence, and resulting non-compliance with s 97(1)(a) should not be condoned: at [33]; *Parkinson v Alexander* [2017] ACTSC 201, referred to.

B. SUPREME COURT CASES

Defence of mental health impairment - Exception to defence if impairment caused solely by temporary effect of ingesting substance or substance use disorder - Onus and burden of proof - Onus on Crown to prove exception to defence on balance of probabilities - Mental Health and Cognitive Impairment Forensic Provisions Act 2020, ss 4(3), 28

R v Miller [2022] NSWSC 802 (Cavanagh J); ***R v Sheridan*** [2022] NSWSC 1669 (Garling J)

A defence of mental health impairment may be raised under s 28 *MHCIFPA* 2020:

> s 28 Defence of mental health impairment or cognitive impairment
> (1) A person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person—
> (a) did not know the nature and quality of the act, or
> (b) did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).
> (2) The question of whether a defendant had a mental health impairment or a cognitive impairment, or both, that had that effect is a question of fact and is to be determined by the jury on the balance of probabilities.
> (3) Until the contrary is proved, it is presumed that a defendant did not have a mental health impairment or cognitive impairment, or both, that had that effect.
> (4) ….."

The meaning of mental health impairment is set out in s 4:

> s 4 Mental health impairment
> (1) For the purposes of this Act, a "person has a mental health impairment" if--
> (a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and
> (b) the disturbance would be regarded as significant for clinical diagnostic purposes, and
> (c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.
> (2) A mental health impairment may arise from any of the following disorders but may also arise for other reasons--
> (a) an anxiety disorder,
> (b) an affective disorder, including clinical depression and bipolar disorder,
> (c) a psychotic disorder,
> (d) a substance induced mental disorder that is not temporary.
> (3) A person does not have a mental health impairment for the purposes of this Act if the person's impairment is caused solely by--
> (a) the temporary effect of ingesting a substance, or
> (b) a substance use disorder.

In these cases, the accused were charged with murder. In general terms, each accused sought to establish a mental health impairment under ss 4(1)-(2). The Crown case was that impairment of the accused was caused by the *temporary* effect of drug-taking within s 4(3).

The issue was whether s 4(3) provides an exclusion or exception such that if the Crown seeks to rely upon that exception, it bears the onus of proving the facts which give rise to that exclusion and, if so, the standard of proof. The latter point arises due to s 28(2) which provides that the question of whether a defendant had a mental health impairment is a question of fact to be determined by the jury on the balance of probabilities: ***R v Sheridan*** at [11]-[12].

Both cases held that where the Crown seeks to prove that the facts required for the operation of s 4(3) are present, it is the Crown who bears the onus of establishing those facts for the purpose of the application of s 4(3) on the balance of probabilities. The onus of proof is not beyond reasonable doubt as submitted by the accused: ***R v Miller*** at [61]; ***R v Sheridan*** at [20]-[27].

The accused must establish the matters referred to in ss 4(1)(a), (b) and (c) and that the mental health impairment arises out any of the disorders (or for other reasons) as set out in s 4(2). However, the Crown is to establish on the balance of probabilities that despite any satisfaction in respect of ss 4(1) and (2), the accused's mental health impairment was caused solely by one of the matters referred to in ss 4(3)(a) or (b): ***R v Miller*** at [62].

"Will not become fit" for trial - s 20 Mental Health and Cognitive Impairment Forensic Provisions Act 2020

R v Woodham [2022] NSWSC 1154 (Hamill J)

The Court considered the meaning of "will" in "will not become fit to be tried" in s 47(1)(b) *MHCIFPA*.

In *R v Risi* [2021] NSWSC 769 Beech-Jones CJ at CL (as his Honour then was) found that s 47(1)(a) - "*may* become fit to be tried" - is cast in terms of a possibility ("*may*") whereas s 47(1)(b) is cast in terms of something akin to near certainty ("will"): at [20].

Recent CCA cases on s 22B *Bail Act* 2013 provide useful analysis of "will" ("will not be sentenced to imprisonment) and confirm that s 47(1)(b) does not require a state of "absolute certainty".

It is a very high standard of satisfaction whether one applies the language of Beech-Jones CJ at CL ("real certainty") or the CCA ("realistically inevitable"): at [20]-[23]; cases on s 22B - *DPP v Day* [2022] NSWCCA 173; *DPP v Van Gestel* [2022] NSWCCA 171.

Meaning of "reasonably necessary" in s 230 Law Enforcement (Powers and Responsibilities) Act 2002

DPP (NSW) v Greenhalgh [2022] NSWSC 980 (Ierace J)

Section 230 *LEPRA* provides it is lawful for a police officer exercising a function under the Act to use such force as is "reasonably necessary" to exercise the function.

The Court allowed the DPP appeal against the Magistrate's dismissal of a charge under s 230 *LEPRA*. The first defendant police officer tasered and struck with a baton 18 times the unarmed teen complainant, who was acting bizarrely, naked, pacing the street under the influence of drugs.

The Court held that for the purposes of s 230, the objective test is: whether a reasonable person in the position of the police officer would not consider the use of force by the police officer to be disproportionate to the risk or danger sought to be prevented: at [186]; *R v Turner* [1962] VR 30; *Woodley v Boyd* [2001] NSWCA 35.

The Magistrate erred by failing to consider whether the defendant's use of force was "reasonably necessary" by an objective standard. No mention was made of what a reasonable person in the defendant's position would think of the proportionality of the contested baton strikes to the level of threat posed by the complainant: at [189]. The matter was remitted to the Local Court.

Appeal against new non-parole period (NPP) following Commonwealth parole revocation

Tran v DPP (Cth) [2022] NSWSC 778 (Rothman J)

The Court allowed the applicant's appeal against a new NPP imposed by the Local Court following Commonwealth parole revocation. The NPP was manifestly excessive given additional evidence regarding the applicant suffering a mental illness or disorder. The nature of such an appeal is by way

of rehearing, with regard to other evidence (s 19AY(3) *Crimes Act* 1914 (Cth)). It is unnecessary to establish error at first instance in this case. It is necessary only for the Court to form the view that the additional evidence would produce a different result had it been available at trial (*CDJ v VAJ* (1998) 197 CLR 172): at [25].

Procedural fairness - conviction in absence of prosecutor

DPP (NSW) v Peckham [2022] NSWSC 713 (Hamill J)

There was a denial of procedural fairness where, in the absence of the prosecutor and an explicit statement by the defendant he was entering a guilty plea, the Magistrate convicted the defendant and imposed no penalty under s 10A *CSPA* for breach of an apprehend domestic violence order. The Magistrate also erred by providing no reasons on sentence. The Court allowed the DPP's application for judicial review under s 69 *Supreme Court Act* 1970, quashed the order and remitted the matter to the Local Court to be dealt with according to law.

C. LEGISLATION

***Confiscation of Proceeds of Crime Legislation Amendment Act* 2022**

Commenced 1.2.2023

Allows a 'drug trafficker declaration' to be made against person convicted of serious drug offence; forfeiture order over unlawfully acquired property of person with declaration; restraining order over property of person with declaration.

Confiscation of Proceeds of Crime Act 1989

s 34 - Drug trafficker declaration

The Director of Public Prosecutions or a police prosecutor may apply to an appropriate court for a declaration against a person convicted of a serious drug offence. The application may be made - (a) during sentencing proceedings for the serious drug offence, or (b) at another time: s 34(2).

The court must make a drug trafficker declaration if satisfied the person has been convicted of:

(a) at least 3 serious drug offences in the previous 10 years, or
(b) a serious drug offence involving a commercial quantity of prohibited drug or plant, or
(c) a serious drug offence and the person is / was a member of a criminal group: s 34(3).

A drug trafficker declaration expires 5 years after the day on which the declaration is made: s 34(5).

s 34A - Forfeiture order: An appropriate officer may apply to the court for a forfeiture order in relation to the property belonging to, or in the effective control of, a person against whom a drug trafficker declaration is made.

s 43A(1) - Restraining Order**:** An officer or member of the Police Force may apply to Supreme Court for a restraining order in relation to property if reasonably suspects belongs to / is in effective control of, a person (a) against whom a declaration has been made, or (b) charged with a serious drug offence and against whom an application for declaration may be made if the person were to be convicted.

s 71A (replaces s 72) - Giving notices to financial institutions:

The Commissioner of Police may give notice to a financial institution requiring information or documents relevant to one or more of the following-

(a) account held by a specified person with the financial institution,
(b) whether a person is / was a signatory to an account,
(c) balance of the account,
(d) transactions over a specified period of up to 6 months,
(e) accounts held by a specified person, including name of other person who held the accounts,
(f) accounts for which a specified person is an authorised signatory,
(g) transaction conducted by the financial institution on behalf of a specified person,
(h) name of the person who holds a safety deposit box and dates accessed.

Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Act 2022

Commenced 1.2.2023

'Digital evidence access orders' will authorise law enforcement officers to issue directions requiring a person to assist the officer to access a device, such as by providing passwords or other access codes, found in execution of search or crime scene warrant.

Law Enforcement (Powers and Responsibilities) Act 2002

New Pt 5 Div 4A (ss 76AA-76AQ)

s 76AB: An eligible applicant may apply for a DEAO in relation to a computer that may be found, or has been found, in the execution of a search or crime scene warrant.

s 76AM: The executing officer for a digital evidence access order may direct the specified person to-

(a) give information or assistance reasonable and necessary to enable the officer to access data from a computer specified in the order, or

(b) give the officer any information or assistance reasonable and necessary to allow the officer to— (i) copy data from a computer to another computer, or (ii) convert the data into a documentary form or another form intelligible to a computer used by the officer.

s 76O: An offence will apply if a person does not comply with such a direction.

A specified person for a digital evidence access order must not, without reasonable excuse
(a) fail to comply with a direction; or
(b) give the executing officer information that is false or misleading

Maximum penalty—100 penalty units or imprisonment for 5 years, or both.

It is not a reasonable excuse to fail to comply with the order on the ground that complying would tend to incriminate the person or expose the person to a penalty.

Dedicated Encrypted Criminal Communication Device Prohibition Orders Act 2022

Commenced 1.2.2023

A scheme aimed at dedicated encrypted criminal communication devices (DECCDs) specifically developed for use by organised crime groups with high-level encryption and closed-network features. A police officer may apply to an authorised magistrate for a DECCD prohibition order.

s 12: An authorised magistrate may make a DECCD prohibition order.

s 13: Matters to be taken into account include any matter the magistrate considers relevant. The magistrate may consider:

(a) potential risk to public safety presented by the eligible person,
(b) whether associates with persons suspected to be involved in serious criminal activity,
(c) intelligence about suspected involvement in serious criminal activity or drug-related crime,
(d) whether a member of, or associates with, a criminal group,
(e) information from registered sources,
(f) surveillance reports,
(g) whether person has cash or assets significantly out of proportion to income.

Crimes Act 1900
New s 192P: Offence of possess DECCD where there are reasonable grounds to suspect the possession was to commit or facilitate "serious criminal activity". Maximum penalty 3 years imprisonment. "Serious criminal activity" (defined in s 192N) includes committing an offence punishable by 5 years or more.

Law Enforcement (Powers and Responsibilities) Act 2002

New Part 5A: DECCD Access Orders can be made by a magistrate to authorise a police officer to examine a device and data.

s 80M: The officer may direct the relevant person to give information or assistance that is reasonable and necessary.

s 80O: Fail to comply with a DECCD access order without reasonable excuse is an offence. Maximum penalty100 penalty units and/or 5 years.

Crimes Amendment (Protection of Criminal Defence Lawyers) Act 2022

Commenced 25.11.2022

Extends offences protecting judges and persons connected with judicial proceedings from threats, intimidation and reprisals to also protect an Australian legal practitioner who acts— (a) for a defendant in a criminal matter, or (b) in connection with criminal proceedings.

Crimes Act 1900

s 322(e): an offence, without reasonable excuse, to threaten to do or cause, or do or cause, an injury or detriment to a person intending to influence the person's conduct as an Australian legal practitioner acting for a defendant in a criminal matter or in connection with criminal proceedings. Maximum penalty 10 years.

s 326(1)(d): an offence, without reasonable excuse, to threaten to do or cause, or do or cause, an injury or detriment to a person on account of anything lawfully done by the person as an Australian legal practitioner acting for a defendant in a criminal matter or in connection with criminal proceedings. Maximum penalty 10 years.

A 'reasonable excuse' includes making a complaint about a person to a person or body acting in an official capacity, e.g Judicial Commission of NSW; or ending, or threatening to end, a retainer.

Criminal Procedure Legislation Amendment (Prosecution of Indictable Offences) Act 2022

Commenced 18.10. 2022

Amends definition of law enforcement or investigating officers and introduces new provisions outlining their duties of disclosure to prosecutors.

Criminal Procedure Act 1986

s 3(1): Definition for 'law enforcement or investigating officer' - a police officer, or another officer or a member of staff of an agency created by or under an Act, who is responsible for an investigation into a matter involving the suspected commission of the alleged offence.

s 36B: Duties of disclosure by law enforcement or investigating officers:

- duty to disclose to prosecutors all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person: s 36B(1).
- duty of disclosure continues until prosecutor decides accused will not be prosecuted for the offence, the prosecution is terminated, or accused is convicted or acquitted: s 36B(2).
- duty to keep the documents subject of s 36B(1) for as long as the duty to disclose them continues: s 36(3).
- This duty is subject to a claim of privilege, public interest immunity, statutory immunity, or statutory publication restriction: s 36B(7). The officer must inform the prosecutor of the existence and nature of material including the claim or publication restriction relating to it: s 36B(8). The officer must provide the protected material if requested by the prosecutor: s 36B(9).
- No duty imposed if the prosecutor is the Director of Public Prosecutions: s 36B(10).
- s 66(2)(b): a prosecutor must certify in a charge certificate they have received and considered verification of compliance with disclosure duties for an alleged offence for which there are such duties under s 15A *Director of Public Prosecutions Act* 1986, and s 36B *CPA*.

Transitional provisions

Sch 2, pt 48: amendments extend to proceedings commenced, but not yet committed for trial or sentence, before 18 October 2022. An existing DPP disclosure certificate may be used as verification of compliance disclosure for the new s 66(2)(b) relating to the offence in the proceedings.

Crimes (Administration of Sentences) Amendment (No Body, No Parole) Act 2022

Commenced 18.10.2022

Prevents homicide offender from receiving parole if fail to disclose location of victim's remains.

Crimes (Administration of Sentences) Act 1999

s 135A applies to offenders serving term of imprisonment for a homicide offence (defined in s 135A(8)) and—

(a) the body or remains of the victim have not been located, or

(b) because of an act or omission of the offender or another person, part of the body or remains of the victim has not been located: s 135A(1).

The State Parole Authority must not make a parole order directing release of an offender to whom s 135A applies unless satisfied the offender has cooperated satisfactorily in police investigations or other actions to identify the victim's location, whether before or after sentencing: ss 135A(2), (3).

s 160(3): s 135A applies to the making of special parole orders where an offender is dying or for other exceptional extenuating circumstances.

Commissioner of Police must provide the Authority a written report evaluating any cooperation provided by the offender, including extent, truthfulness and utility of the cooperation: s 135A(4).

Retrospective application

s 139: s 135A applies to the making of a parole order –

(a) whether the offender was convicted or sentenced before or after 18 October 2022, and

(b) whether or not application for the parole order made before 18 October 2022.

Crimes Legislation Amendment (Assaults on Frontline Emergency and Health Workers) Act 2022

Commenced 18.10. 2022

Amends *Crimes Act* 1900 to create new offences for assaults and other actions in relation to law enforcement officers, frontline emergency and health workers and persons who come to aid of law enforcement officers.

Crimes Act 1900

s 4 Definitions: "public disorder" includes a riot or civil disturbance at a correctional or detention centre.

s 60AA: news definitions of "frontline emergency worker" and "frontline health worker" for Pt 3; definition of "law enforcement officer" to include a person employed or engaged to provide education, health or rehabilitation services to inmates or detainees in a correctional or detention centre.

s 58: Amended to remove that part of the offence relating to officers. It now provides only for the offences of assault with intent to commit a serious indictable offence, and assault with intent to resist or prevent the lawful apprehension or detainer of any person for an offence.

The new offences are inserted into 'Division 8A Assaults etc against law enforcement officers and frontline emergency and health workers.' New offences include: Hinder or resist, or incite another to hinder or resist, in the execution/course of their duty; Assault, throw missile at, stalk, harass or intimidate, in the course of their duty; Assault causing actual bodily harm in the execution/course of their duty during a public disorder; Recklessly wound or cause grievous bodily harm in the course of their duty.

Crimes (Sentencing Procedure) Amendment Act 2022

Commenced 18.10. 2022

Repeals ss 25AA(1), (2), (4) *CSPA* which required court to impose sentences for child sexual offences according to sentencing patterns and practices at the time of sentencing.

Replaces those provisions with s 21B. The main change was that s 25AA was limited to child sexual offences, whilst s 21B applies to all offences. Like s 25AA, ss 21B requires a court to sentence an offender according to sentencing patterns and practices at the time of sentencing,

not the time of the offence (s 21B(1)), and that the SNPP is the one that applied at the time of the offence, not sentencing (s 21B(2)).

Crimes (Sentencing Procedure) Act 1999

s 25AA(3) (court, when sentencing for a child sexual offence, to have regard to trauma of sexual abuse on children as understood at time of sentencing) and s 25AA(5) (definition of child sexual offence) are retained.

Section 21B

New ss 21B(1) and (2): Court must sentence an offender according to sentencing patterns and practices at the time of sentencing. The standard non-parole period for an offence is the one that applied at the time of the offence.

s 21B(3):Court may sentence an offender for an offence in accordance with the sentencing patterns and practices at the time the offence was committed if:

(a) The offence is not a child sexual offence; and

(b) The offender establishes that there are exceptional circumstances.

s 21B(4): Court, when varying or substituting a sentence, must do so in accordance with the sentencing patterns and practices at the time of the original sentencing.

Intensive Corrections Orders

s 67(2)(h) *CSPA*: definition of 'prescribed sexual offence' to include offences under a previous enactment that are substantially similar to an offence referred to in s 67(2)(a)-(g) so that an ICO under s 67(1) cannot made be for certain sexual offences regardless of when offence committed or under what provision charged.

Application

The amendments will not apply to proceedings commenced prior to 18 October 2022.

Crimes Amendment (Prohibition on Display of Nazi Symbols) Act 2022

Commenced 19.9. 2022

Crimes Act 1900

s 93ZA in new Division 9 of Part 3A: an offence to knowingly display, by public act and without reasonable excuse, a Nazi symbol. Maximum penalty: 100 penalty units and/or 12 months imprisonment (individual); 500 penalty units (corporation).

"Public act" has the same meaning as in s 93Z: s 93ZA(4).

Display of a swastika in connection with Buddhism, Hinduism or Jainism does not constitute the display of a Nazi symbol: s 93ZA(2).

"Reasonable excuse" includes, but is not limited to, the display of a Nazi symbol done reasonably and in good faith for an academic, artistic or educational purpose, or for a purpose in the public interest: s 93ZA(3).

Section 584: Div 9 to be reviewed 3 years 6 months after its commencement, then not more than 5 years for subsequent reviews.

Bail Amendment Act 2022

Commenced 27.6.2022

Bail Act 2013

s 22B: For a release or detention application made during the period following conviction and before sentencing for an offence for which the accused will be sentenced to full-time imprisonment, a court must not grant or dispense with bail unless special or exceptional circumstances exist: s 22B(1).

If the offence is a show cause offence, the special or exceptional circumstances test applies instead of the show cause test. If established, the unacceptable risk test will then apply: s 22B(2), (3).

A 'conviction' includes a plea of guilty: s 22B(5).

s 30A: if bail conditions require electronic monitoring, the bail condition must meet any monitoring standard prescribed in the Regulations, and the bail authority must be satisfied that the monitoring meets standards.

Application

Amendments by the *Bail Amendment Act* 2022 apply to bail decisions made after 27 June 2022 (cl 45).

***Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021**

Commenced 1.6.2022. Second Reading Speech.

***Crimes Act* 1900**

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

s 61HF provides an objective of this Subdivision is to recognise—
(a) every person has a right to choose whether or not to participate in a sexual activity,
(b) consent to a sexual activity is not to be presumed,
(c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

The Subdivision applies to ss 61I, 61J, 61JA, 61KC, 61KD, 61KE and 61KF: s 61HG.

Definition of consent – s 61HI, set out below.

Consistent with current law, under s 61H(1) the core definition of consent is a "free and voluntary agreement." Consent must be present at the time of the sexual activity, and different acts along a sexual continuum require consent.

The legislation does not require every small increment along a sexual continuum to have consent sought and obtained. A principal aim of the reforms is to recognise and deal with misconceptions that consent to one sexual activity is consent to all or any other sexual activity.

Consent can also be withdrawn by words or conduct—see s 61HI (2). "This requirement serves to provide fairness to an accused because it precludes an internal—that is, in their own mind—withdrawal of consent to, for example, penetration when that withdrawal is not communicated" (*Second Reading Speech*).

s 61HI further provides a set of universal statements to support the definition of "consent" in s 61HI(1).

> *s 61HI Consent generally*
> *(1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.*
> *(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.*
> *(3) Sexual activity that occurs after consent has been withdrawn occurs without consent.*
> *(4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.*
> *(5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. Example— A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.*
> *(6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—*
> *(a) that person on another occasion, or*
> *(b) another person on that or another occasion.*

Circumstances in which there is no consent – s 61HJ

s 61HJ sets out a non-exhaustive list of circumstances in which there is no consent, including if the person:

- does not say or do anything to communicate consent (addresses the "freeze" response)
- does not have capacity to consent
- is so affected by alcohol or drug as to be incapable of consenting
- is unconscious or asleep
- participates because of force, fear of serious harm of any kind to the person, another person, an animal or property; because of coercion, blackmail or intimidation; is unlawfully detained;

overborne by abuse of a relationship of authority, trust or dependence; or because of fraudulent inducement

- is mistaken about the nature or purpose of the sexual activity, identity of the other person, or being married to the other person.

Knowledge about consent - 61HK

Second Reading Speech: Sections 61HK(1)(a)-(c) retains the three states of mind by which knowledge of non-consent may be established: actual knowledge of non-consent, recklessness, and a hybrid subjective/objective test of no reasonable grounds for believing the other person was consenting.

Section 61HK(1)(c) updates the current test of 'no reasonable grounds' to a 'no reasonable belief' test. The focus is on the reasonableness of any belief an accused has in light of all relevant circumstances, rather than on the narrow question of whether there existed any single ground or grounds on which the accused may have held that belief. A fact finder is to consider whether the accused's belief was objectively reasonable. Specifically, the subjective belief must be as to whether there exists consent in the form of a free and voluntary agreement. The definition of consent, and purpose of the legislation to reinforce a communicative model of consent, limit the extent to which misogynistic beliefs can be taken into account in determining subjective reasonableness of a belief.

Section 61HK(2) reinforces the important principle that consent can never be assumed. It introduces an affirmative consent requirement, meaning the accused must have sought consent by saying or doing something in order to have a reasonable belief that the other person consented. The onus remains on the Crown to prove each element of the sexual offence beyond reasonable doubt.

61HK Knowledge about consent
(1) A person (the accused person) is taken to know that another person does not consent to a sexual activity if
(a) the accused person actually knows the other person does not consent to the sexual activity, or
(b) the accused person is reckless as to whether the other person consents to the sexual activity, or
(c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.
(2) Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.
(3) Subsection (2) does not apply if the accused person shows that—
(a) the accused person had at the time of the sexual activity—
(i) a cognitive impairment within the meaning of section 23A(8) and (9), or
(ii) a mental health impairment, and
(b) the impairment was a substantial cause of the accused person not saying or doing anything.
(4) The onus of establishing a matter referred to in subsection (3) lies with the accused person on the balance of probabilities.
(5) For the purposes of making any finding under this section, the trier of fact—
(a) must consider all the circumstances of the case, including what, if anything, the accused person said or did, and
(b) must not consider any self-induced intoxication of the accused person.

Updating of language - Amendments are made to update and clarify the definitions of sexual intercourse, sexual touching and sexual act, including: it is not relevant whether a body part is 'surgically constructed' for the purposes of a sexual offence; provisions concerning sexual intercourse and sexual touching apply regardless of gender or sex; sexual activities are described in appropriate language (for example, s 61HA(c) describes oral sex on a female as "the application of the mouth or tongue to the female genitalia"); the term 'complainant' replaces 'victim.'

Criminal Procedure Act 1986

New jury directions about consent – ss 292A-292E

Five new jury directions about consent seek to address common misconceptions about consent and to ensure a complainant's evidence is assessed fairly and impartially by the tribunal of fact.

Section 292 Directions in relation to consent – provides that the judge must give any one or more of the directions in ss 292A - 292E if there is good reason to do so, or if requested by a party to the proceedings, unless there is good reason not to do so. A judge may give a consent direction at any time during a trial and on more than one occasion; and is not required to use a particular form of words in giving a direction.

Section 292A Circumstances in which non-consensual sexual activity occurs – clarifies that non-consensual sexual activity can occur in different circumstances and between different kinds of people including people who know each other, are married or in an established relationship. The list is non-exhaustive.

Section 292B Responses to non-consensual sexual activity - direction regarding responses to non-consensual sexual activity, including that there is no normal response, people respond in different ways, including by freezing and that the jury must avoid making assessments based on preconceived ideas about responses to non-consensual sexual activity.

Section 292C Lack of physical injury, violence or threats - direction that people who do not consent may not be physically injured, subjected to violence, or threatened with injury or violence; and absence of such evidence does not necessarily mean that a person is not telling the truth.

Section 292D Responses to giving evidence - direction on responses people may have to giving evidence, including that trauma may affect people differently and that the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth.

Section 292E Behaviour and appearance of complainant - direction that it should not be assumed a person consented because of their behaviour, including having worn particular clothing, consumed drugs or alcohol, or being at a particular location.

***Crimes Legislation Amendment (Loss of Foetus) Act* 2021**

Commenced 29.3.2022

Crimes Act 1900 - new ss 54A and 54B

ss 54A and 54B create offences in relation to causing the loss of a foetus of a pregnant woman. The offences apply only to an offence alleged to have been committed on or after commencement.

Foetus is defined as a foetus - (a) of at least 20 weeks' gestation, or (b) where not possible to reliably establish period of gestation - has a body mass of at least 400 grams.

s 54A Offence of causing loss of a foetus

- An offence is committed if the person's act or omission constitutes an offence involving physical elements of causing GBH to a person and the act or omission causes the loss of a foetus of a pregnant woman.
- Maximum penalty is the total of the maximum penalty for (a) the relevant GBH provision and (b) 3 years' imprisonment (the total maximum penalty).
- The prosecution is not required to prove the defendant knew, or ought reasonably to have known, the woman was pregnant, unless the knowledge is an element of the relevant GBH provision.
- In addition to s 54A, the person may be charged and convicted of another offence under the *Crimes Act* if the act or omission caused other injuries to the pregnant woman.
- A court, in sentencing under s 54A and another offence, may take into account any other injuries caused to the pregnant woman, but may not impose a sentence more than the total maximum penalty.

s. 54B Offence of causing loss of a foetus (death of pregnant woman)

- It is an offence where (a) the act or omission constitutes an offence under certain sections of the *Crimes Act* 1900 relating to homicide (see s 54(6)), and (b) the victim is a pregnant woman, and (c) the act or omission includes causing the loss of the foetus.
- A person can only be charged under s 54B if also charged with an offence under a specified homicide provision in relation to the same act or omission.
- Maximum penalty: 3 years' imprisonment.
- The prosecution is not required to prove the defendant knew, or ought reasonably to have known, the woman was pregnant.

ss 54A and 54B do not apply to:

(a) termination of a pregnancy under *Abortion Law Reform Act* 2019, or

(b) an act or omission of a pregnant woman that results in the loss of the woman's foetus.

Crimes (Sentencing Procedure) Act 1999

s 26 - amended definition of 'family victim' to include an immediate family member of a pregnant woman to extend provisions relating to victim impact statements.

Criminal Procedure Act 1986

New s 16(1)(d) provides that stating the name of a foetus does not affect an indictment for an offence under the *Crimes Act* 1900 relating to the destruction or loss of the foetus.

***Modern Slavery Act* 2018 (NSW)**

Amended before commencement by *Modern Slavery Amendment Act* 2021 (NSW)

Commenced 1.1.2022

The Act:

- Aims to combat modern slavery
- Appoints an Anti-slavery Commissioner whose functions include to advocate for and promote action to combat modern slavery; to identify and provide support for victims of modern slavery.
- Introduces certain offences into the *Crimes Act* 1900 *Modern Slavery Act* 2018

Definitions – s 5(1)

"Modern slavery": includes any conduct—

(a) constituting a modern slavery offence,

(b) involving the use of any form of slavery, servitude or forced labour to exploit children or persons taking place in the supply chains of organisations.

"Modern slavery offence" means—

(a) an offence described in Schedule 2

(b) an offence of attempting, or of incitement, to commit an offence described in Schedule 2

(c) conduct engaged in elsewhere than in NSW that, if it occurred in NSW, would constitute a modern slavery offence under (a) or (b).

Offences in Sch 2 include:

- Causing sexual servitude; conduct of business: *Crimes Act*, ss 80D, 80E
- Use child for production of child abuse material; Production, dissemination or possession of child abuse material: *Crimes Act*, ss 91G, 91H
- Slavery and slavery-like offences: *Crimes Act*, ss 93AA-93AC; *Criminal Code* (Cth), Div 270;
- Trafficking in persons offences: *Criminal Code* (Cth), ss 271.2-271.7
- Organ trafficking offences: *Criminal Code* (Cth), ss 271.7B-271.7E

Crimes Act 1900 – new offences

Aggravated offence of use child for production of child abuse material

s 91G(3)-(3A) - aggravated form of ss 91G(1) and (2) of using a child under 14 years, or 14 years or above, for production of child abuse material. Maximum penalty: 20 years imprisonment.

Offences of digital platforms dealing with child abuse material

s 91HAA(1) - Administering a digital platform used to deal with child abuse material.

s 91HAB(1) - Encouraging use of a digital platform to deal with child abuse material.

s 91HAC - Providing information about avoiding detection of, or prosecution for, conduct that involves an offence against ss 91HAA or 91HAB.

Maximum penalty for each: 14 years imprisonment.

Slavery and slavery-like offences

s 93AB - Slavery, servitude and child forced labour - maximum penalty 25 years imprisonment.

s 93AC - Child forced marriage - maximum penalty 9 years imprisonment.

Crimes (Domestic and Personal Violence) Act 2007

A "personal violence offence" in s 4 is amended to include offences of-

- child forced marriage (s 93AC *Crimes Act*)
- forced marriage offences (*Criminal Code* (Cth), s 270.7B)

"intimidation" in s 7 is amended to include conduct amounting to coercion of, or threats to, a child to enter a forced marriage.

Crimes (High Risk Offenders) Act 2006

"serious sex offence" and "offence of a sexual nature" in s 5 is amended to include an offence of sexual servitude under the *Crimes Act,* Pt 3, Div 10A.

CRIMINAL LAW UPDATE 2023 CASES

SENTENCE

GENERAL

Intensive Correction Order (ICO) - Stanley v DPP (NSW) [2023] HCA 3 – domestic violence related offence - s 66 CSPA- Zheng v R [2023] NSWCCA 64

Five judge bench - standard non-parole period for s.61M(2) Crimes Act 1900 – increased 8-year SNPP does not apply retrospectively to offences pre-1 January 2008 - AC v R [2023] NSWCCA 133

Covid-19 - failure to take into account impact of COVID-19 pandemic on custodial imprisonment - PH v The Queen [2023] NSWCCA 176

Absence of specific reference to reduced 'moral culpability' – appeal dismissed - TA v R [2023] NSWCCA 27

Assessment of objective seriousness - no obligation to place offending at a particular point on a scale or use adjective to describe seriousness of offending - Kochai v R [2023] NSWCCA 116

Sentencing judge had regard to a non-existent standard non-parole period (SNPP) – responsibility of legal representatives to provide court with accurate information as to law - DC v R [2023] NSWCCA 82

MITIGATING FACTORS

Unlikely to re-offend - s 21A(3)(g) CSPA – failure to take into account - where issue addressed by evidence and in written submissions - Li v R [2023] NSWCCA 112

Bugmy v The Queen (2013) 249 CLR 571 - latent error in relation to Bugmy factors - *application of Bugmy principles have no bearing upon assessment of objective seriousness - Chandler v R* [2023] NSWCCA 59

Error not to take good character into account - not active use of good character to gain access to child sexual assault complainant - s 21A(5A) CSPA 1999 - Bhatia v R [2023] NSWCCA 12

No error in finding evidence of post-offence good character of little weight - distinction between lack of further convictions and finding that offending behaviour ceased - Richards v R [2023] NSWCCA 107

Advanced age – elderly offender - principles in Gulyas v Western Australia [2007] WASCA 263; (2007) 178 A Crim 539 - Liu v R [2023] NSWCCA 30

Family hardship – federal offenders - sole ground of appeal based upon Totaan v R [2022] NSWCCA 75 – appeal dismissed - AE v R [2023] NSWCCA 74

DISCOUNTS – GUILTY PLEA

Whether applicant pleaded guilty "as soon as practicable" after being found fit to be tried – power to remit to Local Court after accused found fit - CSP Act 1999, s 25D(5)(a) – MHCIFP Act 2020, s 52 - Stubbings v R [2023] NSWCCA 69

PARTICULAR OFFENCES

Maintain unlawful sexual relationship with child – assessment of objective seriousness not reasonably open – application of principles in Burr v R [2020] NSWCCA 282 - s.66EA Crimes Act 1900 - JG v R [2023] NSWCCA 33

Vehicular manslaughter – manifestly excessive - Chandler v R [2023] NSWCCA 59

Crown appeal against sentence - child sexual offences - indicative sentences far below proper range - aggregate sentence did not reflect total criminality involved – relevance of uncharged acts - Director of Public Prosecutions (NSW) v TH [2023] NSWCCA 81

APPEALS

Five-judge bench - precedent - departure from previous decisions - principles of restraint - Gett v Tabet (2009) 109 NSWLR 1 - AC v R [2023] NSWCCA 133

CONVICTION AND OTHER APPEALS

EVIDENCE

Witness not competent to give evidence - trial judge failed to follow statutory requirements in s 13(5)(c) Evidence Act 1995 - SC v R [2023] NSWCCA 111

Expert evidence - responses of child victims of sexual assault – evidence given within bounds of expertise - Aziz v R [2022] NSWCCA 76 and AJ v R (Decision Restricted) [2022] NSWCCA 136, applied - s 79 Evidence Act 1995 - BQ v R [2023] NSWCCA 34

Expert evidence - expert opinion as to ideology reflected by right wing extremists - opinions not based on specialised knowledge – evidence inadmissible - s 79 Evidence Act 1995 - R v Fleming [2023] NSWSC 560 (Procedural ruling)

Expert evidence - whether Crown's expert evidence outside area of expertise - s 79(1), Evidence Act 1995 - cross-examination of defence expert by Crown prosecutor as to credibility without leave - s 103, Evidence Act 1995 - Al-Salmani v R [2023] NSWCCA 83

DIRECTIONS

Directions – murder – intoxication and specific intent offences – jury required to 'consider' (not 'find') applicant intoxicated to extent to affect capacity to form intent - s 428C(1) Crimes Act 1900 - Cliff v R [2023] NSWCCA 15

JURY

Appeal against decision to refuse discharge whole jury where individual juror discharged - Jury Act 1977- ss s 53C(1)(a), 19(1)(a), 22(a)(i) - Haines v R; Brown v R [2023] NSWCCA 108

PROCEDURE

Invalid indictment - Cth offence - indictment signed by NSW Crown Prosecutor not authorised to do so - Ihemeje v R [2023] NSWCCA 72

PARTICULAR OFFENCES

Five judge bench - persistent sexual abuse of a child - statutory construction - Crimes Act 1900 (NSW), s 66EA - MK v R; RB v R [2023] NSWCCA 180

Stated case from District Court – publish indecent article - nature of mental element - s 578C(2) Crimes Act 1900 - Nguyen v Director of Public Prosecutions (NSW) [2023] NSWCCA 42

Knowingly participate in a criminal group - Crimes Act ss 93S(1), 93T(1) - participants included both vendors and purchasers of drugs - that purchasers sought to engage in further supply does not preclude finding of shared objective - Mohana v R [2023] NSWCCA 61

Crimes (Domestic and Personal Violence) Act 2007, ss 72, 72A - application to vary or revoke an AVO applies only to unexpired AVOs - Wass v DPP (NSW); Wass v Constable Wilcock [2023] NSWCA 71

APPEALS

Jurisdiction of CCA to entertain second application for leave to appeal where first application refused – extension of time refused – not required by the interests of justice - s 10(1)(b) Criminal Appeal Act 1912 - Gould v R [2023] NSWCCA 103

Pre-recorded evidence of child witnesses – trial judge ruling refusing leave to recall child witnesses – ruling not an "interlocutory judgment or order" within s 5F(3) Criminal Appeal Act 1912 - Schedule 2, Clause 87(3)(b) Criminal Procedure Act 1986 - PJ v R [2023] NSWCCA 105

OTHER CASES

Drug Court terminated applicant's program - constructive failure to exercise jurisdiction in s 10 and s 10(1)(b) Drug Court Act 1988 - Cooper v DPP (NSW) [2023] NSWCA 65

Child Protection (Offenders Registration) Act 2000, ss 3(3), 3A(2)(c)(ii), 3A(5) – juvenile offender - possessing child abuse material, s 91H(2) Crimes Act 1900 - "registrable person" - "arise from the same incident" – "committed against the same person" – not committed against any person - Commissioner of Police, NSW Police Force v TM [2023] NSWCA 75

HIGH COURT

Intensive correction order - Whether sentencing judge undertook assessment of community safety in accordance with s 66 CSPA - failure to comply with s 66(2) amounted to jurisdictional error - Stanley v Director of Public Prosecutions (NSW) [2023] HCA 3; 296 ALJR 107; 407 ALR 222

Combination of extended joint criminal enterprise at common law and constructive murder - Mitchell v The King [2023] HCA 5; 97 ALJR 172; 407 ALR 587

Break and enter dwelling-house - appellant joint tenant - "break and enter" must involve trespass - person with lawful authority to enter premises not liable for "break" - BA v The King [2023] HCA 14; 97 ALJR 358

Children - presumption for incapacity - doli incapax - RP v The Queen (2016) 259 CLR 641- BDO v The Queen [2023] HCA 16; 97 ALJR 377

Inquiries into convictions - federal offences - Crimes (Appeal and Review) Act 2001, Pt 7, ss 78, 79 - Judiciary Act 1903 (Cth), s 68 - Attorney-General (Cth) v Huynh [2023] HCA 13; 97 ALJR 298

SUPREME COURT

COVID-19 penalty notices invalid - necessary to identify the offence-creating provision to satisfy specification requirement in s 20 Fines Act 1996 - Beame; Els v Commissioner of Police & Ors [2023] NSWSC 347 (Yehia J)

Question of law alone – alleged assault by teacher on student – magistrate failed to make critical findings of fact and provide reasons for decision to dismiss charges - Director of Public Prosecutions v Tiller [2023] NSWSC 187 (McNaughton J)

Application granted to appear by audio-visual link for sentencing proceedings - Indigenous cultural values and principles - s 5BB Evidence (Audio and Audio Visual Links) Act 1998 - R v Knight (No 1) [2023] NSWSC 195 (Yehia J)

LEGISLATION

Crimes Legislation Amendment (Assaults on Retail Workers) Act 2023

Commenced 13 July 2023

CRIMINAL LAW UPDATE 2023 CASES

SENTENCE

GENERAL

Intensive Correction Order (ICO) - Stanley v DPP (NSW) [2023] HCA 3 – domestic violence related offence - s 66 CSPA

Zheng v R [2023] NSWCCA 64

The CCA allowed the applicant's appeal against sentence of imprisonment of 2 years 6 months, NPP 10 months for wounding reckless as to actual bodily harm (s 35(4) Crimes Act 1900). The applicant stabbed her husband thinking there was a cover on the knife, causing a small wound. The CCA held the sentence was manifestly excessive and resentenced the applicant to 1 year, 10 months imprisonment to be served by ICO: at [261].

The applicant submitted the CCA should direct the sentence of imprisonment be served by way of an ICO (s 7). The Court is required to have regard to community safety as the "paramount consideration" when deciding whether to make an ICO (s 66(1)) and to assess whether making an ICO or serving the sentence by way of fulltime detention is more likely to address the risk of reoffending (s 66(2)). The Court is also required to consider the purposes of sentencing (s 3A), common law sentencing principles, and may consider other matters (s 66(3)).

There is a prohibition on the power to make an ICO in respect of domestic violence offences (ss 4A, 4B), which includes reckless wounding in the context of this case – see further below.

The High Court in *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3 held that the failure to consider the paramount consideration of community safety in s 66(1), by reference to the assessment required by s 66(2), constituted jurisdictional error.

Five points emerge from *Stanley*: at [281]-[286].

- First, the power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2). The issue is not merely the risk of reoffending, but the narrower risk of reoffending in a manner that may affect community safety: (*Stanley* at [72], [75]).
- Second, s 66(2) is premised upon the view that an offender's risk of reoffending may be different depending upon how their sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention will most effectively promote community safety: (*Stanley* at [74]).
- Third, the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending: at (*Stanley* at [75]).
- Fourth, the consideration of community safety required by s 66(2) is to be undertaken in a forward-looking manner having regard to the offender's risk of reoffending: (*Stanley* at [74]).
- Fifth, while community safety is not the sole consideration in the decision to make, or refuse to make, an ICO, it will usually have a decisive effect unless the evidence is inconclusive: (*Stanley* at [76]).

Applying the forward-looking approach in *Stanley* to the evaluative exercise of whether community safety as the paramount consideration, together with the subordinate considerations in s 66(3), warrant full-time detention or an ICO, the Court is satisfied that the risk of reoffending in a manner that may affect community safety would be better reduced by an ICO than full-time imprisonment for the following reasons:

1. the assessment report assessed risk of reoffending as "Medium-Low";

2. the sentencing judge found that the applicant was not a violent or anti-social person and assessed prospects of rehabilitation as good;

3. the applicant has complied with onerous bail conditions over four years, including the non-contact condition with the complainant; and

4. the standard supervision condition of an ICO (s 72(2)(a)) is more likely to promote the applicant's rehabilitation, given her major depressive disorder: at [291].

The CCA further found exceptional circumstances do not to require any additional condition under s 73A(2) if the sentence was directed to be served by way of an ICO: see at [288]-[290].

Sentencing for domestic violence

Sections 4A and 4B apply.

Section 4A provides that full-time imprisonment or a supervised order must be imposed for a domestic violence offence unless a different option is more appropriate.

Section 4B(1) provides an ICO must not be imposed unless the court is satisfied the victim, and any person with whom the offender is likely to reside, will be adequately protected.

As to s 4A, the applicant did not contend for a different sentencing option than a supervised order, an ICO. As to s 4B, the Court is satisfied that the complainant will be adequately protected by an ICO and there is no safety issue regarding the older son (a prosecution witness): at [294]-[295].

Pre-sentence custody

The applicant spent 58 days in custody before being granted bail. Section 71 requires an ICO to commence on the day it is imposed; it is not possible to back-date the sentence (ICO). On the other hand, a sentencing court (including this Court when resentencing) must take into account any period of pre-sentence custody (ss 24(a), 47(3)).

To overcome this problem, the term of imprisonment is therefore to be actually recorded and reduced as outlined in *Mandranis v R* [2021] NSWCCA 97: at [298]-[299]; *Mandranis* at [55]-[56], [61].

Five judge bench - standard non-parole period for s.61M(2) Crimes Act 1900 – increased 8-year SNPP does not apply retrospectively to offences pre-1 January 2008

AC v R [2023] NSWCCA 133

A five-judge bench held, by majority (*Bell CJ, Adamson JA, Ierace J, Chen J agreeing; Beech-Jones CJ at CL contra),* that for s 61M(2) offences committed before 1 January 2008, the correct SNPP is 5 years, not the increased 8-year SNPP. The sentencing judge incorrectly applied the 8-year SNPP instead of the 5-year SNPP for the applicant's offences committed between 1987 and 2007.

The Court followed the Court's earlier decision in *GL v R* [2022] NSWCCA 202 where the majority judges had arrived at the same conclusion in relevantly identical circumstances.

In 2007, the SNPP for s 61M(2) was 5 years.

From 1 January 2008, the SNPP for s 61M(2) was increased to 8 years with retrospective effect (Clause 57, Sch 2, *Crimes (Sentencing Procedure) Amendment Act 2007*).

In 2018, s 25AA *CSPA* commenced.[3] Section 25AA(1) required an offender for a child sexual offence to be sentenced "in accordance with sentencing patterns and practices at the time of sentencing, not at the time of the offence." However, s 25AA(2) provided the SNPP to be applied is the SNPP that applied "at the time of the offence, not sentencing." (Note: These sub-sections have been repealed and replaced by s 21B[4]).

[3] *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018.

[4] Sub-sections 25AA(1), (2) and (4) *CSPA* have been repealed and replaced by s 21B (from 18.10.2022 by the *Crimes (Sentencing Procedure) Amendment Act* 2022). The main change is that s 25AA was limited to *child sexual offences*, whilst s 21B applies to *all offences*. Like s 25AA, ss 21B requires a court to sentence an offender according to sentencing patterns and practices at the time of sentencing, not the time of the offence (s 21B(1)),

The transitional provision for the 2018 amendments in Clause 91 of Sch 2 *CSPA* provides that the SNPP Table as in force prior to the 2018 amendment continued to apply in respect of offences against s 61M(2) committed before the 2018 amendment.

The Court held:

- to the extent that s 25AA(2) qualified the operation of cl 57, s 25AA(2) should prevail, as it was later in time and was extraordinarily clear in its language: at [59]–[61]; *Shergold v Tanner* (2002) 209 CLR 126.
- there is no necessary inconsistency between s 25AA(2) and cl 91. Clause 91 does not in terms qualify s 25AA; it is simply a statement to the effect that a Table continues to apply for a s 61M(1)-(2) offence committed before the 2018 amendments: at [63]-[64], [68].
- Section 25AA is not said to be subject to cl 91. Transitional provisions are important and must be given effect according to their terms. However, absent extremely clear language, a transitional provision would not be expected to limit the scope or operation of a very clearly drafted substantive provision introduced into the Act at the same time as the transitional provision: at [68]-[70].

Covid-19 - failure to take into account impact of COVID-19 pandemic on custodial imprisonment

PH v The Queen [2023] NSWCCA 176

Error was established where the applicant specifically raised the impact of COVID-19 restrictions on their experience in custody and the sentencing judge said they would take judicial notice of its impact - however, the sentencing judge did not mention the factor at all in sentencing remarks, and the only available inference is that it was overlooked: at [53]-[55]. See also ***Nunez v The Queen*** [2023] NSWCCA 136 at [80].

Absence of specific reference to reduced 'moral culpability' – appeal dismissed

TA v R [2023] NSWCCA 27

The applicant, sentenced for kidnapping offences, submitted the sentencing judge failed to make findings as to whether childhood deprivation and mental health reduced moral culpability.

Dismissing the appeal, the CCA held that the absence of any specific reference to the phrase "moral culpability" did not diminish the comprehensive nature of the sentencing judge's remarks and the fact that the judge considered all relevant matters going to sentence: at [86].

The sentencing remarks must be read as a whole. Conflicting purposes of punishment are the matters which are of substance and need be addressed where relevant. If they are properly addressed, then it is not essential for a sentencing judge to expressly use the phrase "*moral culpability*" (*Egan v R* [2017] NSWCCA 206 at [37]; *Prince v R* [2020] NSWCCA 268 at [47]). The applicant's background was fully referred to in remarks: at [81]-[84].

Assessment of objective seriousness - no obligation to place offending at a particular point on a scale or use adjective to describe seriousness of offending

Kochai v R [2023] NSWCCA 116

The applicant submitted that the sentencing judge erred by omitting to express an assessment of the objective seriousness of the offences and that it is unclear whether the judge made any assessment of objective seriousness at all.

The CCA dismissed the appeal.

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and that the standard non-parole period is the one that applied at the time of the offence, not sentencing (s 21B(2)).

Under a heading "Objective Seriousness" the sentencing judge listed all of the matters relevant to the objective seriousness of the offending: at [46].

There is no obligation upon a sentencing judge to place offending at a particular point on a scale or use an adjective to describe the seriousness of offending: at [46], [50]; *DH v R* [2022] NSWCCA 200.

There was no dispute between the parties as to the *factors* relevant to that finding; only as to where on the "scale" of objective seriousness the combination of those factors landed. Given that there is no requirement to make such a finding, the fact that the judge identified all the (uncontested) factors relevant to the objective seriousness meant that there was transparency in the judge's reasons as to the basis upon which the applicant was sentenced: at [52]; see also [61]-[62].

Sentencing judge had regard to a non-existent standard non-parole period (SNPP) – responsibility of legal representatives to provide court with accurate information as to law

DC v R [2023] NSWCCA 82

The CCA allowed the applicant's appeal against sentence for child sexual assault offences. The sentencing judge took into account a non-existent SNPP for offences under s 66C(2) *Crimes Act* 1900.

The two offences were committed between 31 December 2013 and 1 January 2015. The 9 year SNPP for s 66C(2) commenced on 29 June 2015 and does not apply to offences committed before its commencement (*CSPA* 1999, Sch 2 cl 68). Under s 25AA(2) *CSPA* 1999, the SNPP for a child sexual offence is the SNPP that applied at the time of the offence, not sentencing: at [24]-[27].

The judge was led into error by the parties. Legislative change in sexual offences has been frequently significant. Counsel has responsibility to ensure that the relevant law is ascertained and the court properly assisted. Errors resulting in an appeal cause additional distress to the complainant and stress to the applicant: at [3]-[4].

MITIGATING FACTORS

Unlikely to re-offend - s 21A(3)(g) CSPA – failure to take into account - where issue addressed by evidence and in written submissions

Li v R [2023] NSWCCA 112

The CCA allowed the applicant's sentence appeal (drug supply offences) on the ground the sentencing judge failed to take into account the applicant's likelihood of re-offending pursuant to s 21A(3)(g) *CSPA*.

This is not a case where it could be inferred that the judge, having considered the material, was not satisfied that the offender is unlikely to re-offend: at [43]-[44]; cf. *Meoli* [2021] NSWCCA 213 where the absence of any reference to the unlikelihood of re-offending was explained by the absence of any submissions, and there was also no evidence which could support a finding that the applicant was unlikely to re-offend.

In this case, *a psychologist report assessed the applicant as having a "low risk* of re-offending" and the issue was addressed in written submissions, which the Crown did not challenge. The judge made a cursory reference to the *psychologist's r*eport, noted the applicant had no prior criminal record and the offending appeared to be "out of character", and found "reasonable prospects of rehabilitation." The judge made no reference to likelihood of re-offending. The assessment did not encompass a finding that the applicant was unlikely to re-offend, a finding that was open on the evidence: at [45], [49]-[50].

The issues of prospects of rehabilitation (s 21A(3)(h)) and likelihood of re-offending (s 21A(3)(g)) are separate and distinct: *TL v R* [2020] NSWCCA 265 at [369]; *Zuffo v R* [2017] NSWCCA. While remorse, rehabilitation and unlikelihood of re-offending are interconnected, and in some cases could be dealt with "compendiously", what is required is that the reasons make it evident that the relevant factors have been taken into account. This is particularly so where evidence has been relied on and submissions made with respect to factors set out in s 21A: at [40]-[42], [46].

Bugmy v The Queen (2013) 249 CLR 571* - latent error in relation to Bugmy factors - *application of Bugmy principles have no bearing upon assessment of objective seriousness

Chandler v R [2023] NSWCCA 59

The applicant was sentenced for manslaughter to 19 years' imprisonment, NPP 13 years. The applicant drove through a fence, killing an 18 month old child, whilst evading police. The sentencing judge found that the applicant, aged 22, had a dysfunctional upbringing and suffered mental health issues.

The CCA, by majority (N Adams J; Hamill J agreeing with additional reasons; Beech-Jones CJ at CL dissenting on the manifest excess ground), allowed the applicant's appeal on the ground of manifest excess and resentenced the applicant to 15 years, 8 months imprisonment, NPP 10 years, 6 months.

Manifest excess: latent error in regard to *Bugmy* factors

The manifest excess ground was upheld based on a combination of four factors. The first three factors concerned the sentence and comparative cases: see at [99].

The fourth factor concerned *latent* error in relation to *Bugmy*. It is uncontroversial that there was a causal connection between the offence and offending. There is no need for such a connection for the *Bugmy* principles to apply (*Dungay v R* [2020] NSWCCA 209). But when there *is* evidence of such a connection then there can be no doubt that moral culpability is reduced (*R v Millwood* [2012] NSWCCA 2 at [69]).

Thus, although there is not any *patent* error in relation to the *Bugmy* factors, there is *latent* error as it is not apparent that the reduction in moral culpability is reflected in the starting point of 20 years' imprisonment for manslaughter, having regard to the sentencing judge's findings that he only modified the applicant's moral culpability "to an extent", that his dysfunctional background operated "to a degree" to compromise his capacity to mature and learn from experience and that it was still necessary to keep in mind the need for protection of the public in imposing sentence: per N Adams J at [150]-[151]; *Bugmy v The Queen* (2013) 249 CLR 571.

Application of Bugmy principles have no bearing upon assessment of objective seriousness

The CCA rejected that the sentencing judge erred in assessment of objective seriousness. One of the applicant's contentions was that the judge's assessment that the applicant's moral culpability was reduced (or "compromised") on account of the application of *Bugmy* necessarily affected the assessment of the objective seriousness of the offence as the "gravest type". This proposition was rejected in *DS v R; DM v R* [2022] NSWCCA 156. The application of *Bugmy* principles have no bearing upon the assessment of objective seriousness: at [48]-[49] (Beech-Jones CJ at CL); [81] (Hamill J); [90] (N Adams J); *DS v R; DM v R*, approved.

Error not to take good character into account - not active use of good character to gain access to child sexual assault complainant - s 21A(5A) CSPA 1999

Bhatia v R [2023] NSWCCA 12

Section 21A(5A) *CSPA* 1999 provides that good character is not to be taken into account as a mitigating factor if it assisted in the commission of the offence.

The CCA allowed the applicant's appeal against sentence for sexual intercourse with a child under 10 (s 66A(1) *Crimes Act* 1900). The sentencing judge erred by finding that the applicant's good character had allowed access to the complainant and declining to take into account good character in accordance with s 21A(5A). The applicant was a family friend for years before the child complainant was born. There was nothing to suggest he befriended the family to gain access to the child. Neither parent gave evidence that his character played any role in their decision to allow him to babysit: at [141]-[142], [144].

The application of s 21A(5A) turns on the facts of each case. The reference in the Second Reading Speech for s 21A(5A to "misusing perceived trustworthiness and honesty" suggests active use of good character, of which there was no evidence: at [146].

No error in finding evidence of post-offence good character of little weight - distinction between lack of further convictions and finding that offending behaviour ceased

Richards v R [2023] NSWCCA 107

The applicant was sentenced for historical child sexual offences committed between 1969-1985.

The applicant had no recorded convictions for offences committed after 1986. He had been previously sentenced for offences against different children committed over 21 years from 1966-1987 and had been in custody since 2014.

The applicant submitted that the sentencing judge erred in finding that: "there is very limited evidence of otherwise good character in the years after the offences were committed and it is a matter of very little weight…. ."

The CCA dismissed the appeal. The weight to be given to post-offence good character fell within the judge's discretion and varies according to all the circumstances of the case. The assessment that it was of little weight was open (*Neal v The Queen* (1982) 149 CLR 305 at 326; *Bugmy v The Queen* (2013) 249 CLR 571; *Ryan v The Queen* (2001) 206 CLR 267 at [36]). That the judge said that it ought be given little weight indicated that it was taken into account: at [81]; *R v Baker* [2000] NSWCCA 85 at [11].

The CCA further discussed the distinction between a lack of further convictions and the applicant's submission that the sentencing judge (and this Court) should act on the basis that the applicant had *not* in fact re-offended since 1986. The applicant is entitled to have taken into account in mitigation that he has no further convictions recorded after 1986. However, where there is no evidence of further offending conduct after 1986 does not mean that the Court ought infer that there was none. To be sentenced on the basis that the offender *ceased* the offending conduct at a particular time is a matter in mitigation, which must be proved on the balance of probabilities (*The Queen v Olbrich* (1999) 199 CLR 270 at [27]). If there is no evidence, the Court may neither sentence on the basis that the offending conduct has continued nor that it has ceased: at [82]-[87].

Advanced age – elderly offender - principles in Gulyas v Western Australia [2007] WASCA 263; (2007) 178 A Crim 539

Liu v R [2023] NSWCCA 30

The applicant was sentenced for causing grievous bodily harm with intent to murder (s 27 *Crimes Act* 1900). The applicant appealed on the ground that the sentencing judge erred by failing to apply principles in relation to advanced age, relying on on *Holyoak v R* (1995) 82 A Crim R 502 at 507 and Steytler P in *Gulyas v Western Australia* [2007] WASCA 263; (2007) 178 A Crim 539 at [54].

The CCA dismissed the appeal.

The only decision the judge was referred to was *R v Mammone* [2006] NSWCCA 138, where special circumstances on the basis of advanced age and a degree of ill health reduced the NPP to 60 percent of the head sentence, which the judge did. The judge had regard to the applicant's advanced age as a mitigating factor as required by the law, and which had a real and direct effect on the time to be served. No error has been established: at [46]-[48].

The relevant principles are set out in *Gulyas v Western Australia*-

> (1) Where moral culpability is reduced by advanced age (which will inevitably mean that age is coupled with some other factor that is a consequence of it, for example, age related mental impairment), allowance should be made for that factor.
>
> (2) Where there is evidence sufficient to justify the conclusion that circumstances associated with advanced age (for example, continuous ill health, or ill health coupled with physical or mental frailty) will make imprisonment more arduous for the offender than is normal, allowance should be made for this.
>
> (3) Account may also be taken of hardship for the offender arising out of their knowledge that a lengthy sentence of imprisonment is likely to destroy any reasonable expectation of useful life after release. However, the punishment must still reflect the crime, and of such seriousness that the offender has forfeited the right to any reasonable expectation of useful life after release.
>
> (4) Deterrence and denunciation are important even in the case of advanced age. However, where there are factors associated with age that justify a more lenient sentence, the general public will understand why the sentence is less severe than might otherwise have been the case and the purposes of deterrence

> and denunciation will still be served. However, if this is to be achieved, punishment must still reflect the seriousness of the crime.

The principles are not capable of mechanical application. There is no principle that advanced age leads automatically to imposition of a lesser sentence than the objective circumstances require: at [40].

Here, there was no evidence of that the applicant suffered any mental condition or physical or mental frailty. The judge properly took into account the principle of proportionality: at [41]-[44].

Family hardship – federal offenders - sole ground of appeal based upon Totaan v R [2022] NSWCCA 75 – appeal dismissed

AE v R [2023] NSWCCA 74

Totaan v R (2022) 108 NSWLR 17 held that s16A(2)(p) *Crimes Act 1914* (Cth) did not require there to be exceptional hardship to family and dependents before the probable effect on them of a sentence imposed on a federal offender could be taken into account.

The applicant, convicted of drug importation, was sentenced pre-*Totaan*. He appealed on the sole ground that the sentencing judge failed to apply the principle in *Totaan*. The Crown conceded error.

The CCA dismissed the appeal.

The sentencing judge's discretion miscarried and the ground of appeal is made out. However, no less severe sentence is warranted in law. Every conclusion favourable to the applicant was reached. Whilst the judge did not regard the evidence concerning the impact of the probable sentence upon the applicant's family to be exceptional hardship, the judge did not fail to take it into account: at [52]-[55].

N Adams J (Button J agreeing) observed that there is potential for offenders sentenced prior to *Totaan* to seek leave to appeal out of time if incarceration led to hardship to their families which was not "extreme". A similar situation arose following *Xiao v R* (2018) 96 NSWLR 1. It should not be presumed that in *every* such application, error having been conceded, a less severe sentence will inevitably be warranted: at [57]; *Kentwell v R* (2014) 252 CLR 601.

As for what "new" evidence can be adduced in post *Totaan* appeals, each case will turn on its own facts: at [59].

DISCOUNTS – GUILTY PLEA

Whether applicant pleaded guilty "as soon as practicable" after being found fit to be tried – power to remit to Local Court after accused found fit - CSP Act 1999, s 25D(5)(a) – MHCIFP Act 2020, s 52

Stubbings v R [2023] NSWCCA 69

Section 25D(5)(a) *CSP Act* provides that a 25% discount applies if the offender pleaded guilty as "soon as practicable" after being found fit to be tried.

Section 25D(6) provides that in determining whether the offender pleaded guilty as soon as practicable, the court is to take into account whether the offender had a reasonable opportunity to obtain legal advice and give instructions to their legal representative.

The applicant was found fit for trial by the Mental Health Review Tribunal on 8.4.2021. His trial was listed for 25.10.2021. He pleaded guilty on 7.10.2021. As the plea was entered was more than 14 days before trial, the sentencing judge allowed a 10% discount on sentence.

The applicant appealed on the ground that the sentencing judge's conclusion that his plea of guilty was not entered "as soon as practicable" occasioned a miscarriage of justice based on procedural irregularity (as opposed to *House* error). The applicant sought to rely on a solicitor's affidavit which stated that the applicant had provided instructions to offer a plea to a lesser charge.

The CCA refused the affidavit and dismissed the appeal.

<u>The meaning of "as soon as practicable" and "reasonable opportunity"</u>

Whether an offender pleaded guilty "as soon as practicable" within s 25D(5)(a) after the offender is found fit following a committal, is to be evaluated from the point of view of the offender. Such

determination takes into account, as required by s 25D(6), a period of time which, viewed objectively, is appropriate or suitable in the circumstances of the particular case for the offender to obtain legal advice and give instructions to their legal representative: at [51].

Whether the new evidence should be admitted on appeal

Leave to rely upon the affidavit evidence is refused.

The new evidence concerns difficulties the legal representatives had obtaining access to the applicant, and time spent on plea negotiations with the Crown and in obtaining an expert report: at [45].

The new evidence should not be admitted because explanation for the non-production of such evidence is incomplete. The solicitor does not disclose in his affidavit whether he was aware of the discounts in s 25D(5), that he discussed these provisions with trial counsel, and whether he and/or counsel formed the view the applicant was not entitled a higher sentencing discount because he had not pleaded guilty "as soon as practicable" after he was found fit: at [45]-[46].

On the hypothesis that such evidence is admitted on appeal, the applicant has not shown procedural irregularity in the sentencing proceedings. The new evidence, all of the circumstances and the mandatory consideration in s 25D(6) show that the guilty plea was not entered as soon as practicable after the applicant was found fit: at [56].

Section 52 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*

Section 52 *MHCIFP Act* complements s 25D(5)(a) *CSP Act*. Section 52 enables proceedings against an accused to be remitted to a magistrate for the holding of a case conference as a continuation of committal proceedings, if the accused is found fit to be tried and was committed for trial before a case conference was held: at [23].

If an accused who has been committed for trial and is found fit to be tried takes advantage s 52 *MHCIFP Act* (remittal of the proceedings to the Local Court for a continuation of the committal proceedings), the discounts are prescribed by s 25D(2) *CSP Act*. If the accused pleads guilty in the Local Court on remitter the prescribed discount is 25%: at [25].

Alternatively, if an accused who has been committed for trial and is found fit does not apply for remittal to the Local Court for a continuation of the committal proceedings, the discounts are prescribed by s 25D(5) *CSP Act*. A discount of 25% is prescribed if the accused pleads guilty "as soon as practicable" after the person is found fit, taking into account the mandatory consideration in s 25D(6) of whether the person had a reasonable opportunity to obtain legal advice and give instructions to their legal representative: at [26].

PARTICULAR OFFENCES

Maintain unlawful sexual relationship with child – assessment of objective seriousness not reasonably open – application of principles in Burr v R [2020] NSWCCA 282 - s.66EA Crimes Act 1900

JG v R [2023] NSWCCA 33

The CCA, by majority (Davies J; Simpson AJA agreeing; Wilson J dissenting) allowed the applicant's appeal against sentences for **m**aintain unlawful sexual relationship with child (s 66EA Crimes Act 1900). The sentencing judge's assessments of objective seriousness were outside proper exercise of sentencing discretion: at [57].

The sentencing judge was referred to *Burr v R* [2020] NSWCCA 282 and comparative cases. Although a number of these cases were decided prior to the amendments to s 66EA which commenced on 1 December 2018, and whilst the earlier form of s 66EA required at least three occasions on separate days whereas the present form of the section requires only two or more sexual acts at any time, the factors identified by Johnson J in *Burr* at [181] are still relevant: at [67]; *GP (a pseudonym) v R* [2021] NSWCCA 180 at [64].

These factors include the number and nature of sexual offences, ages of victim and applicant and differential, period of time offences were committed and their context, position and abuse of trust, violence, coercion, threats, and/or admonitions as to non-disclosure: at [48]; *Burr*.

When regard is had to the findings of objective seriousness in the cases, it was not open to find that Count 4 was within mid-range. For Count 5, the cases provide reasonable indication that far more serious offending is required to justify a finding that the offending is above mid-range: at [71].

There are significant difficulties in challenging a sentencing judge's finding of objective seriousness (*Mulato v R* [2006] NSWCCA 282; *Magro v R* [2020] NSWCCA 25). Here, there was a paucity of authority from this Court for useful comparisons, and only a few made available to the judge. When regard is had to the small number of cases which assist on objective seriousness, the determinations of objective seriousness were not reasonably open: at [72].

Vehicular manslaughter – manifestly excessive

Chandler v R [2023] NSWCCA 59

The CCA by majority (N Adams J; Hamill J agreeing with additional reasons; Beech-Jones CJ at CL dissenting) allowed the applicant's appeal against sentence for manslaughter of 19 years' imprisonment, NPP 13 years. The applicant drove through a fence, killing an 18 month old child, whilst evading police. The applicant was resentenced to 15 years, 8 months imprisonment, NPP 10 years, 6 months.

The sentence is manifestly excessive: at [83], [152]. The offender received the second highest manslaughter sentence for a single offence since relevant statistics have been recorded**, and** higher than other vehicular manslaughter sentences which included multiple deaths: at [101]-[107]; *Davidson v R* [2022] NSWCCA 153; (2022) 100 MVR 336. The applicant's sentence is broadly comparable with murder sentences imposed where the weapon was a motor vehicle: at [118]ff.

Crown appeal against sentence - child sexual offences - indicative sentences far below proper range - aggregate sentence did not reflect total criminality involved – relevance of uncharged acts

Director of Public Prosecutions (NSW) v TH [2023] NSWCCA 81

The CCA allowed the Crown appeal against the respondent's sentence of imprisonment for 7 years 6 months, NPP 4 years 6 months for four sexual offences committed against his stepson, aged 7-8 and 12, over a four-year period (Sexual intercourse with child under 10 (*Crimes Act 1900*, s 66A(1)) (count 1), 2 counts of aggravated sexual intercourse with child 10-14 (s 66C(2)) (counts 2-3) and intentionally carry out sexual act with child 10-16 (s 66DE(1)(a)) (count 4)). Three additional sexual offences were on a Form 1.

Manifest inadequacy

With appropriate modification, the principles regarding appellate review of an aggregate sentence on the ground of manifest excess are equally applicable to a complaint of manifest inadequacy. These principles allow for argument that manifest excess or inadequacy in relation to an aggregate sentence can be addressed by considering the indicative sentences. It follows that comparisons with other cases have utility. Nevertheless, the ultimate inquiry is "whether the aggregate sentencing reflects the total criminality involved": at [53]-[54]; *Lee v R* [2020] NSWCCA 244 at [32]; *Aryal v R* [2021] NSWCCA 2 at [50], quoting *JM v The Queen* (2014) 246 A Crim R 528.

The indicative sentences for counts 1−3 were far below any conception of the proper range for such offending. It almost inevitably follows that the aggregate sentence is also manifestly inadequate. However, even if it was concluded that the indicative sentences were not manifestly inadequate, then the aggregate sentence still did not "reflect… the total criminality involved" (*JM* at [40]): at [56]-[58].

Relevance of uncharged acts

Uncharged acts that amount to an offence cannot be taken into account in the manner identified for Form 1 offences (*Abbas* and *Attorney General's Application*) i.e., they are not matters that warrant additional need for personal deterrence and retribution. However, the facts and circumstances of that conduct can otherwise be considered in the same way that the facts and circumstances of Form 1 offences can be considered: at [24]; *LN v R* [2020] NSWCCA 131.

That the respondent engaged in sexual abuse over many years destroys any suggestion of good character and that the offences were isolated. Further, they emphasise the victim's vulnerability and give context in reinforcing what the substantive offences suggest, namely, that for a sustained period the victim was treated as a sexual object: at [26].

APPEALS

Five-judge bench - precedent - departure from previous decisions - principles of restraint - Gett v Tabet (2009) 109 NSWLR 1

AC v R [2023] NSWCCA 133

A five-judge bench considered the principles concerning departure from previous decisions of the Court as outlined in *Gett v Tabet* (2009) 109 NSWLR 1.

The appeal involved an identical issue previously considered in *GL v R* [2022] NSWCCA 202. In *GL* the majority judges Garling and Hamill JJ held that for s 61M(2) offences committed before 1 January 2008, the correct SNPP is 5 years, not the increased 8-year SNPP. The decision involved statutory construction of s 25AA(2) *CSPA*. (This aspect of the appeal is discussed above under '1. General Sentencing').

On this appeal, the Crown submitted that *GL* was wrongly decided and should not be followed.

The Court held, by majority, that it ought to follow *GL*. An intermediate appellate court should not depart from its own previous decision(s) unless the court is satisfied that the previous decision was "plainly wrong" or "clearly wrong", and that there are compelling discretionary reasons not to follow (*Gett v Tabet* (2009) 109 NSWLR 1; *Totaan v R* (2022) 108 NSWLR 17). *GL* was not wrongly decided, whether "plainly" so or otherwise: at [24], [53].

Where questions of statutory construction are finely balanced, it may be difficult to conclude that a particular prior interpretation of a statutory provision is "plainly wrong": at [30].

As the issue was not fully argued in the present appeal, the Court does not express a view about whether the operation of the principles of restraint in *Gett* is confined to, or requires the strict identification of, the *ratio decidendi* of a previous decision. However, it may be said that confining the operation of the *Gett* principles to an unduly narrow conception of what is strict *ratio* is undesirable: at [43]-[46].

At least for the purposes of the *Gett* principles, the *ratio decidendi* of a previous decision should generally be taken to include a conclusion of the earlier court in resolving an issue where:

- the relevant issue was fully argued; and
- the issue was treated by the court as a necessary step in reaching its conclusion to uphold a ground of appeal; even if
- the appeal is ultimately dismissed by reason of the exercise of a consequential power, in the nature of a residual discretion, to dismiss an appeal notwithstanding the presence of error: at [50].

Garling and Hamill JJ's statements in *GL* did form part of the *ratio decidendi*. For their Honours to have reached the conclusion they did in the context of a resentencing exercise, it was first necessary for them to have reached the conclusion they did as to the effect of s 25AA(2). Otherwise, there would have been no occasion to exercise the sentencing discretion afresh, no other ground of appeal having succeeded: at [51].

CONVICTION AND OTHER APPEALS

EVIDENCE

Witness not competent to give evidence - trial judge failed to follow statutory requirements in s 13(5)(c) Evidence Act 1995

SC v R [2023] NSWCCA 111

The CCA allowed the applicant's appeal against convictions for child sexual offences and ordered a retrial.

The trial judge, having determined one of the complainants was not competent to give sworn evidence pursuant to s 13 Evidence Act, failed to comply with the statutory requirements in s 13(5)(c).

Section 13(5)(c) requires that prior to a person giving unsworn evidence, the Court is obliged to tell the person:

> "(c) that he or she may be asked questions that suggest certain statements are true or untrue and should feel under no pressure to agree with statements that he or she believes are untrue."

The trial judge considered s 13(5)(c) and determined that "*I don't propose to tell [GC] anything about that in the circumstances.*"

Failure to strictly follow the requirements of s 13(5) meant that the trial had not been conducted according to law. The judge had no discretion to omit informing the complainant of the substance of each of the three sub-sections of s 13(5): at [6]-[11]; *SH v Regina* [2012] NSWCCA 79 at [33]-[35]; *MK v Regina* [2014] NSWCCA 274.

Expert evidence - responses of child victims of sexual assault – evidence given within bounds of expertise - Aziz v R [2022] NSWCCA 76 and AJ v R (Decision Restricted) [2022] NSWCCA 136, applied - s 79 Evidence Act 1995

BQ v R [2023] NSWCCA 34

Sections 79(1) and 108C(1) *Evidence Act* 1995 allow evidence of opinions based on specialised knowledge from training, study or experience - including specialised knowledge of the impact of sexual abuse on behaviours of children - to be admitted as opinion evidence or credibility evidence, respectively.

The applicant was convicted of child sexual assault offences against AA and BB. The trial judge allowed the Crown to call expert evidence from Associate Professor Shackel about how child victims of sexual assault respond to and disclose the offending, but disallowed evidence as to the responses by AA and BB. The Professor has a PhD on use of expert testimony in child sexual assault cases, focused on analysis of psychological and related research with respect to how child sexual assault victims respond to their victimisation.

The applicant appealed on grounds including that the trial miscarried where the Professor impermissibly gave evidence on behaviour of "perpetrators"; the relationship between a victim and a perpetrator; intra-familial relationships; when abuse commonly takes place; and risk factors for sexual abuse.

The CCA dismissed the appeal. The Professor's evidence was within the bounds of her expertise and did not give rise to a miscarriage of justice: *Aziz v R* [2022] NSWCCA 76; *AJ v R* (*Decision Restricted*) [2022] NSWCCA 136, followed. The Professor's evidence was concerned entirely with the relationship between the child and the perpetrator, the effect that such a relationship has on the child's behaviour, and the response and behaviour of children during and after the abuse by reason of the family relationship. Reference to abuse happening in the context of "everyday activities" was an explanation of why the child might react (or not react) in a particular way: at [237]-[239].

The Professor gave two answers that assaults that happen in homes may occur with other people in the vicinity. This might be thought to be outside the Professor's expertise. However, they followed on the Professor's answer that abuse often takes place within the home and in the context of everyday activities. The Professor's knowledge of what is contained in those two answers is very likely to have been obtained by her study of the cases which are the basis of the research, and so closely related to the general discussion of the reactions and behaviour of children, that the evidence was not

objectionable. Even if the questions and answers were inadmissible, the answers did not give rise to a miscarriage of justice: at [239]-[240].

Expert evidence - expert opinion as to ideology reflected by right wing extremists - opinions not based on specialised knowledge – evidence inadmissible - s 79 Evidence Act 1995

R v Fleming [2023] NSWSC 560 (Procedural ruling)

The accused faced trial for engaging in a terrorist act, under s 101.1(1) *Criminal Code* (Cth). The Crown called Professor S, as an expert in a subject referred to as "right wing extremism". At the conclusion of the Professor's evidence in-chief the accused sought orders excluding her evidence.

The Professor holds a PhD in Politics and has been researching far-right extremism since 2017, as to commonalities in violent extremism, right wing extremism, and strategies to de-radicalise individuals associated with extremism; and has published articles and a book.

The Crown submitted the evidence of the professor was highly relevant because it is capable of interpreting for the jury writings by the accused, and placing them within the context of views expressed by individuals or groups who promulgate or support particular political views or ideology.

The Court ruled the evidence was not admissible under s 79. The Court was not persuaded that the study of right-wing extremism is, at this early stage of its development, and in the context of this trial, supported by "specialised knowledge", such that the professor's evidence is capable of informing the jury as to a fact in issue. The opinion evidence given before the jury is not expert evidence pursuant to s 79 and is inadmissible: at [62].

Expert evidence - whether Crown's expert evidence outside area of expertise - s 79(1), Evidence Act 1995 - cross-examination of defence expert by Crown prosecutor as to credibility without leave - s 103, Evidence Act 1995

Al-Salmani v R [2023] NSWCCA 83

The CCA dismissed the applicant's appeal against convictions for three counts of aggravated dangerous driving causing death.

The applicant submitted that the evidence on shock by the Crown expert (a pharmacologist) was outside her area of expertise (s 79 *Evidence Act* 1995). The Crown expert's evidence was that the applicant was impaired by drug use at the time of the collision. Under cross-examination, she said it was unlikely that the applicant was affected by shock. The applicant's expert gave evidence that presentation was more consistent with shock following a traumatic event, not drug use.

The applicant further submitted that the Crown Prosecutor's cross-examination as to credibility of the defence expert without leave led to a miscarriage of justice (ss 102, 103). During cross-examination, the Crown asked the defence expert whether he had been "fired" from previous employment. The trial judge disallowed the question and directed that the jury disregard it.

Expert evidence regarding shock

The applicant failed to demonstrate that the opinions of the Crown expert were not grounded in specialised knowledge based on training, study or experience (s 79): at [52]-[57].

Even if it were demonstrated that opinions as to the effect of shock were beyond expertise of both experts, which it was not, the fact that both side's experts gave evidence on this topic greatly diminished any likelihood of a miscarriage of justice. Admission of the Crown's expert evidence concerning the symptoms of "shock" elicited by the applicant's trial counsel was the result of a forensic choice to pursue an alternative hypothesis upon which the applicant's case rested and no objection was raised at trial: at [61]-[62].

The CCA observed that cross examining counsel has the ability to confine cross examination to the fields of a witness's expertise and if the cross examiner chooses to go beyond that field, that is the consequence of their forensic choice. The very fact that the question is asked of the expert necessarily implies an acceptance that the expert is capable of answering it within the expert's field of expertise: at [66].

In contrast to oral evidence, objection to an expert's *written report* will occur before the report is tendered to immunise a jury against receipt of objectionable expert evidence: at [64].

Cross examination as to credibility without leave

The prosecutor erred in seeking to ask the question without the leave of the Court, contrary to ss 102 and 103: at [40]; *Montgomery v The Queen* [2013] NSWCCA 73. A prosecutor is required to be meticulous in observing requirements in the *Evidence Act* calculated to ensuring that a trial does not miscarry: at [36]-[37].

Ultimately what is determinative is whether the objectionable part of the question was productive of an unfair trial (*Montgomery* at [181]). In the context of the entirety of the trial, including objection to the question, its disallowance and the trial judge's direction to the jury, the objectionable question did not result in an unfair trial or miscarriage of justice: at [42]-[46].

DIRECTIONS

Directions – murder – intoxication and specific intent offences – jury required to 'consider' (not 'find') applicant intoxicated to extent to affect capacity to form intent - s 428C(1) Crimes Act 1900

Cliff v R [2023] NSWCCA 15

The CCA dismissed the applicant's appeal against conviction for murder. The principal issue at trial concerned the impact of his intoxication at the time of the stabbing upon his ability to form the intent of inflicting grievous bodily harm. The applicant submitted the trial judge erred by directing the jury that: the applicant's "level of intoxication (if you *find* he was intoxicated) may be relevant": at [34].

The CCA held that having regard to the entirety and overall effect of the judge's directions no miscarriage of justice has been established: at [5].

However, there is room for criticism. It was not necessary for the jury to *find* – in the sense of positively conclude – that the applicant was intoxicated and to such an extent as to affect his capacity to form an intent to cause grievous bodily harm. It was enough for an acquittal that the evidence, including as to intoxication, raised a reasonable doubt as to intent.

It would have been better if this had been expressed differently – that is, that the jury was required to *consider* the evidence on this point and the trial judge needed to tell them this: at [55]-[58].

JURY

Appeal against decision to refuse discharge whole jury where individual juror discharged - Jury Act 1977- ss s 53C(1)(a), 19(1)(a), 22(a)(i)

Haines v R; Brown v R [2023] NSWCCA 108

The following concerns Brown's appeal only.

Section 53C(1)(a) *Jury Act* 1977 states that if the court discharges a juror, the court must discharge the jury if to continue with the remaining jurors would give rise to the risk of a substantial miscarriage of justice.

Section 19(1)(a) states that, except as provided by s 22, the jury in criminal proceedings is to consist of twelve persons.

Section 22(a)(i) provides that, where a juror in criminal proceedings is discharged, the jury shall be considered as remaining properly constituted if the number of its members is not reduced below ten.

The applicant Brown and his co-accused H were convicted at a joint trial of multiple offences. At the commencement of trial, following empanelment of twelve jurors, the trial judge allowed a joint application by all parties to discharge one juror on the basis of misconduct. The judge dismissed Brown's further application for discharge of the whole jury and ordered that the trial continue with eleven.

The applicant's sole appeal ground was that the trial judge erred in failing to discharge the whole jury pursuant to s 53C(1)(a) *and allowing the trial to proceed with eleven jurors.*

The CCA dismissed the appeal.

The principles regarding s 53C were recently summarised in *Watson* [2022] NSWCCA 208. Section 53C(1)(a) requires a trial judge to discharge the whole jury, following the discharge of one juror, where of the opinion that there is a risk of a substantial miscarriage of justice if that course is not taken. Once the evaluative judgment is formed that there is no risk of a substantial miscarriage of justice, there is no discretion: at [40]-[43]; *Watson v R*; *Haile v R* [2022] NSWCCA 71.

It is true that s 19 provides a *prima facie* right of the accused to a trial by a jury of twelve. However, s 19 is necessarily limited in operation by s 22. The trial judge did not fail to take into account the *prima facie* right (and indeed he considered the desirability) of the accused to a trial by a jury of twelve, nor did the trial judge misapprehend any principle in that regard. However, the trial judge was obliged to act in accordance with s 53C, once the relevant evaluative judgment was formed: at [44]-[46].

There is no inconsistency in the trial judge's finding of misconduct against the juror who was discharged and the trial judge's determination that no risk of a substantial miscarriage of justice arose in allowing the jury of eleven to proceed. In *Watson* the Court at [56] drew attention to the importance of identifying which jurors had purportedly engaged in misconduct and the occasions that any misconduct occurred, in order to establish a risk of a miscarriage of justice. In the present case, no particular act of "delinquency" on the part of any juror other than the discharged juror, nor is it suggested how the discharged juror's "delinquency" may have practically influenced the other jurors' behaviour: at [47]-[48]; *Watson v R*.

PROCEDURE

Invalid indictment - Cth offence - indictment signed by NSW Crown Prosecutor not authorised to do so

Ihemeje v R [2023] NSWCCA 72

The CCA quashed the applicant's convictions and ordered a new trial for Commonwealth drug offences on the basis that the NSW Crown Prosecutor who signed the indictment was not authorised to do so.

The NSW DPP retained carriage of the Commonwealth offences after State offences were severed from the indictment.

Under s 31 *Director of Public Prosecutions Act* 1983 (Cth) the Commonwealth DPP delegates power to institute prosecutions on indictment for Commonwealth indictable offences to the NSW DPP and to certain persons employed by the DPP listed in a schedule. However, the NSW Crown Prosecutor who signed the indictment was not listed in the schedule and was thus not authorised to sign the indictment. There is no statutory provision to overcome that irregularity: at [32].

The CCA referred to other cases where indictments were signed by unauthorised persons: see at [29]-[31]; (Private barristers briefed by the DPP signing indictments when only Crown prosecutors were authorised to do so - s 16(1)(i) *Criminal Procedure Act*; *R v Halmi* (2005) 62 NSWLR 262; *R v Janceski* (2005) 64 NSWLR 10; Non-compliance with s 126 *Criminal Procedure Act* 1986 did not render indictment invalid to confer jurisdiction on the District Court in respect of the Commonwealth offences - *Ozgen v R* (2021) 291 A Crim R 408; [2021] NSWCCA 252).

PARTICULAR OFFENCES

Five judge bench - persistent sexual abuse of a child - statutory construction - Crimes Act 1900 (NSW), s 66EA

MK v R; RB v R [2023] NSWCCA 180

The applicants were each convicted (at two different trials) of persistent sexual abuse of a child under s 66EA *Crimes Act* 1900. Section 66EA(1) states that an adult who maintains an unlawful sexual relationship with a child is guilty of an offence. An unlawful sexual relationship is a relationship in which an adult engages in two or more unlawful sexual acts with or towards a child over any period: s 66EA(2).

Each applicant submitted the trial judges erred in their directions on s 66EA.

A five judge bench considered the proper construction of s 66EA as to whether an offence is established by:

a. proof of the commission of two or more unlawful sexual acts (the "first construction"); or

b. proof of the existence of a *relationship* "in which" two or more unlawful sexual acts were committed (the "second construction"); or

c. proof of the existence of a *sexual relationship* over and above the commission of two or more unlawful sexual acts (the "third construction").

The applicants sought to rely on the third construction as per *R v RB* [2022] NSWCCA 142 at [62] and *RW v R* [2023] NSWCCA 2 per Fagan and Harrison JJ.

The Court (Beech-Jones CJ at CL; Ward P; Price, Wilson and Lonergan JJ agreeing) held that the second construction is the correct construction, as preferred by Basten AJA in his Honour's dissenting judgment in *RW v R (Restricted Decision)* [2023] NSWCCA 2: at [95], [101].

To the extent that the decision in *RB* and the judgments of Harrison and Fagan JJ in *RW* differ, they are "plainly wrong" and should not be followed: at [6].

The second construction respects the difference between a "relationship", as used in ss 66EA(2) and (7), and the defined term "unlawful sexual relationship" as used throughout the provision. Section 66EA(2) plainly states that hat converts "a relationship" into an "unlawful sexual relationship" is the commission of two or more unlawful sexual acts in the course of that relationship ("in which"). Typically, that may involve an established relationship such as parent and child, teacher and student or coach and player which is corrupted by the commission of two or more unlawful sexual acts within that relationship. In some cases, the "relationship" might be something that arises from the facts and circumstances of the commission of the unlawful sexual acts themselves (and what connects them) so that the provision "excludes from the scope of the offence a person who commits unlawful sexual acts with a child with whom he or she has no relationship" (*RW* at [15] per Basten AJA). The word "maintains" in s 66EA(1) does not add anything to the actus reus of the offence beyond satisfaction of s 66EA(2): at [95]; *R v DV, M* (2019) 133 SASR 470; *R v Mann* (2020) 135 SASR 457, approved. *R v RB* [2022] NSWCCA 142; *RW v R* [2023] NSWCCA 2, disapproved.

Neither the Royal Commission Report nor Second Reading Speech warrant any departure from this construction: at [96]-[97]. The statutory text is clear and warrants the adoption of the second construction: at [100]-[101]; *Sydney Seaplanes Pty Ltd v Page* (2021) 106 NSWLR 1 at [28].

The Court dismissed the conviction appeals of both applicants. The trial judges' directions accorded with the second construction: at [107]-[109].

Stated case from District Court – publish indecent article - nature of mental element - s 578C(2) Crimes Act 1900

Nguyen v Director of Public Prosecutions (NSW) [2023] NSWCCA 42

The applicant was convicted of publish indecent video, under s 578C(2) C*rimes Act* 1900.

The District Court judge stated the following question to the CCA:

> *Question: "In proceedings against a person for publishing an indecent article contrary to s. 578C(2) of the Crimes Act 1900, is the prosecution required to prove that the person knew or believed that the article was indecent?"*
>
> *Answered: "No".*

The applicant submitted that the question of indecency required a mixed subjective/objective approach.

The CCA stated that indecency is an element in criminal offences that is wholly objective, based upon the contemporary standards of ordinary members of the community. It does *not* require a mental element (whether intention, knowledge, recklessness, or anything else) about that attribute on the part of an accused person: at [44]; *Purves v Inglis* (1915) 34 NZLR 1051; *Crowe v Graham* (1968) 121 CLR 375 at 390; *R v Court* (1988) 87 Cr App R 144; *R v Harkin* (1989) 38 A Crim R 296; *R v Stringer* (2000) 116 A Crim R 198; [2000] NSWCCA 293 at [56]; *Eades v DPP (NSW)* (2010) 77 NSWLR 173 at [7].

Otherwise, eccentric or thoughtless people could publish profoundly indecent articles without sanction, if it could not be proven beyond reasonable doubt they were aware that the article was contrary to standards of ordinary people. Such an outcome does not accord with the objective intention of Parliament in creating and maintaining the offence: at [45].

The maximum penalty of this wholly summary offence (for an individual) is 12 months' imprisonment or 100 penalty units. In contrast, offences in *He Kaw Teh v The Queen* (1985) 157 CLR 523 and *Environment Protection Authority v N* (1992) 26 NSWLR 352 carried markedly different (heavier) penalties rendering both cases of little use in resolution of the question: at [46].

The position of a person found guilty, but truly ignorant about the indecency of what they have published can be ameliorated on sentence, including by not proceeding to conviction: at [54].

The offence predecessor was a strict liability offence (*R v Wampfler* (1987) 11 NSWLR 541); that is, not requiring proof of a mental element about indecency but permitting the "defence" of honest and reasonable mistake of fact to be raised about that element. Parliament must be taken to have understood how the predecessor offence had been judicially interpreted and was content to re-enact with minor amendments: at [57].

Knowingly participate in a criminal group - Crimes Act ss 93S(1), 93T(1) - participants included both vendors and purchasers of drugs - that purchasers sought to engage in further supply does not preclude finding of shared objective

Mohana v R [2023] NSWCCA 61

The applicant was convicted of participating in a criminal group under s 93T(1) *Crimes Act*. The "criminal group" comprised three persons – the applicant, M1 and M2.

The applicant submitted the verdict was unreasonable. He submitted that the Crown failed to prove that the three participants had a "shared objective" (which is required as proof of the existence of a "criminal group") because their objectives were divergent: M2's objective was to obtain material benefits from selling drugs to the applicant and/or M1; while the applicant's and M1's objective was to obtain material benefits from selling drugs to others: at [104].

The CCA dismissed the appeal.

It is correct that proof of the existence of a "criminal group" requires proof that members have a "shared objective": at [102]-[103]; *Czako v R [2015] NSWCCA 202, applied.*

The definition of "criminal group" in s 93S(1)(a) *Crimes Act* requires conduct that constitutes a single serious indictable offence. Identification of a series of disparate, even if connected, offences will not be sufficient: at [107].

The supply of drugs by M2 to the applicant was a serious indictable offence from which each of the three participants shared the objective of obtaining material benefits. In practical terms, only one individual offence is necessary to be established - the supply, by M2, of drugs to the applicant and M1. M2 sought to obtain material benefits from that supply. So did the applicant and M1 which were (or would be) directly derived from the on-sale. Thus, each of the three participants shared the objective of obtaining material benefits from M2's conduct in selling the drugs to the applicant and M1: at [108].

Crimes (Domestic and Personal Violence) Act 2007, ss 72, 72A - application to vary or revoke an AVO applies only to unexpired AVOs

Wass v DPP (NSW); Wass v Constable Wilcock [2023] NSWCA 71

The Court of Appeal held that an application to vary or revoke an apprehended violence order under ss 72A and 73 *Crimes (Domestic and Personal Violence) Act* applies only to unexpired AVO's.

Sections 72A and 73 provide that "An application may be made to a court *at any time*" and "The court may, if satisfied that in all the circumstances it is proper to do so, vary or revoke a final apprehended violence order or interim order".

The plaintiff had been subject of a 12-month AVO. He was unable to obtain a permit under the *Firearms Act 1996* while he was, or at any time within the last 10 years, subject to an AVO, other than an order that has been revoked. After his AVO expired, he made an application for it to be revoked which was dismissed in the Local Court and in the District Court on appeal.

The Court of Appeal dismissed the plaintiff's summons for judicial review.

The power to "vary or revoke" an order is to be construed as confined to a power to vary or revoke an unexpired order. That accords with natural meanings of "vary" and "revoke". It is consistent with the use of "revoked" in other provisions in the Act. It accords with the legislative history and purpose: at [26]-[44], [59].

Other uses of "revoke" in the statute suggested that the word was only used in relation to unexpired orders. The same was true of the power to "vary" an apprehended violence order: [49]-[52], [54]-[55].

APPEALS

Jurisdiction of CCA to entertain second application for leave to appeal where first application refused – extension of time refused – not required by the interests of justice - s 10(1)(b) Criminal Appeal Act 1912

Gould v R [2023] NSWCCA 103

The applicant had previously sought leave to appeal to the CCA against his conviction for pervert the course of justice which the Court had refused (r 4.15 of the *Supreme Court (Criminal Appeal) Rules* 2021 (NSW)). The Applicant subsequently retained new solicitors and counsel for a special leave application to the High Court which was duly abandoned.

The present appeal concerned the applicant filing in the CCA a second application for leave to appeal against conviction. It was common ground the new grounds could have been brought in the first application.

The CCA determined two issues:

(i) The CCA had jurisdiction to entertain the second application where a first application was refused; and
(ii) The CCA refused to extend the time within which to file the second application for leave to appeal: at [105], [137], [149]; s 10(1)(b) *Criminal Appeal Act 1912.*

(i) Jurisdictional issue

The CCA held that a previous refusal of leave to appeal on the merits does not create a jurisdictional bar preventing the Court from entertaining a further application for leave to appeal: at [52]–[53] (Bell CJ); [149], [161] (Rothman J); [164] (Garling J) following *Lowe v The Queen* (2015) 249 A Crim R 362; [2015] NSWCCA 46 and *Postiglione v The Queen* (1997) 189 CLR 295; cf. *Grierson v The King* (1938) 60 CLR 431, considered.

(ii) Extension of time in respect of second application for leave to appeal

The CCA refused the applicant an extension of time to file the second application for leave to appeal.

The threshold question was whether the interests of justice require an extension of time in the circumstances, namely where the applicant has already had an application for leave to appeal heard and determined on the merits: at [95]; [148]; [164].

The Court does not consider that it is "just under the circumstances" or that the interests of justice require that an extension of time be granted for the second application for leave to appeal: at [105], [137], [149].

The reasons why the applicant should *not* be granted an extension of time included that (see at [105]ff. per Bell CJ):

- The applicant has already had in substance a full hearing challenging conviction;
- It would be a paradoxical outcome if, after a full hearing on the merits, a rejection of leave to appeal because of the weakness of the draft grounds of appeal resulted in the possibility of a further application for leave, whereas a grant of leave to appeal in respect of more meritorious although ultimately unsuccessful proposed grounds of appeal precluded such a possibility.
- Cogent reasons should underwrite any discretion to extend time for a second application for leave to appeal. The applicant's proposed grounds of appeal are simply allegations of further errors. Where an applicant for leave to appeal has had a full opportunity to raise such arguments, prima facie the interests of justice will not warrant a further opportunity being granted. The interests of justice will already have been served by the first opportunity and the applicant's arguments having been heard and determined.

- The current application is a "second go" by a new legal team and does not constitute a material change of circumstances that may otherwise warrant an extension of time to bring a second application for leave to appeal;
- No other such material change in circumstance has been identified;
- Arguments raised at the first appeal hearing were heard and determined and the fact that other arguments were not raised did not amount to a denial of procedural fairness;
- The exercise of the discretion is informed by the principle of finality - a strong albeit not definitive policy of the law.

Pre-recorded evidence of child witnesses – trial judge ruling refusing leave to recall child witnesses – ruling not an "interlocutory judgment or order" within s 5F(3) Criminal Appeal Act 1912 - Schedule 2, Clause 87(3)(b) Criminal Procedure Act 1986

PJ v R [2023] NSWCCA 105

Schedule 2, Clause 87(1) *Criminal Procedure Act 1986* precludes a witness whose evidence is pre-recorded from giving further evidence without leave of the Court. Clause 87(3)(b) provides leave must not be granted unless the Court is satisfied that it is in the interests of justice.

The CCA by majority (Basten AJA and Walton J agreeing; Hamill J dissenting) held that:

(i) where evidence of child witnesses was pre-recorded, the trial judge's ruling not to permit the recall of the children at trial pursuant to cl.87(3)(b) was not an "interlocutory judgment or order" within s 5F(3) *Criminal Appeal Act 1912; and*

(ii) the trial judge did not err in refusing leave for the children to give further evidence.

The applicant's application to appeal the trial judge's ruling pursuant to s 5F(3) was dismissed.

The applicant stood trial for child sexual offences committed against his daughter. The evidence of the complainant and her brother was pre-recorded at a pre-recorded evidence hearing before trial (s 306U *Criminal Procedure Act* 1986). The trial judge, pursuant to cl.87(3)(b), refused the applicant leave to recall the witnesses for further cross-examination as to whether their mother had instigated the concoction of a false story.

(i) The ruling not to permit the recall of the children was not an "interlocutory judgment or order" within s 5F(3) *Criminal Appeal Act 1912*

The application should be dismissed because s 5F was not engaged. If the contrary view was taken and leave were granted, the appeal should be dismissed on the merits: at [63].

The authorities provide the following propositions:

> (1) Rulings on admissibility of evidence do not generally fall within s 5F - but may if they have the "character and effect" of, for example, putting an end to the proceedings, or determining whether or not there should be separate trials (*Bozatsis and Spanakakis* (1997) 97 A Crim R 296).
>
> (2) A ruling that a complainant was not competent to give unsworn evidence engaged s 5F.
>
> (3) A finding that a prosecution witness was a "vulnerable person", so that evidence could be received of a previous representation made by a recorded interview (s 306S *Criminal Procedure Act*) was *not* subject to a s 5F appeal (*AF v R* [2015] NSWCCA 35).
>
> (4) The decision not to revoke the appointment of a particular witness intermediary fell within s 5F (*SC v R* (2020) 104 NSWLR 257).

Refusal to have the children recalled was not in the same category as a finding that the witnesses were not competent, and bore some similarity to a ruling on the admissibility of evidence, in that it could be reviewed in the course of the trial: at [30]. The ruling under cl.87 is closer to one limiting the scope of cross-examination or rejecting a line of questioning. It is also analogous to a refusal to require the prosecution to recall a witness or allow it to reopen its case. If such rulings were made during a trial s 5F would not be engaged. In principle, the fact that such a ruling is made before the trial commences does not alter the character and effect of the ruling: at [31].

(ii) Trial judge did not err in refusing leave for the children to give further evidence.

Clause 87 confers a discretionary power, not an obligation, to grant leave if the court is satisfied of one of the matters identified in cl.87(3): at [42]-[44].

That the court "must not give leave… unless" implies a limited conferral of power which is not consistent with a bare balancing of interests and prejudice. An important consideration in exercising the power must reflect the dominant purpose of protecting child witnesses from the trauma of giving evidence, so far as it is reasonably possible to reduce that trauma. In an application under cl. 87, legal representatives must be aware of the statutory policy not to provide further hearings; and that any matter known to the applicant at the time of the hearing should be addressed if it is a matter which is sought to be relied on at the trial and should, where appropriate, be put to the child witness (cl. 87(3)(a)): at [47]-[48].

The interests of justice require a far more forceful case of prejudice than raised by the applicant: see at [51]-[55].

OTHER CASES

Drug Court terminated applicant's program - constructive failure to exercise jurisdiction in s 10 and s 10(1)(b) Drug Court Act 1988

Cooper v DPP (NSW) [2023] NSWCA 65

The applicant had commenced the Drug Court program. A month later he was charged with further offences and was refused bail. The Drug Court terminated the applicant's program after an application focusing on the probability of a sentence of fulltime imprisonment in respect of the new charges.

The Court of Appeal (Brereton and Kirk JJA, White JA dissenting) held that the Drug Court constructively failed to exercise the jurisdiction reposed by s 10(1) and s 10(1)(b) *Drug Court Act* 1988. The Court of Appeal set aside the order terminating the program and directed the Drug Court to determine the application according to law.

Section 10(1) gives the Drug Court a discretionary power to terminate a program. There are two statutory preconditions that must be met, the second of which contains two alternatives:

1. that the Court is satisfied, on the balance of probabilities, that the participant had failed to comply with their program (this precondition is set out in the chapeau of s 10(1)); and
2. pursuant to s 10(1)(b), that the Court is satisfied, on the balance of probabilities, either that the participant:
   (1) is unlikely to make any further progress in the program, or
   (2) that the offender's further participation in the program poses an unacceptable risk to the community that the person may re-offend.

The Drug Court was satisfied that, by being detained on remand, the applicant had failed to comply with his program, so as to engage the first precondition to the exercise of the discretion to terminate the program under s 10(1). However, the Drug Court placed erroneous focus on the appropriateness of dealing with the fresh charges through the diversionary procedures of the Drug Court, and failed to address the criterion in s 10(1)(b). The Drug Court misconceived the nature of the Drug Court's jurisdiction and constructively failed to exercise that jurisdiction. The decision was afflicted by jurisdictional error: at [57]-[63] (Brereton JA), [67]-[84] (Kirk JA); authorities cited.

Child Protection (Offenders Registration) Act 2000, ss 3(3), 3A(2)(c)(ii), 3A(5) – juvenile offender - possessing child abuse material, s 91H(2) Crimes Act 1900 - "registrable person" - "arise from the same incident" – "committed against the same person" – not committed against any person

Commissioner of Police, NSW Police Force v TM [2023] NSWCA 75

The Court of Appeal allowed the appeal by the Commissioner of Police against the primary judge's declaration that the 17-year-old offender (a child) was not a 'registrable person" under the *Child Protection (Offenders Registration) Act 2000* (NSW) (*TM v Commissioner of NSW Police* [2022] NSWSC 337).

The offender was on a 14 month good behaviour bond for three possess child abuse material offences under s 91H(2) *Crimes Act* 1900.

Section 3A(1) defines a "registrable person" as a person sentenced for a registrable offence. An exception under s 3A(2)(c)(ii) is where a person, as a child, committed "a single offence" of possessing child pornography under s 91H(2): see at [82].

Section 3A(5) provides that a "single offence" includes more than one offence of the same kind arising from the same incident.

Section 3(3) provides that offences "arise from the same incident" only if they (i) are committed within a single 24-hour period and (ii) are committed against the same person.

No incoherence in the application of s 3(3) to s 3A(2)(c)(ii)

The primary judge ruled that reading s 3(3) into s 3A(2)(c)(ii) would not produce a coherent result with respect to possession offences under s 91H(2) as such offences may involve conduct not "*committed against" any person* - for example, where cartoon characters or fictional children are used.

There is no incoherence in that formulation. Its application may produce some incongruous and unfair results but it is not the role of the court to arbitrate on fairness of legislation: at [94]-[95]; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297.

The legislature's clear intention was, by s 3(3), to except from s 3A(1) juvenile offenders who commit multiple offences arising from the same incident, provided they are committed within 24 hours and (if committed against a person) are against the same person: at [95], [104].

Possession of child abuse material not committed against any person

However, the legislature cannot have intended that an offender who commits an offence of possess child abuse material that, by reason of the nature of the material, is not committed against any person, is worse off than one whose offences are committed against an actual person.

Therefore, if the offences are committed within a single 24-hour period but not against any person, the first limb of s 3(3) is sufficient to trigger the operation of the exception to s 3A(1). Resort to the second limb of s 3(3) is unnecessary. Section 3(3) should be read as:

> "For the purposes of this Act, offences arise from the same incident only if they are committed within a single period of 24 hours and (if they are committed against a person) are committed against the same person": at [105]-[106].

Application of s 3(3) to present case - "arise from the same incident"

Possession of child abuse material involving an actual child or children depends on the production of the child abuse material, which is undoubtedly an offence committed against the child(ren) involved: at [109].

The offences were committed against the children depicted in the photographs on the respondent's devices. More than one child was involved. The respondent's offences did not arise from the same incident because, although committed within a single 24-hour period, they were not committed against the same person. The respondent was not entitled to the benefit of the s 3A(2)(c)(ii) exception to s 3A(1). He was therefore a registrable person: at [110].

HIGH COURT

Intensive correction order - Whether sentencing judge undertook assessment of community safety in accordance with s 66 CSPA - failure to comply with s 66(2) amounted to jurisdictional error

Stanley v Director of Public Prosecutions (NSW) [2023] HCA 3; 296 ALJR 107; 407 ALR 222

Appeal from NSW.

The appellant was sentenced in the Local Court to aggregate sentence of 3 years imprisonment, NPP 2 years for firearms offences. On sentence appeal in the District Court, the appellant asked that her sentence be served by way of ICO.

Section 66(1) *CSPA* provides that community safety must be the "paramount consideration" when deciding whether to make an ICO. Section 66(2) provides that, when considering community safety, the court is to assess whether making the ICO or serving the sentence by way of full-time detention is more likely to address the risk of reoffending.

The District Court dismissed the appeal, making no express reference or findings as to an assessment under s 66(2). The appellant appealed to the Court of Appeal. By majority, the Court of Appeal held that non-compliance with s 66(2) was not a jurisdictional error of law and dismissed the application for review (*Stanley v Director of Public Prosecutions (NSW)* (2021) 107 NSWLR 1).

Held: By majority, appeal allowed. Set aside order of District Court dismissing the appellant's appeal, and order the District Court to determine the appeal according to law.

- Three steps are to be undertaken by a sentencing court prior to the final order by which a sentence of imprisonment is imposed under the *CSPA*, or confirmed or varied on a sentencing appeal: first, a determination that the threshold in s 5(1) is met; second, determination of the appropriate term of the sentence of imprisonment; and third, where the issue arises, consideration of whether or not to make an ICO: at [59].
- s 66 imposes specific mandatory considerations upon the decision maker to make, or refuse to make, an ICO: at [72]ff.
- While aspects of community safety underpin some of the general purposes of sentencing, such as specific and general deterrence and protection of the community from the offender, those aspects will have been considered in deciding whether to impose a sentence of imprisonment (ie, before considering an ICO). Community safety is required to be considered *again* and in a different manner under s 66 when considering whether to make an ICO. At this third step, community safety in s 66(1) is given its principal content by s 66(2), namely, the safety of the community from harms that might result if the offender reoffends, whether while serving the term of imprisonment that has been imposed or after serving that term of imprisonment: at [77].
- The jurisdiction to make an ICO calls for a subsequent and separate decision to be made *after* a sentence of imprisonment is imposed: at [82].
- The failure to consider the paramount consideration in s 66(1) by reference to the assessment of community safety in s 66(2) demonstrates a misconception of the function being performed when deciding whether to make an ICO by failing to ask the right question within jurisdiction: at [88].
- The District Court failed to undertake the assessment required by s 66(2) and thereby fell into jurisdictional error. As there is a duty to consider whether to grant an ICO in cases where the power is engaged, this duty remains unperformed: [116]-[117].
- Failure to undertake the assessment in s 66(2) did not invalidate the sentence of imprisonment: at [98].

Combination of extended joint criminal enterprise at common law and constructive murder

Mitchell v The King [2023] HCA 5; 97 ALJR 172; 407 ALR 587

Appeal from SA.

The High Court allowed appeals of the four accused on the ground that the doctrine of extended joint criminal enterprise and constructive murder under s 12A *Criminal Law Consolidation Act* 1935 (SA) could not be relied upon in combination to create a new pathway to Murder under s 11. Section 12A extends liability for murder to a person who commits or agrees to an intentional act of violence causing death while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more.

There has been no NSW appellate decision regarding *Mitchell*. Button J stated in *R v Nehme, Price, Rahim, Taufahema and Rizk* [2023] NSWSC 202 that it is "very difficult to resist" a reading of the effect of *Mitchell* is that the combination of extended joint criminal enterprise at common law and constructive murder has been abolished, not just in South Australia, but throughout Australia, for all purposes: at [1].

Break and enter dwelling-house - appellant joint tenant - "break and enter" must involve trespass - person with lawful authority to enter premises not liable for "break"

BA v The King [2023] HCA 14; 97 ALJR 358

Appeal from NSW.

The High Court allowed the appellant's appeal against the NSW CCA decision in *R v BA* [2021] NSWCCA 191.

The accused was charged with aggravated break and enter with intimidation (s 112(2) *Crimes Act* 1900) for breaking into his ex-partner's apartment. He was a tenant under a residential tenancy agreement but no longer an occupant of the apartment. The trial judge directed a verdict of not guilty on the basis that the accused had a right to enter as a lessee, therefore could not be guilty of '*breaking'* in.

The CCA allowed an appeal by the Crown. The trial judge erred in holding that the prosecution was required to establish that the respondent did not have a pre-existing right to enter, as a pre-condition to proof of 'breaking'. Rather, the prosecution was obliged to establish that entry occurred without consent of the complainant. A re-trial was ordered: at [28], [30]; [39]-[41].

Held: The High Court, by majority, allowed the applicant's appeal.

Section 112(1)(a) requires a trespass, that is, entry to premises of another without lawful authority. The appellant did not commit a trespass. He had a right of exclusive possession which would not have been lost even if he ceased to occupy the premises prior to the expiry or termination of the residential tenancy agreement. He had lawful authority for entry, including by force of the kind that would constitute a "break" in the absence of such authority. Having that authority, he did not require the complainant's consent to enter the premises. His liberty to enter the premises was also not conditional upon his having a purpose to use the premises as a residence, nor was it removed when he entered the apartment by force, in contravention of s 51(1)(d) of the *Residential Tenancies Act 2010* (NSW): at [42].

***Children - presumption for incapacity - doli incapax - RP v The Queen* (2016) 259 CLR 641**

BDO v The Queen [2023] HCA 16; 97 ALJR 377

Appeal from Qld.

(This case has relevance to NSW due to the High Court's discussion of *RP v The Queen* (2016) 259 CLR 641).

The appellant, a child, was convicted of eleven counts of sexual assault.

Section 29 *Criminal Code* (Qld) provides:

> Immature age
>
> (1)A person under the age of 10 years is not criminally responsible for any act or omission.
>
> (2) A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.

The appeal raised the question of whether what is required by s 29(2) to rebut the presumption of incapacity can be equated with what is required by the common law as stated in *RP v The Queen*. At common law the presumption may be rebutted by evidence that the child "knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence" (*RP v The Queen* at [9]) - what is spoken of is the child's *actual knowledge*: at [6].

The High Court held the trial judge did not err in directing the jury that to rebut the presumption for incapacity it had to be proved that at the time he did the act, the appellant "had the capacity to know he ought not do it."

Section 29(2) does not use the term "knowledge". There is a difference between what is meant by a person's capacity to know and their knowledge. The former has regard to ability to understand moral wrongness, the latter to what in fact they know or understand: at [15].

It may be that *RP v The Queen* as to matters of proof is relevant to a child's capacity to know or understand that the act is morally wrong. Wrongness is expressed by reference to the standard of

reasonable adults, from which it takes its moral dimension. It is not what is adjudged to be wrong by the law or by a child's standard of naughtiness. The capacity of a child to know that conduct is morally wrong will usually depend on an inference to be drawn from evidence as to the child's intellectual and moral development: at [23].

Section 29(2) does not require the prosecution prove actual knowledge of moral wrongness of the act, but rather the capacity to know or understand that to be the case. In practical terms in some cases the distinction will not be of importance, but the distinction remains in Queensland: at [24].

The appeal was allowed, in part. There was insufficient evidence by the prosecution to rebut the presumption of incapacity beyond reasonable doubt for five counts, for which verdicts of acquittal were entered: at [52].

Inquiries into convictions - federal offences - Crimes (Appeal and Review) Act 2001, Pt 7, ss 78, 79 - Judiciary Act 1903 (Cth), s 68

Attorney-General (Cth) v Huynh [2023] HCA 13; 97 ALJR 298

Appeal from NSW.

The applicant was convicted of Commonwealth drug importation offences. His application for a review into his conviction to the NSW Supreme Court under s 78 *Crimes (Appeal and Review) Act* 2001 (*CARA*) was refused. His application for judicial review was dismissed by the NSW Court of Appeal (*Huynh v Attorney-General (NSW)* [2021] NSWCA 297).

Held: The High Court, by majority, allowed the appellant's appeal and remitted the matter to the Court of Appeal.

CARA can be picked up by the *Judiciary Act* 1903 (Cth), s 68 so as to apply to a conviction for a federal offence.

Sections 78(1) and 79(1) of *CARA* do not apply of their own force to a conviction by a NSW court for a Commonwealth offence. But ss 78(1) and 79(1)(b) do apply to such a conviction / Commonwealth laws by force of s 68(1) *Judiciary Act*, as they are laws respecting the procedure for the hearing of appeals in the "like jurisdiction" to that conferred under s 86 *CARA*, invested in the NSW Court of Criminal Appeal upon its receipt of a reference under s 79(1)(b) *CARA*: at [77].

[Section 79(1)(b) provides that, after considering an application under s 78, the Supreme Court may refer the whole case to the CCA, to be dealt with as an appeal under the *Criminal Appeal Act* 1912.

Section 86 provides that on receiving a s 79(1)(b) reference, the CCA deals with the case as an appeal under the *Criminal Appeal Act* 1912.

Section 68(1) of the *Judiciary Act* provides for application of NSW laws to persons charged with Commonwealth offences in respect of whom jurisdiction is conferred on NSW courts by s 68].

SUPREME COURT

COVID-19 penalty notices invalid - necessary to identify the offence-creating provision to satisfy specification requirement in s 20 Fines Act 1996

Beame; Els v Commissioner of Police & Ors [2023] NSWSC 347 **(Yehia J)**

Section 20 *Fines Act* 1996 states that, when a person is issued a penalty notice, the relevant offence must be "specified in the notice".

The Court declared that the COVID-19 penalty notices issued to the plaintiffs were invalid for not being a "penalty notice" within s 20. The short description identifying the substance of the penalty notice offences was insufficient to meet s 20 requirements. The offence-creating provision should have been included. This was a bare minimum requirement, particularly where a "penalty notice offence" is defined in s 3 as one arising "under a statutory provision": see at [118]-[119].

The statutory context and purpose of s 20 favours an interpretation where the penalty notice offence must be *clearly and unambiguously* specified in the notice. What is required is that the penalty notice offence appears on the "face of" the notice itself: at [84]-[87]; *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177.

Question of law alone – alleged assault by teacher on student – magistrate failed to make critical findings of fact and provide reasons for decision to dismiss charges

Director of Public Prosecutions v Tiller [2023] NSWSC 187 (McNaughton J)

The Court allowed the DPP appeal against the magistrate's dismissal of charges of AOABH and common assault by a teacher (the first respondent/defendant) towards a 7-year old student. The teacher had raised defence of another student pursuant to s 418 Crimes Act 1900.

The magistrate failed to make findings critical for assessing the reasonableness or otherwise of the first respondent's actions. The reasons failed to address the elements of the second limb of s 418 and failed to reveal why the plaintiff failed to negative that defence: at [59].

The issue for consideration was whether the second limb of s 418 had been negatived by the prosecution. It was necessary the reasons set out: 1. What were the circumstances as the first respondent perceived them; 2. What was her "response"; and 3. Was her response "reasonable" in those circumstances: at [53]. The magistrate either failed to make these critical findings or if he did, did not provide reasons: at [54].

The magistrate delivered reasons using emotive language which appeared to cause him to stray from the judicial task of making findings and providing reasons in accordance with the dictates of his office and rule of law. This is not to underestimate the pressures under which magistrates operate. However, if a judicial officer feels that they are unable to dispassionately fulfil their role, they should take steps to withdraw from the matter, or generally, and seek help and guidance: at [64].

Application granted to appear by audio-visual link for sentencing proceedings - Indigenous cultural values and principles - s 5BB Evidence (Audio and Audio Visual Links) Act 1998

R v Knight (No 1) [2023] NSWSC 195 (Yehia J)

The applicant pleaded guilty to murder. Proceedings were listed for sentence with the applicant to appear in person. Both the deceased and applicant come from the Bourke Indigenous community.

The Court granted the applicant's application to revoke the direction to appear in person, and to appear by AVL pursuant to s 5BB *Evidence (Audio and Audio Visual Links) Act 1998*. The Crown had opposed the application on the basis of representations by the deceased's sisters that the applicant should attend in person and on country.

Section 5BB(1) provides that an accused detainee who is charged with an offence and is required to appear before a NSW court in criminal proceedings (other than physical appearance proceedings) must, unless the court otherwise directs, appear before the court by audio visual link.

'Physical appearance proceedings' do not include sentencing proceedings: s 3.

Section 5BB(4) provides that the court may make such a direction only if it is satisfied that it is in the interests of the administration of justice for the accused detainee to appear physically before the court.

The Court held that in all the circumstances of this case, the statutory presumption that the applicant appear by AVL is not displaced: at [31]. It is not in the "interests of the administration of justice" that the applicant attends in-person, given that the sentencing proceedings will be held in the usual way, rather than pursuant to a restorative justice model, and in the local area allowing family and community to attend. It is difficult to see how attendance in-person would better fulfil the purposes of sentencing (s 3A *CSP Act 1999)*, namely, to make the applicant accountable for his actions, to denounce his conduct, and to recognise harm done to the deceased and community: at [23]-[25].

The Court further noted the importance of recognising Indigenous cultural values and principles in the criminal law. In an appropriate case with sufficient evidence, it may be wholly appropriate that cultural values and principles would dictate that a direction is made for an offender to appear in-person at sentencing proceedings: at [27].

The Bugmy Bar Book is increasingly relied upon as capable of assisting judicial officers, dealing with impact of intergenerational trauma and the stolen generations: at [20].

LEGISLATION

Crimes Legislation Amendment (Assaults on Retail Workers) Act 2023

Commenced 13 July 2023

Crimes Act 1900

New s 60F defines "retail worker" as a person whose duties primarily involve working in an area of a shop open to the public. “Shop" means the whole or a part of a building, place, stall, structure, tent, vehicle or yard in which goods are sold, or offered or exposed for sale, by retail, including by auction.

New offence under s 60G Assault retail worker:

s 60G(1) – assault, throw missile at, stalk, harass or intimidate retail worker in course of duty without causing actual bodily harm. Maximum penalty: 4 years imprisonment; Table 2 offence.

s 60G(2) – assault retail worker causing actual bodily harm. Maximum penalty: 6 years imprisonment; Table 1 offence.

s 60G(3) - wound or cause grievous bodily harm to retail worker, being reckless as to causing actual bodily harm. Maximum penalty: 11 years imprisonment.