SUPREME COURT OF NEW SOUTH WALES 2013 ANNUAL CONFERENCE

Criminal Law Update

The Honourable Justice R A Hulme

7 September 2013

CONTENTS

SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning significant legislative activity and the range of issues that have been considered in appellate criminal decisions in the past 12 months. However, some of the judgments were handed down more than 12 months ago but they are included because they only became available by being published on Caselaw within that period.

Where reference is made to the author of a judgment in the Court of Criminal Appeal it should be taken that the other members of the Court agreed unless otherwise indicated.

I am most grateful for the assistance in the compilation of this paper provided by Mr Eliot Olivier LLB (Hons) B Int S and Mr Alexander Edwards BA LLB (Hons).

APPEALS

Sufficiency of reasons by appellate court in unreasonable verdict appeal

BCM was charged, in Queensland, with three counts of indecent treatment of a child under 12. He was convicted of two of those counts, with the jury being unable to reach a verdict on the third. He appealed his conviction to the Court of Appeal of the Supreme Court of Queensland, arguing, inter alia, that the verdict was unsafe and unreasonable (referring to *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400). The QCA succinctly dismissed the appeal in *R v BCM* [2012] QCA 333. The conclusion in relation to the unreasonable point was stated by Chief Justice de Jersey at [24]:

> Having reviewed the evidence as required, I am satisfied these convictions are not unsafe. This is a case where the jury, alive to the competing considerations, were entitled, reasonably, to accept the evidence for the prosecution and convict.

An application for special leave to appeal was argued before the High Court, largely on the basis that the reasons on which the above conclusion were reached were inadequate. In particular, it was argued that the QCA did not deal properly with the case mounted for the defence and the various pieces of evidence making up that defence. Justice Bell remarked, "One would expect some review of that in the court's reasons". Special leave was granted: ***PEB v The Queen* [2012] HCATrans 135.**

Whether a conviction appeal may be heard on behalf of a deceased offender

Frederick McDermott was convicted of murder in 1947 and sentenced to death, later commuted to life imprisonment. A subsequent Royal Commission found that the jury in his trial might have been misled by incorrect evidence, and Mr McDermott was released in 1952. He died in 1977. The remains of the victim were not discovered until 2004. Neither the location of the body nor the injuries sustained were at all consistent with the case Mr McDermott was convicted upon. The Attorney General referred the case to the Court of Criminal Appeal for a review of conviction under s 77 of the *Crimes (Appeal and Review) Act 2001*.

The Court determined, as a threshold matter, that it was irrelevant to the exercise of the power under s 77 that the offender was deceased. In making that finding, Bathurst CJ held, "The fact that a wrongly convicted person has died does not mean an injustice has not occurred". The conviction was overturned and a verdict of acquittal entered: ***A reference by the Attorney General for the State of New South Wales under s 77(1)(b) of the Crimes (Appeal and Review) Act 2001 re the conviction of Frederick Lincoln McDermott*** **[2013] NSWCCA 10**2.

One indictment, one jury, one appeal

Mr Morgan had successfully appealed a conviction for two counts of robbery. Those counts had been accompanied by two counts of dealing with proceeds of crime, which Mr Morgan's counsel had declined to appeal. Before a retrial could commence, the DPP directed that there be no further proceedings for the robbery offences. Mr Morgan sought then to appeal his conviction for dealing with proceeds of crime (or for the Court to excuse his "abandonment" of the appeal in relation to those charges). In ***Morgan v R (No 2)*** **[2013] NSWCCA 80**, Beazley P confirmed the rule that one jury must proceed on one indictment and, consequently, that only one appeal may be had against a conviction against multiple offences on a single indictment. To conclude otherwise would offend the principle of finality. On the side issue of abandonment, her Honour held that it was not possible to abandon an appeal against some, but not all, convictions on a single indictment.

Summary of principles relating to manifest excessiveness

In ***Thompson-Davis v R*** **[2013] NSWCCA 75**, a sentence appeal, Campbell J had occasion to consider the principles relating to whether a sentence is manifestly excessive. His Honour helpfully collected the principles at [53] as follows:

a) manifest excess means the sentence below was unreasonable or plainly unjust;

b) there must have been some explicit or implicit misapplication of principle;

c) detection of manifest error is not purely intuitive, but is revealed by consideration of all matters relevant to the sentence;

d) a plea of manifest excess need not allege specific error;

e) consideration of past sentences may highlight excess, but must be limited to a "yardstick"; and

f) bare statistics are not useful in relation to a particular sentence unless the judge is informed of the reasons for those sentences being fixed as they were.

Mitigating features not relied upon below

Pali v R **[2013] NSWCCA 65** concerned a sentence appeal based partly on the ground that the judge below had failed to take into account a mitigating factor. The offences in question were for breaking and entering and committing a serious indictable offence and for robbery. The mitigating factor cited on the appeal was the asserted fact that the

offences were not part of a planned or organised criminal act. That fact had not been relied upon or identified in the hearing below, and the sentencing judge did not refer to it. Citing *Zreika v R* [2012] NSWCCA 44 and *Romero v R* [2011] VSCA 45; 206 A Crim R 519, Basten JA held that there was no erroneous failure to taking into account a relevant consideration where it had not been identified and relied upon before the trial or sentencing judge. The ground of appeal was rejected.

Power of Court of Criminal Appeal to amend incorrectly entered orders

Mark and Paul Akkawi successfully appealed the severity of their sentences for various kidnapping and firearm offences. There was a disparity in the appeal judgment between the sentences proposed in the body of the judgment and those recorded on the coversheet. The sentences entered on JusticeLink were those appearing on the coversheet. After the passing of almost a year from the appeal judgment, the brothers applied to the Court of Criminal Appeal for confirmation of the orders as entered on JusticeLink. In ***Akkawi v R; Akkawi v R (No 2)*** **[2013] NSWCCA 72**, the Court of Criminal Appeal (as originally constituted) observed that r 50B(2) of the Criminal Appeal Rules state that orders of the Court are taken to be entered when recorded on JusticeLink. But it held that it had the power, in its capacity as the Supreme Court, a superior court of record, to amend the sentences on the basis that the judgment did not manifest the intention of the Court.

(The Crown had filed a request for correction of the order in accordance with Criminal Appeal Rules r 50C(2) twelve days after the appeal judgment, on 29 February 2012. Apparently the error was corrected on 24 August 2012 by an Amended Notification of the Court's determination. It may be the case that the Court reflected it would need to issue reasons (at [26], "The reasons for that correction are contained herein") or that there were delays in reconstituting the original bench.)

Duty on District Court judge to submit question of law only exists where certain conditions fulfilled

The District Court dismissed an appeal against conviction in the Local Court for two counts of making a false statement with intent to obtain financial advantage. The appellant sought judicial review of the decision pursuant to s 69 of the *Supreme Court Act* 1970, as well as requesting that the District Court submit a question of law to the Court of Criminal Appeal under s 5B of the *Criminal Appeal Act* 1912. The judge refused to submit the question of law, and the appellant amended the judicial review application to seek a review of the judge's refusal.

Basten JA in ***Elias v Director of Public Prosecutions (NSW)*** **[2012] NSWCA 302**, with Beazley JA agreeing, found that no duty to submit a question of law under s 5B had arisen and dismissed the summons. The appellant had placed reliance on the statement of Jordan CJ in *Ex parte McGavin; Re Berne* (1946) 46 SR(NSW) 58 that a District Court judge is to submit a question of law unless it is "obviously frivolous and baseless that its submission would be an abuse of process". Basten JA clarified (at [8]) that there is no duty, however, unless the power to submit a question of law has arisen. In this case the primary judge was not satisfied that there was a question of law and so was under no duty to submit the question to the Court of Criminal Appeal.

BAIL

Meaning of "exceptional circumstances"

Mr Chehab was granted bail in respect of three serious violent offences. He was, as defined by s 9D(2) of the *Bail Act*, a repeat offender. Section 9D required that the Court be satisfied of exceptional circumstances before granting bail in respect of an accused such as Mr Chehab. The Court of Criminal Appeal revoked the grant of bail in ***R v Chehab*** **[2013] NSWCCA 62**. The Court held that the fact that accused was complying with bail conditions and addressing anger management issues did not constitute "exceptional circumstances".

EVIDENCE

Expert evidence on shared anatomical features between persons

Honeysett v R **[2013] NSWCCA 135** concerned the evidence of Professor Henneberg, the slightly controversial anatomical expert previously the subject of extensive argument in *Morgan v R* [2011] NSWCCA 257. The finding in the latter case, in summary, was that Professor Henneberg's evidence that two photographs showed persons bearing a "high degree of anatomical similarity" was not an expert opinion, rather one that could be made by the jury for themselves, and lent an undesirable "white coat effect" to what was a lay observation. In *Honeysett*, Professor Henneberg gave evidence that a man depicted robbing a hotel on CCTV and a man photographed at a police station shared particular anatomical features. It was the Crown case that the images depicted the same person: Mr Honeysett. Mr Honeysett was convicted and appealed, arguing that the decision in *Morgan* required the ground relating to Professor Henneberg's evidence to be upheld.

Macfarlan JA disagreed with the appellant. Unlike in *Morgan*, Professor Henneberg did not state in this case that the two persons displayed a "high degree of anatomical similarity". In this case, Professor Henneberg did not give evidence of any conclusions to be drawn from his observations of identified common characteristics. And his evidence in this case, as to the characterisation of the shape of the head and face of a person wearing a balaclava, was clearly based on the evidence before him and his own specialised knowledge.

(The appellant had disavowed any reliance upon lack of relevance or the discretionary considerations in ss 135 and 137, making two rulings in *Morgan*, that the jury could make these observations for themselves and the undesirability of the "white coat effect", moot in this case.)

Whether cross examination of accused as to veracity of witness accounts permissible

BJS was a former Catholic priest charged with numerous counts of indecent assault against various complainants. He gave evidence at his trial. As part of his cross-examination by the Crown, he was asked whether a number of witnesses were wrong in having given evidence that he stayed in the home of one of the victims on three occasions. After he

was convicted, BJS appealed, one of the grounds being that the jury should have been discharged after this exchange: ***BJS v R* [2013] NSWCCA 123**. He relied upon the principle in *Palmer v R* [2009] HCA 2; 193 CLR 1 that asking an accused if a complainant had a motive to lie invites the jury to accept that complainant's evidence unless positively disproved.

Hoeben CJ at CL dismissed the ground of appeal. The accused was asked if the witnesses were wrong, not *why* their evidence was wrong. While in cross-examination the word "mistaken" was used once, it was clear in the context that it was used to mean "wrong". Hoeben CJ at CL also observed that counsel for BJS had dealt with the concern by successfully seeking a specific direction on the subject of motive to lie.

Relevance of risk of contamination to tendency evidence

In ***BJS v R* [2013] NSWCCA 123**, the charges against the accused in respect of different complainants proceeded as a joint trial, and the Crown relied upon certain similarities in the evidence of the complainants as tendency evidence. There was some evidence that the complainants had seen publicity regarding the criminal charges, and that two (who were sisters) had had some discussion of their allegations. On his appeal, BJS argued that the risk of contamination between the accounts of the complainants meant that the Crown should not have been able to rely on tendency reasoning. Hoeben CJ at CL rejected this argument. The chance of contamination was established only to a speculative concern, not a "real risk". The submission that this meant the evidence should have been excluded was to assert that the trial judge should go considerably beyond the tendency evidence balancing exercise in ss 97 and 101 *Evidence Act* and so usurp the function of the jury.

Probative value of evidence in relation to s 137

The respondent in ***R v XY* [2013] NSWCCA 121** was charged with a number of child sex offences allegedly committed against the complainant when she was 8 years old. The Crown sought to tender two recorded telephone conversations between the respondent and the complainant, in which, it alleged, the respondent had made admissions. Defence objected to the tender of the conversations on a number of grounds, including under s 137 *Evidence Act*. The recording allowed an inference that the respondent was not sure whom he was talking to, and that he was referring to sexual activity with a high school student. The asserted prejudice was that the jury would engage in tendency reasoning if aware of this last-mentioned confession. The trial judge excluded evidence of the conversations on the basis that its probative value was outweighed by the danger of unfair prejudice. The Crown appealed that ruling pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*.

The grounds relied upon by the Crown raised a question of whether the trial judge had been mistaken, in excluding the conversations under s 137, in evaluating the *weight* of the evidence, not just its objective probative value. That is, he found that the probative value of the admissions was reduced by the circumstances in which they were made. The Court of Criminal Appeal convened a full bench, because the appeal required a consideration of whether the Court should be bound by *R v Shamouil* [2006] NSWCCA 112; 66 NSWLR 228, which had since been held to be wrongly decided in Victoria in *Dupas v The Queen* [2012] VSCA 328. The controversy was that *Shamouil* was argued to stand for the proposition

that a trial judge should not take into account the weight a jury might give to evidence when considering whether to exclude it under s 137, while *Dupas* suggested a trial judge should make that assessment. Their Honours each delivered separate judgments.

Basten JA and Simpson J held that the correct approach in NSW was that identified in *Shamouil*. Basten JA summarised the principles, at [66], in the following way:

> (1) in determining inadmissibility under s 137, the judge should assess the evidence proffered by the prosecution on the basis of its capacity to advance the prosecution case;
>
> (2) it follows from (1) that the judge should deal with the evidence on the basis of any inference or direct support for a fact in issue which would be available to a reasonable jury considering the proffered evidence, without speculating as to whether the jury would in fact accept the evidence and give it particular weight;
>
> (3) it also follows from (1) that **the judge should not make his or her own findings as to whether or not to accept the inference or give the evidence particular weight**. (Emphasis added)

Hoeben CJ at CL agreed with the conclusion of Basten JA and Simpson J regarding the authority of *Shamouil*, and expressed specific approval of Basten JA's extraction of principles reproduced above.

But Hoeben CJ at CL was not in complete agreement with the judgments of Basten JA and Simpson J. Against their conclusions on the actual decision to reject the evidence, he instead agreed with Blanch and Price JJ that the probative value of the evidence was outweighed by the danger of unfair prejudice. In explaining his disagreement, he held, at [88]-[89] that the *fact* of competing available inferences may be taken into account, as distinct from deciding which of those inferences might be preferred. This view appears to have been taken by Blanch J, at [207], who held that competing inferences objectively affected the capacity of the evidence to prove a fact in issue. Price J did not endorse any particular view, and simply decided that the evidence was inherently weak.

(Note: Basten JA decided, at [40] that in the face of the controversy between *Shamouil* and *Dupas*, the Court should "determine for itself the correct approach to the statutory provision, giving proper consideration to the reasoning and conclusions of earlier authorities, both in this Court and in the Victorian Court of Appeal", rather than a technical approach requiring a conclusion that the court in *Dupas* was wrong in holding *Shamouil* wrong. Simpson J expressly agreed with that conclusion (at [159]) and Hoeben CJ at CL's agreement that *Shamouil* applied (at [86]-[87]) appears to support that conclusion. This decision may have an effect on resolving disagreements between Australian intermediate courts of appeal, at least in NSW.)

Prohibition on cross-examination on credit where based on evidence with little probative value

Mr Montgomery was convicted of conspiring to import a commercial quantity of cocaine. At trial, one of his alibi witnesses, a Mr Potter, had been subject to cross-examination as to credit by the Crown Prosecutor. That cross-examination had included reference to Mr Potter's past criminal convictions, including a rape charge that he was acquitted of on appeal. The Crown Prosecutor had not been aware of the acquittal before he commenced his cross-examination. The remaining offences had occurred, regardless, in the area of 50

years ago. Notice was not given to the defence of the cross-examination, nor was permission sought from the trial judge. Mr Montgomery appealed his conviction and argued, among other things, that the conduct of the prosecutor was unfair.

On the appeal, Simpson J (McClellan CJ at CL agreeing) held that the prosecutor should have sought a ruling under s 103(1) *Evidence Act* from the trial judge, or given defence notice of his intention to cross-examine on past convictions: ***Montgomery v R*** **[2013] NSWCCA 73.** Her Honour called the conduct, at [6], "a serious departure from proper standards of conduct required of a Crown Prosecutor". This was especially so because, having regard to the age of the convictions and the mistake as to the rape acquittal, permission to cross-examine would not have been forthcoming. Simpson J (McClellan CJ at CL) concluded, however, that there was no miscarriage of justice. Fullerton J was of the view that there was a miscarriage but favoured application of the proviso.

Using DNA evidence where analysis reveals relatively common profile

MK was charged with the kidnapping and aggravated indecent assault of a 6-year-old girl. DNA swabs taken from the victim's underpants yielded two male profiles. MK could not be excluded as the contributor of one of the two profiles, but neither could anyone from his paternal line. The profile was also unable to exclude an estimated 1 in 630 unrelated males in the general population (or 1 in 512 in the defence expert's calculation). The trial judge held that the probative value of the DNA evidence was so weak as to "verging on unreliable and meaningless". He excluded the evidence pursuant to ss 135 and 137 *Evidence Act*. In ***R v MK*** **[2012] NSWCCA 110**, the Court held he was wrong to do so. The DNA ratio evidence formed part of the matrix of facts from which the jury might draw an adverse conclusion against MK. In this case, other possibly identifying facts included the sighting of MK's car in the neighbourhood, and unusual cheek piercings noticed by the victim's playmate. The DNA evidence was "conceptually no different" (at [46]) to these identifying characteristics.

Contemporaneous statements and the presumption of continuance

R v Salami **[2013] NSWCCA 96** concerned the admissibility of a phone call made by an accused moments before an alleged offence. Mr Salami was charged with entering a dwelling with intent to commit a serious indictable offence in circumstances of aggravation (amongst other charges). The Crown alleged he entered the victim's home with a knife with the purpose of intimidating her into relinquishing an apprehended violence order. At trial, a translated transcript of a menacing telephone call by Mr Salami to the victim shortly before he entered the home was excluded by the trial judge pursuant to s 137 of the *Evidence Act*. His Honour had concluded that the phone call, made outside the home, was incapable of proving the conduct of Mr Salami inside the home. On the appeal, R S Hulme AJ held this finding was in error. By reference to the presumption of continuance, the occurrence of an event is inherently capable of being proved by circumstances occurring contemporaneous with it or shortly before. His Honour also observed that the relevant question, in this case, was the intention manifested by Mr Salami *before* he entered the premises.

Admissibility of admissions made in course of mental health assessment at police station

The accused in ***R v Leung*** **[2012] NSWSC 1451** had made certain statements to a clinical nurse specialist in the course of a mental health assessment subsequent to his arrest. The Crown sought to rely on the content of those statements. Price J ruled that the communication between the accused and the clinical nurse specialist was a protected confidence under the terms of s 126A *Evidence Act 1995*, and could not be admitted.

Admissibility and prejudice – recording of police interview including accused declining to answer questions

A man was found guilty by a jury of sexually assaulting the daughter of his partner. He had participated in a recorded police interview and the whole of the recording was admitted in evidence. It included him responding "no comment" to numerous questions. On appeal, it was argued that those sections if the interview should not have been admitted under s 89 of the *Evidence Act*.

In ***Ross v R*** **[2012] NSWCCA 207**, Allsop P concluded (at [54]) that there was no error in admitting the entire interview. The trial judge had clearly directed the jury that the appellant was entitled to say nothing to police and no adverse inference could be drawn from that fact. Further, it could be concluded that the purpose of the evidence was other than to draw an impermissible inference from the appellant's silence. Counsel for the appellant sought to rely on the record of interview to demonstrate his client's reactions as he became aware of the allegations against him.

Also, the final questions in the interview showed that the appellant did not believe that his questioning had been fair. Submissions on appeal were focused on whether the whole record of interview was admissible to prove the fairness of the police interview, relying on cases such as *R v Reeves* (1992) 29 NSWLR 109 and *Plevac v R* (1995) 84 A Crim R 570. It was indicated by Allsop P (at [53]) and Hidden J (at [69]) that these authorities decided pre-*Evidence Act* may need to be reconsidered, but this was not an appropriate case to do so.

Examining "relationship evidence" for relevance

Norman v R **[2012] NSWCCA 230** was an appeal by a man convicted of three offences of sexual intercourse without consent committed against his wife. Evidence of two incidents of violence committed by the appellant against his wife, albeit not ones characterised by a sexual dimension, in the course of their 14-year relationship were admitted at trial. The Crown did not purport to rely on any part of that particular "relationship evidence" as demonstrating a propensity to commit the offences the appellant was ultimately found guilty of. One of the grounds of appeal subsequently relied upon by the appellant was that this evidence should not have been admitted. In the Court of Criminal Appeal, Macfarlan JA cautioned that relationship evidence, where not used to demonstrate propensity, should be carefully examined for relevance. The two physical assaults were not directly relevant to, nor did they place in context, any fact in issue, and evidence of their occurrence should not have been admitted. (The appeal was dismissed on the proviso.)

(Special leave to appeal was refused on 7 June 2013: *Norman v The Queen* [2013] HCATrans 142.)

LEGISLATION

Bail Act 2013

The long-awaited *Bail Act 2013* was passed and received assent on 27 May 2013. It follows a comprehensive report by the Law Reform Commission, which was tabled in 2012. The legislation enacts many of the Commission's recommendations, with some significant differences. The primary difference is a move towards a general "risk-management" approach, reflected in the terms of the Act. Section 20 is in the following terms:

> A bail authority may refuse bail for an offence only if the bail authority is satisfied that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions.

An "unacceptable risk" is an unacceptable risk that the accused will fail to appear at any proceedings for the offence; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses or evidence. Presumptions against bail for particular offences are not provided for.

In his second reading speech, the Attorney General indicated that the Act would not commence until approximately May 2014. The Attorney General stated:

> The Government is aware that its new bail model is a paradigm shift. Therefore, the period between passage of the legislation and its commencement will be used to mount an education and training campaign for police, legal practitioners and courts regarding the new legislation. Further, changes will be made to the courts' JusticeLink system, the New South Wales Police information technology systems and bail forms to ensure a smooth transition to the new regime. Supporting regulations for the new legislation will also be drafted in anticipation of its commencement.

Road Transport Act 2013 No. 18

The ***Road Transport Act 2013*** was proclaimed to commence on 1 July 2013. In the words of the 2nd reading speech, this Act,

> amalgamates into one Act the *Road Transport (Driver Licensing) Act 1998*, the *Road Transport (Vehicle Registration) Act 1997* and the *Road Transport (Safety and Traffic Management) Act 1999*, and the compliance and enforcement provisions of the *Road Transport (General) Act 2005* applicable to road transport legislation generally.

The introduction of the Act comes with the usual difficulties inherent in a consolidation. An excerpt of s 9, dealing with second and subsequent offences, bears reproduction as an example:

> (5) A previous offence is an "equivalent offence" to a new offence for the purposes of subsection (2) (a) (iii) if:
>
> (a) where the new offence is an offence against section 54 (1)-the previous offence was an offence against section 53 (3) or 54 (3) or (4) or a corresponding former provision or a major offence, or

(b) where the new offence is an offence against section 54 (3)-the previous offence was an offence against section 53 (3) or 54 (1) or (4) or a corresponding former provision or a major offence, or

(c) where the new offence is an offence against section 54 (4)-the previous offence was an offence against section 53 (3) or 54 (1) or (3) or a corresponding former provision or a major offence, or

(d) where the new offence is an offence against a provision of Chapter 5 or Schedule 3-the previous offence was a major offence, or

(e) a provision of this Act (in the case of offences against this Act) or the statutory rules (in the case of offences against the statutory rules) declares the offence to be an equivalent offence to another offence for the purposes of this section.

OFFENCES

Dangerous navigation occasioning death: what does "navigate" mean?

***Small v R* [2013] NSWCCA 165** concerned a collision between a workboat and a much larger fishing trawler in Sydney Harbour in the early hours of the morning. Six passengers on the workboat were killed. Mr Small had taken the helm before the accident at the invitation of the skipper, Mr Reynolds. Mr Small was not an experienced boat operator and was intoxicated. He was charged and convicted of six counts of dangerous navigation occasioning death in contravention of s 52B *Crimes Act*. He appealed, arguing that mere physical control of the helm did not constitute "navigation" and that Mr Reynolds, as skipper, was the one navigating the workboat. Emmett JA held that the term extended to persons directing, steering, or helming vessels, and other more nautical aspects of the term, such as captaincy or a person who plots a route, depending on the circumstances. He was guided in his determination of the breadth of the term by its ordinary English meaning, and the clear intention of Parliament to re-enact the provisions of s 52A (motor vehicles) in s 52B (vessels). The appeal was dismissed.

"One punch" assaults and drunken violence

***Pattalis v R* [2013] NSWCCA 171** was an appeal against a sentence imposed for an offence of assault occasioning actual bodily harm. Mr Pattalis had exited a Sydney nightclub at 3:25am, drunk, and struck another patron in the face for no apparent reason (nor one he could later recall). He pleaded guilty to the charge, and was sentenced to two years imprisonment with a non-parole period of one year. He appealed on the sole ground of manifest excess. In refusing leave to appeal, Hoeben CJ at CL remarked, at [23]:

> It is now notorious (as his Honour recognised) that a single punch can not only cause catastrophic injuries but also death. For offences of this kind, the community has the rightful expectation that judicial officers will impose meaningful penalties.

Intent to cause harm and "reckless wounding"

***Chen v R* [2013] NSWCCA 116** concerned a finding that the appellant, who had been convicted of reckless wounding contrary to s 35(3) *Crimes Act*, had *intended* to cause some injury. The appeal was conducted on the basis that the finding was inconsistent with the meaning of "recklessness" as defined in *Blackwell v R* [2011] NSWCCA 93; (2011) 81

NSWLR 119. The appeal was dismissed by Button J (Hoeben JA agreeing, Campbell J finding it unnecessary to decide). *Blackwell* was concerned with the offence of recklessly causing grievous bodily harm. It decided that, to commit that offence, an offender must have foreseen the possibility of the infliction of *grievous* bodily harm, not merely *actual* bodily harm; it had no application to the mental elements of reckless wounding.

Is spitting on a bench "damaging property"?

Mr Hammond was arrested and taken to the local police station. While in the dock, he expectorated upon the stainless steel bench he was sitting on. He was charged with an offence under s 195(1)(a) *Crimes Act 1900*, of maliciously damaging the property of another. He was convicted and his appeal to the District Court was dismissed, but Lerve DCJ referred a question of a law to the Court of Criminal Appeal for determination in ***Hammond v R* [2013] NSWCCA 93**.

Slattery J held that, in this case, Mr Hammond could not have committed the offence charged because the element that "a person damages" requires proof of either physical harm or functional interference. The only evidence that any cost could or would be incurred was a hearsay assertion from a police officer that a professional cleaner would have to be engaged. Slattery J was obviously not convinced that this was so (at [74]): "these findings are quite consistent with an employee at the police station merely wiping a damp cloth over the seat to clear it of spittle/mucus in the course of otherwise required routine cleaning".

Whether Police Integrity Commission proceedings unable to support perjury charges because of legal error in appointment of counsel

***R v Vos* [2011] NSWCCA 172** stemmed from the prosecution of Mr Vos for offences of knowingly giving false or misleading information to the Police Integrity Commission ("PIC"). He moved the District Court for a permanent stay on the basis that the PIC proceedings were a nullity. Section 12 of the *Police Integrity Commission Act 1996* allows an Australian legal practitioner to be appointed as counsel assisting the Commission. Mr Errol Ryan was appointed as counsel assisting the Commission in the course of PIC proceedings in 2008, when Mr Vos gave evidence. Mr Ryan was a Senior Investigator with PIC, but not a qualified Australian legal practitioner. The trial judge held this error was so fundamental as to render the proceedings a nullity, and granted a stay to Mr Vos.

On the appeal, McClellan CJ at CL decided that while the *Police Integrity Commission Act* envisages counsel assisting asking questions of witnesses in the course of proceedings, it was nonetheless made clear by s 40 that all questions were asked with the authority of the Commissioner. The fact that Mr Ryan could not have been authorised to make such inquiries on his own did not make the proceedings a nullity. Furthermore, the relevant provisions for appointment of counsel assisting were concerned with facilitating the task of the PIC, not affecting the constitution of its investigations. Mr Vos's responses Mr Ryan's questions were capable of being evidence in his prosecution

Elements of offence of people smuggling

***Alomalu v R* [2012] NSWCCA 255** was an appeal from a people smuggling conviction following the decision of the Court of Criminal Appeal in *Sunanda v R; Jaru v R* [2012] NSWCCA 187. The decision is a reminder that the offence of people smuggling requires proof that the accused believed that the destination to which passengers were being smuggled was part of Australia.

Meaning and relevance of "consent" in medical assault cases

Dr Reeves performed surgery upon the genitalia of one of his patients. The surgery involved the removal of the patient's labia and clitoris. The procedure was grossly excessive, and expert evidence showed that small excision would have been sufficient. Dr Reeves was found guilty of maliciously inflicting grievous bodily harm with intent to cause grievous bodily harm. It was clear that the patient had not been aware of, and had not had explained to her, the full extent of the procedure. The trial judge had instructed the jury that Dr Reeves would not be guilty if the Crown could not prove that the surgery was conducted without lawful cause or excuse. One of the elements of "lawful cause or excuse", the trial judge said, was that Dr Reeves had the patient's "informed consent". Dr Reeves appealed against the verdict, contending that, amongst other things, "informed consent" was relevant to negligence and was a misdirection in a criminal prosecution.

In ***Reeves v R; R v Reeves* [2013] NSWCCA 34**, Bathurst CJ (Hall and R A Hulme JJ agreeing) upheld this ground of appeal. A failure to explain to a patient the possible risks contingent on a procedure does not vitiate consent in an action for civil trespass or criminal battery; nor does a failure to expand upon alternative treatment options. The impugned direction gave rise to a real risk that the jury would convict on the basis that an incorrectly stringent level of consent had not been met. (The appeal was dismissed by application of the proviso.)

(Special leave to appeal was granted on 7 June 2013: *Reeves v The Queen* [2013] HCATrans 143.)

Meaning of "malicious intent" in context of surgical procedure

***Reeves v R; R v Reeves* [2013] NSWCCA 34** also concerned, in part, a Crown appeal against a sentence for Dr Reeves, who had performed grossly excessive surgery on a patient. The offender had been sentenced for maliciously inflicting grievous bodily harm with intent to cause grievous bodily harm, contrary to s 33 *Crimes Act*. A ground of appeal was that the judge had allowed for the possibility that the offender had, in conducting surgery upon the complainant, not acted in malice. That is, the offender believed wrongly but honestly that the surgery was necessary. The Crown argument was that this contradicted the "malicious" element of the offence, as it was then. Hall J held that the trial judge had not been mistaken. Proof of malicious intent was not necessary in this case. Surgery often involves the intentional infliction of really serious bodily harm. The intentional infliction of harm in that context is "malicious" only if it is done without lawful excuse (which it was in this case).

(Special leave to appeal was granted on 7 June 2013: *Reeves v The Queen* [2013] HCATrans 143.)

Wounding as both an element and aggravating circumstance of a break-in

The appellant in ***Firbank v R*** **[2011] NSWCCA 171** had been convicted of breaking into a dwelling-place and committing a serious indictable offence (sub-s 112(1)(a)), being reckless wounding, in circumstances of special aggravation (sub-s 112(3)). The indictment specified the circumstances of aggravation as wounding (s 105A). One ground of appeal was that the indictment disclosed no offence known to law in that the purported circumstance of special aggravation was an essential element of the serious indictable offence of reckless wounding.

The Court of Criminal Appeal rejected that ground of appeal (upholding the appeal on another ground). McClellan CJ at CL, following *R v Donoghue* [2005] NSWCCA 62; 151 A Crim R 597, held, firstly, that the *De Simoni* principle allowed the court to consider all conduct of the offender, except circumstances of aggravation that would have warranted a conviction for a more serious offence. (It is not made explicit by his Honour at [48], but the maximum penalty under s 122(3) is significantly higher than that for reckless wounding.) Secondly, McClellan CJ at CL held that the reckless wounding was a mere *particular* of the offence. The relevant element to which it referred was the committing of a serious indictable offence.

Note: In submissions the Court of Criminal Appeal was presented with two conflicting decisions. In *R v Price* [2005] NSWCCA 285, Simpson J, confronted with a sentence appeal on a similar ground, held at [31] that the violence constituting the serious indictable offence was an element of the charge and could not also be an aggravating circumstance. As mentioned above, the court followed a different view stated in *R v Donoghue*, preferring that decision as it was a conviction appeal. The appellant did not seek leave to challenge the correctness of the decision in *R v Donoghue*.

Manslaughter – whether supplier guilty where deceased voluntarily ingested fatal drug

Mr Hay had voluntarily taken a drug supplied to him by the appellant in ***Burns v R*** **[2012] HCA 35; (2012) 290 ALR 713**. He had an adverse reaction and left the appellant's house at her request. Mr Hay was subsequently found dead and the appellant was convicted of manslaughter. The High Court allowed her appeal against conviction. It was held (at [76]) that supplying the drug to Mr Hay could not constitute manslaughter by unlawful and dangerous act. Although the act of supply was unlawful it was not dangerous; any danger lay in the ingestion of the drug. The deceased Mr Hay had done so by making a voluntary and informed decision.

Also, the appellant did not owe a legal duty to obtain medical assistance for the deceased and her failure to do so did not make her liable for manslaughter by gross negligence. At [106], it was said that the supply of prohibited drugs attracted severe punishment under the criminal law. To impose a duty on a supplier to take reasonable care for a user would be incongruous with that prohibition. Furthermore, there is absent the element of control that exists in relationships, for example between a doctor and patient, where the law imposes a duty on a person to preserve the other's life.

Obtaining financial advantage by deception – bank loans obtained making false statements about income

In ***Elias v Director of Public Prosecution (NSW)*** **[2012] NSWCA 302** made loan applications with two banks in which he overstated his income and was convicted of two counts of obtaining financial advantage by deception in the Local Court. He had provided security above the value of the loans and had made all of his repayments on time. The District Court refused an appeal and Mr Elias sought judicial review of that decision under s 69 of the Supreme Court Act 1970. He argued that he had received no financial advantage.

Basten JA (at [20]) dismissed the argument that a loan could not constitute a financial advantage. Blanch J considered the elements of the offence of obtaining financial advantage by deception (at [38]-[45]). First, the obligation to repay a loan does not cancel out the intention to permanently deprive the lender of the loans. Even where the loans would actually be repaid, the offence could still be made out. The basis of the offence is that the offender obtains financial advantage as a result of the deception; it is immaterial that the deceived person suffers no disadvantage. Second, there is no requirement that there be dishonest intent, although deception will often be strong indicator of dishonesty. Third, the falsity constituting the deception must go to something material. A false statement will be will be material if it is relevant to the purpose for which it was made and *may* be taken into account by the deceived person. Last, at [46] Blanch J agreed with Basten JA that a loan could constitute a financial advantage. They found that the District Court judge had been correct refuse to allow the appeal.

Meaning of "inflicting" grievous bodily harm

In ***R v Aubrey*** **[2012] NSWCCA 254**, the respondent had been accused of infecting a complainant with HIV through consensual sexual intercourse, without a condom, knowing that he had earlier been diagnosed with HIV. The indictment alleged that the respondent had maliciously caused another person to contract a grievous bodily disease, and in the alternative that that he had maliciously inflicted grievous bodily harm. The controversy on appeal was the meaning of "inflicted" in s 35(1)(b) of the *Crimes Act*. Macfarlan JA, following *R v Salisbury* [1976] VR 452 and *R v Cameron* (1983) 2 NSWLR 66, found that the infliction of grievous bodily harm did not necessarily require a direct application of force to the body. That line of reasoning, followed logically, rejects the need for a direct and immediate connection. Thus the passing on of an infection, involving a period of incubation and uncertainty, could be an "infliction" of harm.

Using a postal service in a way reasonable persons would regard as offensive – constitutional validity of the offence

Letters were sent to the wives and relatives of military personnel killed in Afghanistan that were critical of the involvement of Australian troops in that country and referred to the deceased in a denigrating and derogatory fashion. Two men were charged with using a postal service in a way that reasonable persons would regard as offensive (one as a principal in the first degree and the other for aiding and abetting). It was contended that the offence infringed the implied constitutional freedom of political communication. The trial judge rejected this and refused to quash the indictments. The accused appealed pursuant to s 5F *Criminal Appeal Act* 1912: *Monis v R; Droudis v R* [2011] NSWCCA 231.

Bathurst CJ, Allsop P and McClellan CJ at CL delivered separate judgments but each held that the offence in s 471.12 of the *Criminal Code* 1995 (Cth) was not constitutionally invalid.

In ***Monis v The Queen, Droudis v The Queen*** **[2013] HCA 4**, the High Court agreed that s 471.12 infringed on the right of political communication, but was split 3-3 on whether it did so permissibly. Accordingly, under s 23(2)(a) *Judiciary Act 1903* (Cth), the decision of the Court of Criminal Appeal was affirmed.

POLICE POWERS

Seizure of property to prevent breach of the peace

Police found Mr Semaan at an apartment block where drug activity was detected. He was not arrested, but he was informed that he might be charged with trespass. To this advice Mr Semaan responded, "Oh come on get fucked, we will see about this, you wait and see, you're fucked now" and began dialling on his mobile phone. An officer attempted to remove the phone, and Mr Semaan did not comply. He was charged and convicted in the Local Court of resisting a police officer in the execution of his duty. The officer gave evidence that he had seized the phone because he was concerned that it would be used to summon other men and cause a breach of the peace. Mr Semaan appealed his conviction in accordance with s 52 *Crimes (Appeal and Review) Act 2001*.

In ***Semaan v Poidevin*** **[2013] NSWSC 226**, Rothman J allowed the appeal. There were three reasons why the conviction was wrong:

1. The officer did not inform Mr Semaan of his reason for seizing the phone. The prosecution did not provide that Mr Semaan did not make an honest and reasonable mistake as to the intention of the officer when he acted in defence of his property. The Magistrate did not give this consideration, so an error of law was established.

2. The phone itself could not be property that could cause a breach of the peace. The incipient breach of the peace was said to originate in a communication that had not yet been made. While this point was not argued on the appeal, Rothman J concluded it raised an issue of lawfulness, requiring the prosecutor to negative an honest and reasonable belief that the actions of the officer were not lawful.

3. Section 201(2) LEPRA states that the time for compliance with the requirement to provide reasons for the exercise of police powers does not arise until it is not impractical to comply. The prosecution did not prove at trial when the time for compliance with LEPRA arose, so could not rely on the lawfulness of the actions (if they were indeed lawful).

The decision is also notable for the opening sentence, "A woman walks into a bar".

Reasonable grounds to suspect or believe

Hyder v Commonwealth **[2012] NSWCA 336** was an appeal concerning an action for wrongful arrest and false imprisonment. Mr Hyder was arrested by an AFP officer, without a warrant, in relation to a fraud. The primary issue at trial was whether the officer had had the power under s 3W(1)(a) of the *Crimes Act* 1914. The section provides a power to arrest without a warrant where the officer believes on "reasonable grounds" that a person had committed a federal offence. (This provision is similar to s 99(2) of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW).) The trial judge held that the officer had held an honest belief that Mr Hyder had committed the offence on reasonable grounds.

McColl JA (Hoeben JA agreeing and Basten JA dissenting) dismissed the appeal, set out (at [15]) a number of propositions about "reasonable grounds to suspect and believe" that enliven to police powers to search and arrest:

(1) "Reasonable grounds" for belief requires there to be sufficient facts to support that requisite belief.

(2) The arresting officer must form the belief or suspicion him or herself.

(3) Proposition (2) is to hold the arresting officer accountable.

(4) There must be a factual basis for the suspicion or belief. It may be material that would be inadmissible in court proceedings but must have some probative value.

(5) Circumstances supporting the belief must point towards it, but need not be evidence sufficient to prove the belief.

(6) Belief is "an inclination of the mind towards assenting to, rather than rejecting, a proposition" and the grounds for that inclination may still eave room for surmise or conjecture.

(7) Reasonable grounds should be assessed against what was, or could reasonably have been, know at the time.

(8) An officer can form the relevant state of mind on the basis of what they have been told, but it must be assessed in light of all the surrounding circumstances and what inference a reasonable person would draw from that information.

(9) "The identification of a particular source, who is reasonably likely to have knowledge of the relevant fact, will ordinarily be sufficient to permit the Court to assess the weight to be given to the basis of the expressed [state of mind] and, therefore, to determine that reasonable grounds for [it] exist": *New South Wales Crime Commission v Vu* [2009] NSWCA 349 at [46].

(10) The lawfulness of an arrest without warrant also depends on the effective exercise of the executive discretion to arrest alluded to by the word "may" in s 3W(1)(a).

PRACTICE AND PROCEDURE

Duplicity

***Chapman v R* [2013] NSWCCA 91** concerned a single charge that disclosed two separate offences. The kitchen pantry of Mr Chapman's house was found to contain 224 tablets of methylamphetamine. Five further tablets were found in his car, of a total weight less than that needed for deemed supply. He was charged with a drug supply offence. Mr Chapman moved for the charge to be quashed on the grounds of duplicity. His motion was refused, and he appealed to the Court of Criminal Appeal under s 5Fof the *Criminal Appeal Act 1912*.

Adamson J agreed that the indictment revealed duplicity. Mr Chapman could be convicted of the offence if the jury were satisfied that he was in possession of the deemed supply quantity in the pantry; or if he was in possession of the five tablets in the utility for the purpose of supply; or both. It would not be possible to ascertain definitively on what facts the jury reached their verdicts, or whether they were unanimously convinced of one ground. (On the appeal, the Crown indicated that it would not rely on the five tablets being for supply, rendering the point moot.)

Failure to answer outstanding question from jury before delivery of verdict

Mr Alameddine was on trial for two counts of aggravated armed robbery arising from a security van heist. The jury experienced difficulty in reaching a verdict. A note was sent to the judge expressing this, and the trial judge delivered encouragements generally along the lines suggested in *Black v The Queen* (1993) 179 CLR 44. Soon another note was received from the jury, this one asking what use could be made of a specific piece of DNA evidence. The note read:

> How much weight can be given in reference to joint criminal enterprise in regard to using the DNA evidence from the interior door handle of the car to implicate the accused for robbery?

The trial judge and counsel agreed that the note required clarification. This was sought from the jury, but was not immediately forthcoming. One hour later, the jury sent another note stating that it had "finished deliberating", by which it meant that it was unable to reach a verdict. The jury was informed of its ability to deliver a majority verdict, and soon found Mr Alameddine guilty of both counts. Mr Alameddine appealed.

On the appeal (***Alameddine v R* [2012] NSWCCA 63**), Grove AJ held that it was an error to accept a verdict from the jury while a question remained unanswered. He held, at [44]-[45]:

> Where a question manifests confusion, it is important that this be removed and the jury be directed along the correct path. Even if, absent direction, a jury has resolved an issue to their own satisfaction, it has been held erroneous to omit so to do: *R v Salama* [1999] NSWCCA 105.
>
> It is perhaps understandable how the obtaining of the requested redraft of the question was overlooked, given the focus of the series of communications from the jury concerning its inability to agree but the omission amounted to error. Even where the directions in the initial charge are adequate, it has been held that they no longer remain so in the light of the existence of an unanswered question: *R v Hickey* (2002) 137 A Crim R 62.

Whether availability of Crime Commission transcripts results in fundamental defect in trial for related offences

In a trial of two individuals for tax offences, the Commonwealth Director of Public Prosecutions ("CDPP") was provided with transcripts of evidence both accused had given in a private hearing of the Australian Crime Commission. After argument, the trial judge found that the transcripts should not have been disseminated: in contravention of s 25A(9) *Australian Crime Commission Act 2002* (Cth), the material had the potential to prejudice a fair trial. He granted a permanent stay of the proceedings and the Crown appealed. In ***R v Seller; R v McCarthy*** **[2013] NSWCCA 42**, Bathurst CJ held that the trial judge was right to decide that the transcripts should not have been disseminated, but that the bare risk of a resulting defect in the trial process did not entitle the accused to a stay. It must have been shown that a defect had in fact arisen. In this case, the CDPP case officer had not read the transcripts or known of their contents, and nor had CDPP counsel at trial. The stay was quashed.

Revisiting evidence rulings where the successful objector takes unfair advantage

WC v R **[2012] NSWCCA 231** concerned a trial for three counts of indecent assault. Counsel for the accused had objected to certain evidence by the child complainant that made reference to sexual approaches beyond the scope of the charged acts. The Crown had sought to lead that evidence to provide a reason as to why the complainant had not rebuffed the accused's advances. The trial judge, having regard to the limited probative value of the evidence at that stage of the proceeding and its prejudicial content, granted the application. But in his address to the jury, counsel for the accused emphasised the fact that the complainant had not rebuffed the accused. He called it "bizarre" and "unusual", and suggested that it was against "common sense". The trial judge decided that counsel had taken unfair advantage of the exclusion of evidence that might provide an explanation, and discharged the jury. The accused appealed under s 5G *Criminal Appeal Act*, which allows an appeal with leave from any decision to discharge a jury.

In the Court of Criminal Appeal, McClellan CJ at CL refused leave to appeal. He held that the trial judge was entitled to revisit the issues arising from his evidentiary ruling. It was not anticipated, at that time, that defence counsel would make the submissions he did. No direction could have remedied the unfairness as it manifested itself in closing addresses.

Unlawful disclosure of evidence given before NSW Crime Commission before trial for related offences

The appellants in ***Lee v R; Lee v R*** **[2013] NSWCCA 68** were convicted of a number of drug and weapons offences. The offences related to their involvement in a syndicate that imported pseudoephedrine from Korea in the guise of washing machine powder. Before they were charged, the applicants (and another person who would become a Crown witness) had given evidence in Crime Commission proceedings relating to the syndicate. The Commissioner had provided transcripts of that evidence to the Crown. It was conceded by the Crown, on the appeal, that the dissemination of the transcripts was unlawful. But Basten JA did not find that possession of the material caused a miscarriage of justice. The salient reasons were as follows:

1. If the prosecution possesses inadmissible material potentially relevant to the defence of the accused the trial is not by default unfair;
2. there was no objective unfairness in the conduct of the trial resulting from the dissemination of the transcripts; and
3. no objection was taken at trial, despite the appellant being aware of all the material in the prosecution brief.

Whether ex officio indictment filed after Local Court refuses leave to proceed on indictment is an abuse of process

Mr Iqbal was charged with recklessly causing grievous bodily harm. The police prosecutor did not elect to have the matter heard on indictment, and his trial was to proceed in the Local Court. Before the hearing date, the DPP took over the matter and applied for leave, under s 263(2) *Criminal Procedure Act*, to make a late election to have the matter proceed by way of indictment. The Court refused leave, but the DPP, evidently determined, filed an *ex officio* indictment in the District Court. Mr Iqbal sought a stay of the District Court proceedings. He contended that the circumvention of the Local Court determination by the DPP was an abuse of process because of the adverse impact it had upon public confidence in the proper administration of justice. The stay was refused, and Mr Iqbal appealed.

In ***Iqbal v R*** **[2012] NSWCCA 72**, McClellan CJ at CL confirmed the refusal to grant a stay. First, his Honour held that the DPP had the necessary power. The applicant disavowed any argument that the legislative scheme excluded the filing of an ex officio indictment where s 263 leave was refused. His Honour drew a comparison between Mr Iqbal's circumstances and the situation where a magistrate declines to commit an accused person, both being decisions of the Local Court preventing a matter going to indictment. Since filing of an *ex officio* indictment is permissible in the latter case, there was no technical reason why it was not in relation to Mr Iqbal. Second, it was not an abuse of process. The applicant did not argue that unfair prejudice was occasioned by the *ex officio* indictment. In response to the allegation that public confidence would be impaired, McClellan CJ at CL merely observed, at [24]:

> My present understanding of the facts to be alleged against the applicant are such that public confidence in the criminal justice system may be adversely impacted if the matter is not prosecuted on indictment.

Application for recusal for ostensible bias arising from confusion

Ms Gurung pleaded guilty to an offence after she had been placed in the care of a jury at trial in the District Court. Before sentencing, she filed a Notice of Motion seeking to withdraw her plea. That motion came before the original trial judge, where it was also foreshadowed that an application for bail would be made. The trial judge indicated that the motion would entail an attack on Ms Gurung's original barrister, and also mentioned that the prospects for bail were unfavourable. Ms Gurung's advocate asked the trial judge to recuse himself in relation to the application to withdraw the plea. He cited what the trial judge had said in relation to the bail application, and what had been said in relation to the plea withdrawal application. Confusion ensued. In any event, the recusal application was refused.

The matter was heard as an urgent appeal in ***Gurung v R*** **[2012] NSWCCA 201**. McClellan CJ at CL (McCallum J dissenting, Garling J agreeing) held, first, that a refusal by a judge to accede to a submission that he disqualify himself is not itself a judgment or an order of the court that can be appealed from. Second, because the first point was not fully argued in the expedited circumstances, a careful reading of the transcript revealed nothing a reasonable bystander would regard as bias.

(It appears that s 157 of the *Criminal Procedure Act 1986* was not brought to the Court's attention. A guilty plea entered after the accused is in the charge of the jury is taken to have effect as if it were the verdict of the jury. The trial judge did not have jurisdiction to entertain the motion in the first place.)

Obligation to make confiscation order where defendant has benefited from drug trafficking

R v Hall **[2013] NSWCCA 47** concerned the making of a Drug Proceeds Order against Mr Hall, who had pleaded guilty to supplying cannabis and knowingly dealing with proceeds of crime. Conlon DCJ ordered the forfeiture of cash found in the possession of Mr Hall, but declined to grant the Drug Proceeds Order on the basis that the information before him was too scant to form a proper assessment. The Court of Criminal Appeal held that the judge must have been satisfied that the dealer had received a benefit from drug trafficking, because he had ordered the forfeiture of cash. The Court held that he should have gone on to make a Drug Proceeds Order. The *Confiscation of Proceeds of Crimes Act 1989* requires, once that conclusion is reached, an assessment of appropriate order having regard to the available information, notwithstanding that it may be vague or unsatisfactory.

Accused absconding during trial ***(N.B. RULE 4 ISSUE RE COUNSEL CONTINUING – BASTEN JA (D/MATTER) v. ADAMS J (D/APPLY WHEN NOT "REPRESENTED" – COUNSEL WAS AMICUS)***

The case of ***Williams v R*** **[2012] NSWCCA 286** reaffirmed the discretionary power of a judicial officer, outlined in *Jamal v R* [2012] NSWCCA 198 from [35], to continue a trial after the accused has absconded. Ms Williams was on trial for dangerous driving offences, and during the course of giving evidence suffered a "complete meltdown". After the following adjournment, it was discovered that she had absconded. She did not return after the weekend. The trial judge refused to discharge the jury and continued the trial. R A Hulme J held this was an acceptable exercise of the discretion, noting the voluntary absence of the accused, the continued presence of counsel, and the late stage of the trial.

Reasons in trial by judge alone

CJ v R **[2012] NSWCCA 258** was an appeal from a trial by judge alone for a number of sexual offences. There was no dispute at trial over whether the offences had been committed; the controversy was the availability of a special verdict arising from the accused's asserted mental illness. In refusing the mental illness defence, the trial judge rejected the evidence of Dr Nielssen, one of two experts, who had specialised knowledge in bipolar disorders, the relevant diagnosis. On the appeal, Hall J held that the trial judge's simple statement that he preferred one witness to another, without more, was not a proper exercise of judicial decision making.

Inappropriate expression used in Crown closing address

At the conclusion of a trial for sexual assault, the Crown prosecutor's closing address included a characterisation of one part of the defence's case as a "scurrilous attack upon the complainant's credibility and character". Although no objection was taken at trial, the offender appealed on the basis that the comments were highly prejudicial: ***Geggo v R* [2013] NSWCCA 7**. Johnson J held that, in the context of the trial, the appellant had been perfectly entitled to test the evidence of the complainant and the particular expression "scurrilous attack" was inflammatory. However, noting in particular the absence of an objection at the time, the court dismissed the appeal on the proviso.

Accused to be permitted reasonable opportunity to be present at view

A man was on trial by a jury for a drive-by shooting for which he was convicted. During the trial a view had been conducted at the location where the offence was alleged to have occurred. The accused was on remand and classified as an "extreme high risk" inmate, and the trial judge was informed that he would be shackled in orange prison overalls in the cage of a corrective services vehicle during the view. In those circumstances, the judge determined that he should not be present during the view and it was sufficient that he was represented by counsel, even though the accused had expressed a strong desire to attend.

On appeal in ***Jamal v R* [2012] NSWCCA 198** Hidden J found (at [34]) that this decision had breached the statutory requirement under s 53(2)(a) of the *Evidence Act* that a judge is not to order a view unless satisfied that the parties will be given a "reasonable opportunity" to be present. This is a mandatory requirement, in addition to it being a factor to be taken into account under s 53(3). His Honour found (at [46]) that this error was fatal to the trial and the conviction was set aside.

Importance of reasons when ordering trial to continue following the discharge of juror

Mr Le had been convicted at trial after a juror had been discharged and the judge had ordered the trial continue. Mr Le appealed, including on the basis of the adequacy of the trial judge's reasons for making those orders pursuant to ss 53B and 53C of the *Jury Act* 1977. In ***Le v R* [2012] NSWCCA 202,** R A Hulme J stated (at [67]) that although lengthy reasons will rarely be required when deciding such matters, it is important that sufficient reasons are disclosed. Parties need to understand the basis for the decision and an appeal court should not be left to "divine from the circumstances whether the decision was correct".

The determinative issue to be resolved in such cases is not whether there were insufficient reasons, but whether the continuation of the trial with a reduced number of jurors gave rise to a substantial risk of a miscarriage of justice: *Evans v The Queen* [2007] HCA 59, at [247] per Heydon J. However, R A Hulme J found that leaving an appeal court to redetermine the issue for itself was unsatisfactory. His Honour found that the reasons given by the trial judge in this case were "barely satisfactory" (at [71]). There were circumstances that limited the scope for extensive reasons and the judge would have been encouraged to take an economical approach by counsel for the appellant who did not

oppose the order. But it was suggested the Court would benefit if brief reasons were given for making such orders in the future.

SENTENCING – GENERAL ISSUES

Muldrock v The Queen – are matters personal to an offender relevant to the objective seriousness?

The Court of Criminal Appeal has grappled with this issue since the High Court delivered its judgment in *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120; see, for example, *Yang v R* [2012] NSWCCA 49, *MDZ v R* [2011] NSWCCA 243 and *Ayshow v R* [2011] NSWCCA 240. In *Williams v R* [2012] NSWCCA 172, Price J held, at [42]:

> The objective seriousness of an offence is to be determined wholly by reference to the "*nature of the offending*". I do not think that the nature of the offending is to be confined to the ingredients of the crime, but may be taken to mean the fundamental qualities of the offence. In my view, where provocation is established such that it is a mitigating factor under s 21A(3)(c) *Crimes (Sentencing Procedure) Act*, it is a fundamental quality of the offending which may reduce its objective seriousness. It seems to me, that in those circumstances, there cannot be a realistic assessment of the objective seriousness of the offence unless the provocation is taken into account. The absence of provocation is not a factor of aggravation and does not increase the objective seriousness of the offence.

In ***McLaren v R* [2012] NSWCCA 284** there a ground of appeal was that "[t]he Sentencing Judge erroneously attributed weight to the appellant's apparent state of mind when making findings as to the objective seriousness of the offence." McCallum J found that the sentencing judge had indeed articulated his reasons for sentence in accordance with *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168. But her Honour went on to say, at [28]-[29]:

> …there is no sense in attempting to place the offence at hand (with all its features, including matters personal to the offender where relevant to an assessment of the nature of the offending) at a point along a purely hypothetical range which, of its nature, is ignorant of those matters.
>
> The decision in *Muldrock* does not, however, derogate from the requirement on a sentencing judge to form an assessment as to the moral culpability of the offending in question, which remains an important task in the sentencing process. That this assessment is also sometimes referred to as the "objective seriousness" of the offence perhaps contributes to the misconception. I do not understand the High Court to have suggested in *Muldrock* that a sentencing judge cannot have regard to an offender's mental state when undertaking that task (as an aspect of his or her instinctive synthesis of all of the factors relevant to sentencing).

A differently composed bench in ***Subramaniam* v R [2013] NSWCCA 159** approached the question afresh; that is, without reference to *McLaren*. Latham J (Simpson J agreeing, Emmett JA providing a separate judgment) held at [57] that "attributes personal to the applicant (in particular her mental state at the time of offending) more appropriately belong to an assessment of moral culpability" as distinguished from the objective features of the offending.

Question: If *Muldrock* affirms *Markarian* in requiring all facts, matters and circumstances to be considered in the assessment of sentence, what is the a point of distinguishing

between "objective seriousness of the offence" and "moral culpability" by assigning consideration of the offender's mental state to the latter and not the former?

Muldrock v The Queen – assessment of objective seriousness generally

The decision in *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120 has also raised difficult questions as to how a judge should assess objective seriousness of an offence, or even whether such an assessment is desirable.

McCallum J provided a useful summation of the position in ***PK v Regina*** **[2012] NSWCCA 263**. There her Honour said at [25]-[26], of the assessment of objective seriousness generally:

> "…whilst an assessment of the objective seriousness of the offending remains an essential aspect of the sentencing task, the sentencing court need not, and arguably should not, attempt to quantify the distance between the actual offence before the court and a putative offence in the middle of the range: see *Muldrock* at [29]…
>
> What has been emphasised in decisions since Muldrock is that it remains important to assess the objective criminality of the offending, which has always been an essential aspect of the sentencing process. In that context, the view has been expressed that there is no vice in doing so according to a scale of seriousness: *Zreika v R* [2012] NSWCCA 44 at [45] per Johnson J (citing *R v Koloamatangi* [2011] NSWCCA 288 at [18]-[19] per Basten JA); McClellan CJ at CL agreeing at [1]; Rothman J not addressing that point (see [128] to [130]). However, as I read *Muldrock*, the usefulness of comparing the particular offence before the court with the hypothetical mid-point offence has been doubted."

No fiddling with sentences imposed in the District Court

Mr Tabuan was sentenced for his part in the supply of a prohibited drug. He was present, for the purposes of security, at a sale of 460g of methylamphetamine. The jury verdict of acquittal of commercial supply could only be reconciled with a finding that Mr Tabuan did not know the quantity of drug involved. In his remarks on sentence, the judge found that Mr Tabuan would have known that the quantity of drugs involved was large, "in the order of 150 grams or thereabouts", or his presence would not have been required. Mr Tabuan appealed, and in ***Tabuan v R*** **[2013] NSWCCA 143**, Harrison J found that there had been an insufficient factual basis for such a finding. But his Honour also found that no lesser penalty was warranted. His Honour also remarked, at [28]:

> As an additional matter I consider that it is important to recognise that the judges in the District Court are faced on a daily basis with an almost unending onslaught of serious and complex sentencing exercises. The fact that an error or errors may be identified upon quiet reflection by others in circumstances that are unconstrained by the pressures under which the judges are required to operate is neither surprising nor derogatory. There is no doubt that the process must be undertaken according to the detailed and difficult sentencing principles that guide all sentencing judges. *But where, as in this case, the sentencing judge passes a sentence that in all of the circumstances of the case is a proper sentence howsoever it is viewed, it is not appropriate to make minor adjustments to the result in order only to give some practical recognition of or endorsement to the identified error if it is not otherwise warranted.* (Emphasis supplied)

Form 1 offences and the primary sentence

Mr Abbas was sentenced for two offences of knowingly taking part in the supply of a commercial quantity of a prohibited drug. The sentencing judge was asked to take into account four offences on a Form 1. The judge stated that, in some cases, taking additional matters into account would increase the weight given to personal deterrence and retribution, and so have the consequential effect of increasing the penalty for the primary offence. Mr Abbas appealed his sentence and contended that this approach as erroneous. On the appeal (***Abbas, Bodiotis, Taleb and Amoun v R* [2013] NSWCCA 115**) Bathurst CJ (Garling and Campbell JJ agreeing, Basten JA and Hoeben CJ at CL also rejecting the ground) held that the approach was correct. While it was not open to the sentencing judge to punish the offender for the criminality reflected by the Form 1 offences, it was open to find personal deterrence and retribution be given additional weight in respect of the primary offence.

Failing to warn that uncontested evidence will not be accepted amounts to procedural unfairness

The appellant in ***Cherdchoochatri v R* [2013] NSWCCA 118** was being sentenced for importing a marketable quantity of heroin. He gave evidence, which was not challenged by the Crown, that he had been subject to duress in respect of the offending. That evidence was the subject of a submission on the appellant's behalf, and neither the Crown nor the sentencing judge made any comment on the use that was made of it. But on sentence, the judge rejected the argument that the appellant was motivated by duress. In the Court of Criminal Appeal, Emmett JA and Simpson J (with whom Latham J agreed) held that to give no warning that the submission might be rejected amounted to a denial of procedural fairness. In terms of the practical aspects of this, Simpson J pointed out at [58] that:

> It may even have been possible to call additional evidence in support, for example, from the applicant's wife, or from Mr Howard. In this respect it is pertinent to note (although it is often overlooked) that the *Evidence Act 1995* applies in sentencing proceedings only if a direction is given to that effect. There is a degree of flexibility in sentencing proceedings in the manner in which evidence may be given.

More onerous imprisonment as consequence of assisting authorities

***C v R* [2013] NSWCCA 81** concerned the extent to which a sentencing judge should take into account the onerous prison conditions that invariably come with an offender providing a high degree of assistance to authorities. The appellant was engaged by a Mexican cartel to come to Sydney to receive and distribute an enormous shipment of cocaine. The shipment was detected and the appellant was arrested. He plead guilty and provided considerable assistance in relation to the criminal enterprise he was involved in. On sentence, he was allowed a combined discount of 35 per cent. The sentence judge noted he would be kept in the Special Purpose Centre at Long Bay, but said that she had received no evidence to establish that conditions there would be more onerous than in the general population.

In the Court of Criminal Appeal, Hoeben JA found that the sentencing judge had been in error to not make at least some allowance for the fact that the appellant was to be detained in the Special Purpose Centre. He found, at [41], that

> an offender in the position of the applicant during a sentence hearing, if he or she wishes to gain some benefit in the sentencing process because of the conditions under which the sentence is likely to be served, should adduce evidence as to those conditions. If the Crown disputes that evidence, it can call its own evidence, otherwise the evidence of the offender should be given appropriate weight.

But notwithstanding the lack of evidence, an appropriate discount in this case was 45 per cent.

Self-induced intoxication and violent offences

***ZZ v R* [2013] NSWCCA 83** concerned, amongst other things, the relevance of self-induced intoxication as a mitigating factor on sentence for violent offences. The appellant had, while severely affected by alcohol and cocaine, committed a violent sexual assault on his girlfriend. It was submitted for the appellant that his was the unusual case where intoxication mitigated the offences because it led to violence being committed out of character. Johnson J held that it was not a mitigating factor of any account. The appellant's conduct was committed over a sustained period in the face of a clear lack of consent; and he did not demonstrate himself to be a person of prior good character, being a considerable recidivist in terms of fraud offences.

(It did not appear to be argued that the appellant was not an inexperienced user of alcohol and cocaine, but that seems apparent from the facts and would serve, by reference to authorities such as *Hasan v R* [2010] VSCA 352; 31 VR 28, to further diminish the relevance of his intoxication.)

Illicit drug dependence and moral culpability

***Nair v R* [2013] NSWCCA 79** involved a sentence appeal by Dr Nair, a neurosurgeon who was convicted of manslaughter for failing to intervene in the fatal cocaine overdose of an escort he had hired. One ground of appeal was that the sentencing judge had not reduced Dr Nair's moral culpability to take into account his "intense craving to use the drug in sexual situations". Blanch J rejected any suggestion that drug addiction, without underlying or supervening mental illness, is a reason to reduce moral culpability. His Honour referred in particular to the free (initial) choice to experiment with illicit drugs known generally to have addictive qualities.

Correct calculation of discount for assistance to authorities

LB was involved in the large-scale manufacture of methamphetamine and ecstasy in Western Sydney. He was arrested and charged with two serious drug manufacture offences, to which he pleaded guilty. He provided the Crown with significant information in relation to the criminal enterprise that he was involved in. At his sentencing, Garling DCJ allowed LB a discount of 25% for his plea of guilty, and 25% for his assistance to the authorities. But his Honour applied a combined discount of only 30% to the final sentence,

giving no particular reasons for doing so. LB appealed on the basis he had not been afforded a sufficient discount for assistance.

In ***LB v R*** **[2013] NSWCCA 70**, Button J rejected the suggestion that there had been mathematical miscalculation. Rather, he found that Garling DCJ had attempted to balance the competing imperatives of s 23(4) *Crimes (Sentencing Procedure) Act 1999*, which requires particularisation of the discount, with s 23(3), which requires that the total penalty not be unreasonably disproportionate to the offence. The approach taken led to error. If LB withdrew his assistance in the future, it would not be possible to calculate the relevant discount for the purpose of a Crown appeal under s 5DA *Criminal Appeal Act 1912*. The correct approach was to formulate the discounts; explicitly reduce them, if necessary, by reference to s 24(3); and then apply them to the undiscounted sentence.

Beware the effect of accumulation on ratio between non-parole period and total sentence

Dawson v R **[2013] NSWCCA 61** concerned an appeal against an asserted failure by a sentencing judge to reflect a finding of special circumstances in sentencing the appellant for a number of offences. The judge had fixed the ratio of the non-parole period and head sentence in respect of each offence at between 60 and 66 per cent. But the effect of his subsequent findings on concurrency and accumulation was to increase the ratio between the total non-parole period and the total sentence to 72%. Schmidt J agreed with the appellant that this exercise had led to mathematical error with the result that the finding of special circumstances was not reflected in the sentence.

Severity appeals in sentences for historical child sex offences

Mr Magnuson committed a number of sex offences against three child victims between 1977 and 1984. He was given a sentence of 19 years with a non-parole period of 13 years. He appealed, arguing that the sentencing judge had imposed a more severe sentence than was correct by failing to properly take into account sentencing patterns and practices at the time of the commission of the offences.

Button J granted the appeal, imposing a lesser sentence of 16 years, with a non-parole period of 9 years: ***Magnuson v R*** **[2013] NSWCCA 50**. As to sentencing patterns, his Honour observed a general increase in sentences for all types of crimes in NSW over the last 25 years. But on a proper inspection of that generalisation, it was apparent that sentences for offences of rape committed against children had not markedly increased. Historical sentencing practices, on the other hand, showed a greater disparity. In particular, the approach to accumulation and concurrence was lax. As a result, while Button J was not convinced that the total sentence imposed in relation to any one victim was manifestly excessive, the overall sentence was.

Basis for plea and assistance discounts in Commonwealth matters

The decision of ***R v Karan*** **[2013] NSWCCA 53** serves as a reminder that the legislation allowing discounts for pleas of guilty and assistance to authorities in Commonwealth cases differs from the NSW scheme. Regard is not to be had to the utilitarian value of the plea, rather to the offender's contrition and willingness to facilitate the course of justice by cooperation. The case concerned a Crown appeal against a discount of 25 per cent given

to an offender who offered a late plea and "assisted the authorities" by presenting himself at the police station for arrest. The Court of Criminal Appeal found that the late plea had been spurred by the addition of further evidence to an already-strong Crown case: it was recognition of the inevitable. This substantially reduced the extent to which the offender could be said to be willingly facilitating the course of justice. An appropriate discount was 15 per cent.

Meaning of "duress" in offending behaviour

Marcelo Hernandez, a South American national, was sentenced for a number of offences relating to safe heists against fast-food stores. He gave evidence that through a gambling addiction he had fallen into debt with insalubrious characters in Panama and was forced to flee to Australia, leaving his wife behind. He said that his creditors had threatened his wife and this was why he committed his offences. In due course, Mr Hernandez appealed his sentence, arguing that his evidence suggested that the offences were committed in circumstances of duress and that the sentencing judge had not made a clear finding as to whether this was accepted and, if so, to what extent it sounded in mitigation. In ***Marcelo v R* [2013] NSWCCA 51**, Rothman J found that the sentencing judge had taken into account the facts said to constitute "duress" in dealing with the matter. As to actual duress, the offender bore the onus of proving it and the sentencing judge was not in error in holding that he had not. Mr Hernandez was not left, by his circumstances, with no option but to commit the crimes he did.

Expressing plea discounts in approximate terms

Mr Ayache pleaded guilty to a drug supply offence. The sentencing judge said, in his reasons, that he had reduced the sentence "by about 25 per cent". Mr Ayache appealed; arguing that the language used indicated a discount had been given of less that 25 per cent, and that this was in error as no reasons had been given for departing from the top of the available discount range. In ***Ayache v R* [2013] NSWCCA 41**, Rothman J dismissed the appellant's argument out of hand. Not only did the language not support the inference that the discount must have been less than 25 per cent, the "proposition that there must be mathematical precision of the kind for which the applicant contends cannot be supported" (at [15]). Sentencing is an exercise of instinctive synthesis, not calculus.

Parity and errors in sentencing co-offenders

***Truong v R; R v Le; Nguyen v R; R v Nguyen* [2013] NSWCCA 36** concerned, in part, an appeal by a Mr Truong against the severity of his sentence for a firearm offence. His co-offenders had been sentenced on the erroneous factual basis that the weapon in question was not capable of firing live rounds. Mr Truong submitted that he had a justifiable sense of grievance because he did not, in his sentence proceedings, have the advantage of that error. Button J dismissed the appeal, holding that the Court could not knowingly replicate the error below. Nor in the absence of a Crown appeal, the error being on the basis of a mistaken concession, could not correct it by reference to the sentence for the other offenders.

Commonwealth offences with mandatory sentences

In ***Karim & ors v R*** **[2013] NSWCCA 23**, Allsop P (Bathurst CJ, McClellan CJ at CL, Hall and Bellew JJ agreeing) held that it was within the province of Parliament to dictate minimum sentences in respect of specific offences (at [94]). Following the decisions of intermediate appellate courts in Western Australia and Queensland, the Court held that the correct way to sentence an offender to whom a minimum sentence applies is to approach the minimum sentence as the "floor" of the possible range, in the same way as the maximum sentence is the "ceiling". It is not correct for the sentencing judge to fix what he or she considers a "just and appropriate" sentence and then modify that sentence in accordance with the mandated minimum.

Taking into account non-custodial offences on a Form 1

Mr Marshall was convicted and sentenced for two indictable offences. The sentencing judge took into account another offence, that of entering a vehicle without consent, which is punishable by a fine. Mr Marshall appealed his sentence on the basis that the sentencing judge had impermissibly considered a non-custodial offence when assessing the penalty for an offence that carried a sentence of imprisonment. The appeal was dismissed: ***Marshall v R*** **[2013] NSWCCA 16.** Grove AJ said that it was entirely permissible, in sentencing for a particular offence, to take into account other matters for which guilt has been admitted with a view to increasing the sentence. This gives weight to two normal sentencing considerations: personal deterrence and the community's expectation for condign punishment.

No requirement that remarks on sentence be bland

Piscitelli v R **[2013] NSWCCA 8** was a sentence appeal by the offender in a home invasion and sexual assault committed on an 83 year old woman. One ground related to remarks by the sentencing judge that a person reading the facts would be "horrified" and "disgusted". Button J, dismissing the appeal, held that there is no requirement that remarks on sentence be anodyne or mealy-mouthed, especially where the offence deserves condemnation.

Accumulation in aggregate sentencing

In ***R v Rae*** **[2013] NSWCCA 9**, the respondent had been sentenced for three offences. The sentencing judge had imposed an aggregate sentence in accordance with s 53A *Crimes (Sentencing Procedure) Act* 1999. The first offence was an aggravated break enter and steal committed against a veterinary practice. The second and third were firearm offences relating to a separate incident, some three days later, where the respondent shot and wounded another man. The sentence ultimately passed reflected exactly the indicative head sentence for the more serious firearm offence. In allowing the Crown appeal, Button J said it was an error to not reflect any accumulation in the sentence for the earlier break enter and steal offence. His Honour concluded at [45]:

> Of course, the newly available option of aggregate sentencing will free sentencing judges and magistrates from the laborious and complicated task of creating a cascading or "stairway" sentencing structure when sentences for multiple offences are being imposed and partial accumulation is desired. That will be especially beneficial in cases where an offender is to be dealt

> with for a very large number of offences. However, merely because an offender is to receive an aggregate sentence does not mean that considerations of accumulation, whether partial or complete, need no longer be taken into account.

Criticising psychiatric opinions without cross-examination

In ***Devaney v R*** **[2012] NSWCCA 285** the sentencing judge was sceptical of the concurring view of three psychiatrists that Mr Devaney was "floridly psychotic", and expressed the view that he had manipulated his diagnoses. Allsop P upheld the appeal, stating at [88]:

> It is one thing to discount admissible statements made to a psychiatrist or psychologist if the offender is not prepared to give evidence to the same effect…it is quite another to lessen the effect of the opinion of a professional psychiatrists, without cross-examination, when that opinion is based on history.

Reminder against sentencing co-offenders in separate proceedings

In ***Arenila-Cepeda v R*** **[2012] NSWCCA 267**, the Court considered a sentencing appeal by an offender who had been sentenced in separate proceedings from his co-offender. The evidence before each sentencing judge was different; each judge made different findings in relation to that evidence; and the remarks on sentence produced in the prior proceeding were not provided to the latter judge. Johnson J upheld the appeal on the grounds of parity and proportionality, noting that the case was a reminder that separate sentence proceedings for co-offenders were undesirable, but if they were to be pursued the Crown would bear the main burden for ensuring that each subsequent judge had the relevant remarks on sentence.

Information on sentences passed upon co-offenders

In ***Shortland v R*** **[2013] NSWCCA 4**, the Court yet again stressed the importance of sentencing judges being provided with the details of sentences passes upon co-offenders. If this is not done, there is a likelihood of delivering inconsistent sentences across a group of offenders without allowing for practical comparison of culpability. This is an objective basis for a sense of grievance on the part of an individual co-offender, and re-sentence on parity grounds may be necessary. (The most desirable arrangement is, of course, for one judge to sentence all offenders.)

Mental illness does not necessarily mean that general deterrence is inappropriate

Mr Bugmy was sentenced for two counts of assaulting a corrective services officer and one count of grievous bodily harm with intent after he attacked three prison guards whilst in custody. The Crown appealed the sentence and submitted in part that too much weight had been paced on Bugmy's mental illness. Hoeben JA upheld the appeal in ***R v Bugmy*** **[2012] NSWCCA 223** and found (at [43]) that the trial judge had assumed a diagnosis of mental illness automatically meant Bugmy was an inappropriate vehicle for general deterrence. Mental illness will only reduce the weight to be given general and specific deterrence where the illness is directly involved in the commission of the offence. But in this case Bugmy's mental illness had nothing to do with the offending and the judge's approach was held to be erroneous.

(An appeal to the High Court of Australia was argued on 6 August 2013 with judgment reserved).

Protection of the community as a factor in sentencing a mentally ill offender

In ***R v Windle*** **[2012] NSWCCA 222** the Crown appealed against the sentence imposed on Mr Windle for attempting to murder a fellow inmate while in prison. There was evidence that Windle had a severe mental illness and would pose a significant risk to the community when released. Although the Court allowed the appeal, Basten JA (Price J agreeing, SG Campbell J agreeing with different reasons) held that little weight can be given to the protection of society when imposing a sentence on a person with mental illness.

At [43]-[46], his Honour reviewed the judgments in *Veen v The Queen [No 2]* [1988] HCA 14 where the majority noted the countervailing effect of a dangerous mental illness on a sentence: it makes the offender a greater danger to society but reduces moral culpability for the crime. These may balance out, but mental illness cannot lead to a more severe penalty than the offender would have otherwise received. In the case of Windle, Basten JA held (at [57]), little weight could be given to protection of society. The danger arose from his mental illness and protection for society should be addressed through preventative mental health legislation. The criminal law is an inappropriate vehicle for that purpose.

Aggregate sentencing requires separate consideration of criminality of each offence

An offender received an aggregate sentence for a number of sexual offences committed against a child. The Crown appealed against the sentence and submitted *inter alia* that the sentencing judge had not assessed the individual criminality of each offence. In ***R v Brown*** **[2012] NSWCCA 199** Grove AJ agreed and allowed the Crown's appeal. For four of the offences, the offender had been allocated equivalent sentence indications of 5 years' imprisonment. The variations in criminality between the offences suggested that individual criminality had not been assessed by the sentencing judge and Grove AJ stated (at [17]) that imposing an aggregate sentence did not remove the obligation to assess criminality for each offence: s 53A(2)(b) of the *Crimes (Sentencing Procedure) Act* 1999.

Special circumstances - first time in custody

Mr Collier was sentenced to a non-parole period of 15 years imprisonment with a balance of 5 years. There was therefore no finding of special circumstances. On appeal it was argued that as she was 50 years old, it was her first time in custody and she had good prospects of rehabilitation there should have been a finding of special circumstances. In ***Collier v R*** **[2012] NSWCCA 213** McClellan CJ at CL, allowing the appeal but preserving the statutory ratio, stated that he had reservations about whether being sentenced to imprisonment for the first time alone could support a finding of special circumstance. At [36] his Honour stated that it is a fact relevant to the total sentence and non-parole period, but it is not a factor warranting further leniency by a further reduction of the non-parole period.

Judgment in DPP v De La Rosa only to be used for general guidance

An offender sought to appeal against his sentence for importing a marketable quantity of heroin on the ground that it was manifestly excessive. He relied on the judgment of McClellan CJ at CL in *DPP v De La Rosa* [2010] NSWCCA 194 and submitted that his case fell between the second and third categories identified by his Honour. In ***Nguyen v R* [2012] NSWCCA 184** Davies J said (at [38]) that an applicant should be cautious about relying on the categories set out in *De La Rosa*. It is not a guideline judgment and should only be relied upon for general guidance and assistance: *Lindsay v R* [2012] NSWCCA 124 at [8]. His Honour held (at [41]) that the sentence imposed was not obviously wrong and was open to the sentencing judge; it was not manifestly excessive.

Disproportion between non-parole period and head sentence may indicate excessive sentence

AM was 16 years old when he committed a serious offence of causing grievous bodily harm with intent to cause grievous bodily harm. He was almost 18 when he was sentenced to 7 years with a non-parole period of 3 years. In **AM v R [2012] NSWCCA 203** an appeal against the head sentence was dismissed. It was submitted that the disproportion between the non-parole period and total sentence supported the contention that the head sentence was excessive. Johnson J (at [86]) said that while such a disproportion might support a finding that that the sentence was excessive, the ratio in AM's case resulted from a "substantial indulgence extended to the Applicant after a finding of special circumstances". It was not otherwise demonstrated that the sentence was unreasonable or plainly unjust.

Discount for assisting authorities applies to all counts

Mr Isaac was sentenced for three offences of aiding and abetting the importation of heroin. For assistance provided to authorities, the sentencing judge granted a discount of 15 percent for counts 2 and 3. But her Honour did not provide a discount for count 1 on the basis that a co-offender had pleaded guilty before Mr Isaac had been arrested or charged. Mr Isaac's information had been of no use to the authorities in relation to two of the three counts.

In ***Isaac v R* [2012] NSWCCA 195** it was held by Garling J that the judge had erred by applying the discount differently to the three sentences. His Honour held at [43]-[45] that the proper approach is to assess all the assistance given and apply an appropriate discount to each sentence after they are initially assessed, otherwise the discount may be eroded. It is then necessary to consider totality.

Utilitarian value of a proposed, but not entered, plea of guilty to the alternative offence

In ***Blackwell v R* [2012] NSWCCA 227**, the respondent had, while in a highly intoxicated state, struck another man with a glass in the early hours at Scruffy Murphy's Hotel. He was charged with maliciously inflicting grievous bodily harm. At trial, he denied being involved in the altercation. He was convicted, but the Court of Criminal Appeal returned the matter for retrial on account of a misdirection. At the commencement of the second trial, the respondent maintained his plea of not guilty, but did offer to plead guilty for the

statutory alternative of recklessly inflicting grievous bodily harm. The Crown indicated that it would not accept that plea, and no plea was formally entered. The respondent was found guilty of the alternative offence, and the sentencing judge allowed him a discount of 13 per cent for the utilitarian value of the plea. Garling J held that there was no error in granting the discount, notwithstanding that the plea had not been entered, and that the circumstances of the retrial were not relevant to calculating the utilitarian value of the plea.

Future dangerousness

In 2009, Kirby J sentenced Malcolm Potts to a non-parole period of 21 years for murder. His appeal was heard in ***Potts v R*** **[2012] NSWCCA 229**. One ground of appeal was that the sentence passed was manifestly excessive. The murder had been committed in 2008. In 2001, the appellant had killed his own father, had successfully argued substantial impairment, and had since then been undertaking psychiatric treatment. Given these circumstances, and medical evidence that the appellant was not responding well to treatment, Kirby J took into account the appellant's future danger to the community in setting an appropriate sentence. Johnson J in the Court of Criminal Appeal, citing *Veen v The Queen* (1988) 164 CLR 465, held that Kirby J had demonstrated no error in this respect.

(Special leave to appeal refused 7 June 2013: *Potts v The Queen* [2013] HCATrans 141.)

Misidentification of maximum penalty does not necessarily mean the sentence will be excessive

The appellant in ***RLS v R*** **[2012] NSWCCA 236** pleaded guilty to a child pornography offence and was sentenced for that charge to an effective term of 15 months. The sentencing judge had misidentified the maximum penalty for that offence as ten years, the actual penalty at the time of the offence being five years. The sentencing judge did not err as the standard non-parole period, correctly stating that none was specified for the offence. On the appeal, Bellew J observed that while the mistake was an error justifying a grant of leave to appeal, no lesser sentence was warranted in law. The appeal was dismissed.

The scope of the discount for providing assistance to authorities

In ***RJT v R*** **[2012] NSWCCA 280**, the appellant argued for a discount to his sentence under s 23 of the *Crimes (Sentencing Procedure) Act 1999* because he had, independently of the offence for which he was convicted, reported another crime of which he was the victim. The appellant had committed two serious sex offences against his 7-year old daughter. After she had reported the offences, but before he was interviewed in relation to them, he reported to police that his grandfather had, for a long period when he was younger, committed sexual offences against him. The appellant assisted police in recording incriminating conversations with his grandfather.

Basten JA (with whom Adams J agreed, R A Hulme J dissenting) identified the purpose of the discount in s 23 as, in a general sense, countering the disincentive of reporting criminal activities. While some disincentives are more established, such as fear of retribution by one's criminal associates, the discount could be applied where there was a public interest

in overcoming any disincentive to reporting. Basten JA observed that it was well known that sexual abuse was underreported for a variety of reasons, and there was a public interest in applying the discount in this case. The appropriate discount was set at 10 per cent. His Honour declined to decide whether this interpretation would apply to independent witnesses, rather than victims, of crimes, or to assistance provided to authorities *before* the discovery of a crime for which the informant received a sentence. The full scope of the discount remains at large.

Intensive correction orders not confined to offenders in need of rehabilitation; all offenders in need of rehabilitation

In ***R v Pogson, Lapham and Martin*** **[2012] NSWCCA 225**, five members of the Court of Criminal Appeal overturned a previous decision in *R v Boughen; R v Cameron* [2012] NSWCCA 17. In *Boughen*, Simpson J had held that intensive correction orders were only available where the offender was in need of rehabilitation, in the sense of reducing the risk that he or she would reoffend. In *Pogson*, McClellan CJ at CL and Johnson J (Price, R A Hulme and Button JJ agreeing) held, firstly, that as a matter of law intensive correction orders were not only available for offenders in need of rehabilitation; and secondly that the Court in *Boughen* had been mistaken as to the meaning of "rehabilitation". McClellan CJ at CL and Johnson J found, at [122]-[125], that rehabilitation encompasses the reincorporation of an offender into a community and, in that sense, rehabilitation was a relevant consideration to all offenders. In particular, the court held that intensive correction orders are not an inappropriate sentencing option for "white-collar" crimes.

SENTENCING - SPECIFIC OFFENCES

Dangerous driving causing death/gbh – aggravating factor of the number of persons put at risk

While driving in Boat Harbour Park, south of Sydney, Mr Stanyard miscalculated his speed and launched his vehicle off the crest of a sand dune. The vehicle pitched forward and rolled on impact with the descending slope. Mr Stanyard's two passengers were seriously injured. He was convicted of two counts of driving in a manner dangerous to the public occasioning grievous bodily harm, contrary to s 52A(3) of the *Crimes Act 1900*. At sentence, Berman DCJ found (as was conceded by the defence) that the number of people put at risk, being the two passengers, was an aggravating feature of the offence. Mr Stanyard appealed Berman DCJ's severity findings.

On the appeal (***Stanyard v R*** **[2013] NSWCCA 134**), Fullerton J held that Berman DCJ had been in error in finding (and counsel had been in error in conceding) that having two passengers was an aggravating feature in the circumstances. Her Honour held, at 32:

> In promulgating the guideline judgment in *Jurisic*, where the nature and extent of the injuries inflicted has been recognised as a discrete aggravating factor and where, as here, the suffering of grievous bodily harm is an element of the offence of dangerous driving, I am satisfied that the number of persons who may have been exposed to risk by the offender's dangerous driving must refer to people other than those identified as victims in the particulars of charge. Were it otherwise there is a danger of double counting and a corresponding risk that the sentence imposed will be excessive.

The judgment does not refer to *R v Berg* [2004] NSWCCA 300 in which Howie J (at [26]) regarded risk to a single passenger/victim as a matter of aggravation. Nor does it refer to *SBF v R* [2009] NSWCCA 231; 198 A Crim R 219 in which Johnson J (at [78]) adopted a similar approach. Pertinently, Johnson J said:

> "the fact that each of them was killed or seriously injured does not render it impermissible for the sentencing Judge to have regard to the number of people put at risk by the course of driving, as an aggravating factor".

Sexual intercourse committed without motive for sexual gratification

The appellant in ***R v Essex*** **[2013] NSWCCA 11** was sentenced for one offence of aggravated sexual intercourse of a child under 10. The offending occurred in unique circumstances. Mr Essex was, over a period of time, supervising the potty training of one of the children of his partner. In the course of cleaning the child's bottom with a garden hose, the offender deliberately inserted the nozzle of the hose into the victim's vagina. The offence was committed out of anger or frustration, rather than for sexual gratification. Mr Essex appealed on the basis that the sentencing judge had failed to reduce the objective gravity of the offence accordingly. On the appeal, Bellew J agreed with the appellant and held that the objective gravity of the offence was somewhat lower than had been found below.

Armed robbery - financial gain as an aggravating factor

Mr Couloumbis was convicted of an offence of conspiring to commit an aggravated armed robbery. The trial judge had noted the motive of financial gain as an aggravating factor. On Mr Couloumbis' sentence appeal (***Couloumbis v R*** **[2012] NSWCCA 264**), Harrison J held that there was no double counting: financial gain is a motive of the offence, not an element or "inherent characteristic".

Sexual assault - relationship between offender and complainant a relevant consideration

NM was convicted of five counts of sexual assault against the complainant all occurring on a single evening. The complainant had been in a relationship with NM until the month before and had invited him to her home for sex on the night the offences occurred. NM appealed against the sentence of 9 years 6 months with a non-parole period of 6 years 6 months on the ground that it was manifestly excessive. Allowing the appeal in ***NM v R*** **[2012] NSWCCA 215**, Macfarlan JA found that the sentencing judge had erred by assessing the offences as in the mid-range of seriousness and failing to attach significance to the relationship between M and the complainant.

His Honour held (at [58]-[59]) a prior sexual relationship between an offender and complainant might, depending on the circumstances, be an important mitigating factor in determining sentence for an offence of sexual assault. This assault could not be equated to those involving strangers, which would be accompanied by extreme terror and fear. Macfarlan JA emphasised that he did not discount the seriousness nature of the offence of sexual assault, but viewed the offences committed by NM as falling well below the mid-range of seriousness for that offence.

Clearing of native vegetation - penalty not to be determined solely by quantum of land cleared

Walker Corp Pty Ltd was convicted of an offence of clearing native vegetation without consent or a property vegetation plan which carries a maximum penalty of $1,100,000: s 12, *Native Vegetation Act* 2003. The company was fined $200,000 and appealed on the basis that the penalty was excessive. In ***Walker Corp Pty Ltd v Director-General, Dept of Environment, Climate Change and Water*** **[2012] NSWCCA 210** McClellan CJ at CL reviewed the penalties imposed and the area of land cleared in a number of decisions which indicated that the penalty imposed was high. But his Honour found (at [98) that the sentencing judge was not in error in determining the seriousness of the offence. In assessing the seriousness of the offence, undue weight should not be placed on the quantum of land cleared. It was open to the sentencing judge to give significant weight to factors such as the moral culpability of the corporation, and the need to sentence for specific and general deterrence. The appeal was dismissed.

Dangerous driving occasioning death – application of Whyte guideline judgment in serious case

WW was a minor who hit and killed a cyclist when his car veered across to the wrong side of a straight country road. The sentencing judge found that at the time WW had lost concentration sending a text message. He also failed to stop after the incident. WW was aged 17 years 3 months, had twice previously been caught driving without a license and did not have a license at the time of the offence. For the offence of dangerous driving occasioning death, the judge imposed a sentence of 7 years, and a sentence of 2 years 9 months for failing to stop after occasioning death. The total accumulated sentence was 8 years with a non-parole period of 5 years. WW appealed.

In ***WW v R*** **[2012] NSWCCA 165** it was submitted that the sentencing judge had not had sufficient regard to the guideline judgment of *R v Whyte* [2002] NSWCCA 343 where a typical case of dangerous driving occasioning death, where the offender has high moral culpability, was said to generally warrant a sentence of no less than 3 years imprisonment. Hoeben JA dismissed the appeal and held (at [74]) that the judge had not erred in his approach to *Whyte.* The absence or presence of factors set out in *Whyte* do not have a mathematical value that reduces or increases the sentence to be imposed: *R v Berg* [2004] NSWCCA 300. Rather, the further outside the typical case, the less important the guideline judgment to the sentence.

Hoeben JA found (at [75]) that there were three factors that set the appellant's case apart from the "typical case". The appellant was not of good character, there was no plea of guilty, and while he showed some remorse it was not unqualified. Further, there was no reference to an upper limit for sentence in *Whyte.* Three years was the limit below which a sentence would not generally be appropriate in a typical case.

The appellant criticised the sentencing judge's finding that his culpability for the offence was high. But Hoeben JA rejected the submission. His previous convictions, not having a license and failing to stop (although basis for the second offence) were all relevant to his culpability. Texting while driving, a deliberate act that is highly dangerous, was also relevant. His Honour stated (at [81]) that, as many young people take this deliberate and

unnecessary risk, the trial judge was justified in placing particular importance on general deterrence in this case.

Error in assessing seriousness of car rebirthing offences

R v Tannous; R v Fahda; R v Dib **[2012] NSWCCA 243** was a Crown appeal against three sentences for car rebirthing offences on the ground of manifest inadequacy. The three respondents had each been in the business of buying repairable write-offs from others states, repairing and registering them in NSW, and then replacing the standard components with parts from other vehicles, some of which were later identified as having been stolen. All three received sentences of imprisonment of between 19 and 20 months, to be served by way of intensive correction in the community. The maximum penalty for each offence was 14 years imprisonment and carried a standard non-parole period of four years imprisonment. Basten JA found that the sentencing judge had erred in her assessment both of the subjective circumstances of the offenders, which were unremarkable, and the objective seriousness of the offence of car rebirthing. A judge sentencing for such offences must bear in mind the consequential effects of the activities, including facilitating the theft of vehicles and adverse public safety. The court re-sentenced the offenders to terms of imprisonment of between 20 and 24 months, to be served full-time.

SUMMING UP

When directions on "proper medical purpose" required in sexual assault trial

Zhu v R **[2013] NSWCCA 163** was an appeal involving a contention that a trial judge should have directed the jury that sexual intercourse is not established where penetration is carried out for proper medical purposes. Mr Zhu was a practitioner of traditional Chinese medicine, and the complainant was a patient who presented with a skin rash on her arms and lips. During the course of the examination, Mr Zhu inserted his finger into his patient's vagina twice. Hoeben CJ at CL and Fullerton and McCallum JJ agreed in separate judgments that the question of "proper medical purpose" did not arise on the evidence and no direction was required. Hoeben CJ at CL observed at [79] and [84], that though the fact that the issue was disclaimed at trial was not determinative, the appellant's case at trial was that the act in question had not occurred. No evidence at all was adduced at trial to the effect that the conduct was part of the practice of traditional Chinese medicine. Or, as McCallum J put it at [103], "the notion of there being a proper medical purpose for inserting a finger in SB's vagina when she presented for treatment of skin irritation around the eye and mouth…is frankly ridiculous."

Error in simplifying directions to jury on elements of offence

The appellant in ***RH v R*** **[2011] NSWCCA 98** was tried for offences of indecent assault and sexual intercourse without consent which were alleged to have occurred in the one incident. The Crown case was that the complainant was asleep when the appellant commenced the sexual activity, and when he awoke he immediately left the room. The defence case was that the appellant and complainant had engaged in consensual sexual activity over a number of hours, the complainant being at all times awake. Transcripts of

police interviews given by the appellant recorded his version that the complainant had got up to use the bathroom on three occasions, and was making noises consistent with sexual activity. The trial judge directed the jury with respect to the charge of sexual intercourse without consent:

> Consent must be voluntarily and consciously given. You cannot give consent to something if you are asleep, it is as simple as that and on the issue of whether or not the accused knew that he was not consenting, if you were satisfied beyond reasonable doubt that what [the complainant] said about him being asleep was both honest and accurate then you would be entitled to infer that the accused knew that he was not consenting, that he was not conscious and therefore not able to consent to what was happening and you are also on that issue entitled to take into account the way the case has been run.

About one hour after they retired, the jury sent a note to the trial judge asking for clarification of the elements of indecent assault, and specifically the consent element. The trial judge proposed to counsel that he would simply direct the jury that if they were satisfied that the version given by the complainant was honest and accurate, they would be satisfied that the appellant had committed an indecent assault. Despite defence counsel's protest that "it's not just an issue of whether they accept that the complainant was asleep but that that was known at the time to the accused", the trial judge gave his direction in the terms he originally outlined.

On appeal, the appellant argued that the trial judge ought to have given a direction that it was an element of indecent assault that the appellant knew that the complainant was not consenting. Davies J agreed. The simplification of the direction meant that the jury was precluded from acquitting the appellant if they found *his* evidence to also be accurate (presumably, in so far as it was consistent with the other party being asleep). The jury note indicated that they might well have been considering whether the appellant held a reasonable belief of consent, and should have been directed accordingly. A new trial was ordered.

Note: this case was decided before the High Court handed down ***Huyhn v The Queen*** **[2013] HCA 6; (2013) 87 ALJR 434**, where it was held at [31] that:

> The contention that it is an error of law for a trial judge to omit to instruct a jury on all of the elements of liability for an offence cannot stand with the many decisions of this Court affirming the statement of the responsibility of the trial judge in *Alford v Magee* [(1952) 85 CLR 437]. The duty is to decide what the real issues in the case are and to direct the jury on only so much of the law as they need to know to guide them to a decision on those issues.

The Court of Criminal Appeal was taken to *Alford v Magee* in *RH*, leaving the inference that they were of the view that, perhaps because of the combined effect of counsel's objection and the jury note, the issue of belief in consent was a "real issue".

Failure to give R v Mitchell *direction in a trial for child sex offences*

The appellant in ***RSS v R*** **[2013] NSWCCA 94** argued that his trial for child sexual assault offences had miscarried because the trial judge had failed to give a direction in accordance with *R v Mitchell* (NSW Court of Criminal Appeal, 5 April 1995, unreported) and *R v Mayberry* [2000] NSWCCA 531. That is, the trial judge had failed to warn the jury in

explicit terms against using the evidence of one complainant as proof of the guilt of the appellant of offences against another child.

Hall J rejected the appellant's argument. An *R v Mitchell* direction is necessary where the jury might assume, due to the way the evidence is led or the summing up is framed, that the evidence of one complainant was admissible towards the issue of the accused's guilt generally. But in the appellant's case, there was no such suggestion in either addresses or summing up. The summing up was carefully delivered and emphasised the caution to be exercised and the necessary standard of guilt in relation to each case. The issue of "cross-admissibility" was not raised at trial, and no *R v Mitchell* direction was sought. There was no error by the trial judge, in those circumstances, in failing to give a direction along those lines.

Specificity in directions on conduct that is said to illustrate admission of guilt

Mr Christian was charged with seven child sex offences allegedly committed against a complainant at various times when the complainant was between the ages of five and thirteen. The Crown sought to use a recorded conversation between the victim and Mr Christian where the latter had failed to unequivocally deny certain allegations as evidence of incriminating conduct. Mr Christian was convicted, and appealed on the ground, amongst others, that the trial judge had provided inadequate directions on the use the jury could make of the telephone call: ***Christian v R* [2012] NSWCCA 34**. McClellan CJ at CL held that the trial judge should have given more specific directions. In particular, he pointed out the ambiguity of the conversation in the context of the historical spread of the offences and the fact that Mr Christian and the complainant had had consensual adult sexual relations. The trial judge was required to direct the jury to consider particular parts of the conversation, in the context of the whole, in relation to specific charges on the indictment and to remind the jury of the available alternative explanations. The jury ought also have been warned against engaging in tendency reasoning when the evidence was not led for that purpose.

Unhelpful "gloss" in directions to jury

***Abbosh v R; Bene v R* [2011] NSWCCA 265** is another case where the Court of Criminal Appeal delivered an admonition in response to the use of poorly considered expressions in directions. The impugned directions related, in a trial for violent offences, to good character and self-defence. On the former, the trial judge had correctly outlined the use the jury could make of evidence of good character, but finished his direction with "an unhelpful anecdotal gloss" by referring to the notorious fall from grace of Allan Bond. Then, in relation to self-defence, the judge elaborated at the end of his standard directions:

> It does not arise unless there is a reasonable possibility of it happening in the way that the said it happened. And a reasonable possibility means a reasonable possibility, not a far flung chance, or perhaps it could have happened somehow or another.

This was submitted, on appeal, to be a misdirection on the necessary standard of proof. In the Court of Criminal Appeal, Johnson J held that the comments at the end of the standard directions were regrettable because they had the potential to distract the jury, but was not convinced that they did in this case. (The appeal was dismissed on the proviso.)

Directions concerning complainant not giving evidence at retrial

PGM (No 2) v R **[2012] NSWCCA 261** was an appeal from a retrial for a sexual assault. The complainant's recorded evidence from the first trial was played at the retrial, but she did not give evidence herself. The trial judge explained to the jury that procedural legislation (s 306C *Criminal Procedure Act 1986*) meant the complainant was not compellable to give evidence. The direction also contained a general, neutral description of the forensic disadvantage borne by each party as a result. The outline of the direction had been discussed and agreed with trial counsel. The direction became, in due course, a ground of appeal. McClellan CJ at CL held that there was no error in referring to the relevant legislation and the potential consequences for each party in a balanced and fair manner, as was done by the trial judge.

Comments made to jury indicating a different verdict on different counts would be "perverse" did not amount to a miscarriage of justice

Bilal Ahmed was charged with two offences: possessing a firearm and discharging the same firearm in a public place. The trial judge observed to the jury, "[y]ou can't fire a weapon unless you possess it", and other statements of that nature to indicate that it would be illogical to return different verdicts on both counts. Mr Ahmed appealed (***Ahmed v R*** **[2012] NSWCCA 260**) on the basis that those "directions" amounted to a substantial miscarriage of justice by purporting to prohibit the jury from coming to different verdicts on the different counts. Adamson J held that the relevant statements were observations, not directions. The statements were not only a legitimate observation on the facts before the jury, but also served to avoid a compromise verdict adverse to the appellant.