DISTRICT COURT OF NEW SOUTH WALES

ANNUAL CONFERENCE 2012

Court of Criminal Appeal Review

The Honourable Justice R A Hulme
Wednesday 11 April 2012

SCOPE OF THIS PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the past 12 months that may be relevant to the District Court, aside from matters concerning sentence.

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.

EVIDENCE

"Body mapping" evidence – admissibility

In ***Morgan v R*** **[2011] NSWCCA 257** the prosecution sought to rely upon the evidence of a "biological anthropologist and anatomist", Dr Maciej Henneberg. Through a process he described as a "morphological approach to anatomical examination" he expressed the opinion that "there is a high level of anatomical similarity between the offender [depicted in CCTV images] and the suspect". The trial judge admitted the evidence over objection and after a voir dire in which the defence called 3 experts who were critical of Dr Henneberg's approach. It was held on appeal that the doctor's comparison of the images was a task which the jury could have undertaken for themselves. The opinion evidence was dressed up in technical jargon but when stripped of this it was simplistic. Hidden J concluded on the subject by saying that "it tended to cloak evidence of similarity in a mantle of expertise, described by Mr Stratton [SC] as a 'white coat effect', which it did not deserve".

Compellability of a parent to give evidence against their child

In ***LS v Director of Public Prosecutions (DPP) (NSW)*** **[2011] NSWSC 1016,** a 15 year old boy was charged with having damaged household property belonging to his mother during the course of an argument. The charges were heard in the Children's Court. The mother applied to be excused from being required to give evidence for the prosecution pursuant to s 18 of the *Evidence Act* 1995, to which the prosecutor objected. The prosecutor contended that section 19 applied as an exception to s 18 because the offence fell within the definition of a domestic violence offence under the *Crimes (Domestic and Personal Violence) Act* 2007. Section 19 provides that, inter alia, the exception to compellability in s 18 does not apply to proceedings for an offence against or referred to in, inter alia, s 279 of the *Criminal Procedure Act* 1986 (the provision is headed "Compellability of spouses to give evidence in certain proceedings"). Subsection 279(1)(b) makes reference to domestic violence offences.

The magistrate accepted the prosecutor's submission and ruled that it was not open to the mother to object to being required to give evidence.

On appeal, Johnson J quashed the magistrate's ruling. His Honour held (at [54] and following) that the reference in s 19 of the *Evidence Act* 1995 to s 279 of the *Criminal Procedure Act* 1986 is a reference to a domestic violence offence committed by a spouse, and not a domestic violence offence generally within the meaning of the *Crimes (Domestic and Personal Violence) Act* 2007.

Identification parades

Visual identification evidence is inadmissible pursuant to s 114 of the *Evidence Act* 1995 unless any of the circumstances in s 114(2)(a), (b) or (c) are met, and the identification was made without the person having been intentionally influenced to do so. In ***Director of Public Prosecutions (DPP) (NSW) v Walford*** **[2011] NSWSC 759**, the circumstances were that the defendant was charged with knowingly contravening an AVO that had been issued three months earlier in relation to allegations of an assault. The complainant gave evidence that she had not known the appellant before the occasion of the alleged assault but had seen him subsequently, and then identified him as the person she saw approaching her home. The evidence was objected to, and evidence was called from a police officer who said that no identification parade had been conducted as the complainant knew who the offender was. The magistrate excluded the evidence on the basis that no identification parade had been held.

On appeal, Davies J held that the magistrate had erred in excluding the evidence. Reference was made to the complainant having made an identification, to police, of the defendant around the time of the alleged commission of the offence. His Honour held that, consequently, it would not have been reasonable to hold an identification parade (a reference to the exception at s 114(2)(b)): [23] and [46].

Search warrants and s 138 of the Evidence Act 1995

The prosecution of the accused in ***R v Sibraa*** **[2012] NSWCCA 19** for child pornography style offences depended upon materials seized when his home was searched pursuant to a search warrant. The search warrant turned out to be invalid because the issuing magistrate had neglected to date it. The trial judge excluded the evidence pursuant to s 138 of the *Evidence Act* 1995. He was critical of the police officers involved in the search for failing to satisfy themselves that the warrant was valid. He regarded their conduct as "reckless". The prosecution appealed.

It was held by R S Hulme J ([18] – [26]) that the judge's findings in relation to the officers were erroneous. It was the purported execution of an invalid warrant that constituted the impropriety, not the failure of the officers to check it. It was not insignificant that the origin of the impropriety was the accidental omission of the issuing magistrate. Had the omission been detected, it could easily have been rectified. But for the defect in the warrant, the intrusion into the respondent's home would have been legal. There was no deliberate or conscious undertaking of a risk by the officers. It was not necessarily unreasonable for the officers to expect that the magistrate would have carried out the simple task of signing, sealing and dating the warrant without the need for any oversight. It was unrealistic to expect that each of the police officers involved in the search should have checked to ensure that all "i"s have been dotted and "t"s crossed as some of the trial judge's remarks suggest. The finding of "recklessness" was unwarranted.

Silence in the face of an allegation of child sexual assault

The appellant in ***Mark McKey v Regina*** **[2012] NSWCCA 1** was found guilty of a child sexual assault offence. The complainant was the younger sister of a woman (KN) who was about to marry the appellant's good friend (N). The complainant disclosed the offence to KN who repeated it to N. That night, KN tried to call the appellant but was unsuccessful. A few days later, the appellant rang N who said, *"we've been given some information about a few days before our wedding that involved [the complainant]"*. The appellant said he was driving but would call N soon. He did not. In the ensuing days, KN sent the appellant some text messages but he did not reply. N gave evidence that he had sent a text message to the appellant saying *"I want to know both sides of the story"*. About a month later the appellant sent a text in which he said that they (N and KN) would not believe him and would only believe the complainant. There was no further contact.

The appellant gave evidence that he became aware of the allegation when he received the call from KN. He claimed that he had said, *"I don't know what you're talking about"* before the call dropped out. He agreed that he received some text messages but had been advised by his sister, who was a police officer, and a friend that he should not respond or do anything about the damage to his reputation in the country town in which the events occurred.

The Crown Prosecutor suggested in cross-examination that if the allegations were untrue, the appellant would have wanted to protest his innocence "long and loud". It was suggested that he did not do so because the allegations were in fact true. The prosecutor put to the jury in address that they might think that the appellant would be "protesting his innocence from the rooftops" if the allegations were untrue. Defence

counsel put alternative arguments. The trial judge simply reminded the jury of the competing submissions and said that it was a matter for them to evaluate.

It was contended on appeal that the Crown had invited the jury to infer that the appellant's silence was because of consciousness of guilt and the trial judge had erred by failing to properly deal with this issue. The Crown submitted that the issue was only relevant to credibility and this is how the prosecutor had approached the issue at trial.

It was held by Latham J (at [31] – [44]) that the cross-examination had invited consciousness of guilt reasoning. At the very least, there should have been a direction as to the care with which the jury should approach such an issue before drawing an inference adverse to the appellant. There was the obvious alternative inference that his silence was not as a result of consciousness of guilt but was because he was acting on the advice of his sister and his friend that he should not respond to the allegations.

OFFENCES

Causing another person to take a poison or other destructive or noxious thing so as to endanger life – meaning of "cause to be taken"

Two of the offences for which the appellant in ***Riley v R*** **[2011] NSWCCA 238** was convicted were against s 39 *Crimes Act* 1900. (The terms of the offence were recast in 2008 but the concept of causing another person to take remains). The allegation was that the appellant had provided prescription drugs to the victims which had dangerous effects when they were taken in combination. There was also a manslaughter charge in relation to another victim which also required consideration of the concept of "cause to be taken". The trial judge directed the jury that the victim must have been "substantially influenced" by the accused in taking the substances. This was held to have been erroneous. The reasoning of Howie J in *R v Wilhelm* [2010] NSWSC 334 (2010) 200 A Crim R 413 was accepted as being correct. That is, there is a difference between a person being in a position of influence over a person and a person influencing the other person. "Cause to be taken" is to cover a situation where a person in authority over another (e.g. an adult over a child) orders, commands, or directs the other person to take the substance.

Conspiracy – underlying agreement formed before the period alleged in the indictment

The accused in ***Agius v R; Abibadra v R; Jandagi v R; Zerafa v R*** **[2011] NSWCCA 119** were charged with two counts of conspiracy. The conspiracy in count 1 was said to

have existed from 1 January 1997 to about 23 May 2001 whilst the conspiracy in count 2 was said to have existed from 24 May 2001 to about 10 April 2008. The trial judge refused an application for a permanent stay of count 2 upon a contention that it was foredoomed to fail because the agreement was alleged to have been entered before the dates specified in the indictment. An appeal was brought under s 5F of the *Criminal Appeal Act* 1912. Johnson J agreed (at [62]) with the observations of the trial judge as to the nature of conspiracy being a "continuing offence" such that the offence depends upon the existence of, or participation in, an agreement, and not the precise timing of its formation.

There was also discussion of the differences between the common law offence of conspiracy and s 11.5 of the *Criminal Code* 1995 (Cth). Counsel for the accused argued that the provision had the effect such that it was necessary for the Crown to establish that the agreement was entered into after the date of its commencement. Johnson J observed that "the only presently relevant alteration to the common law [by the provision enacted in the *Criminal Code* 1995 (Cth)] is that effected by s 135.4(9)(c), which requires proof of the commission of an overt act pursuant to an agreement". His Honour concluded [(at 74)] that to suggest that an agreement entered into before the commencement of the provision, but that then continued thereafter, could not be prosecuted because the conspirators failed to renew their agreement would lead to a highly artificial and absurd result.

Entering inclosed lands without consent of the owner and without lawful excuse

In ***Director of Public Prosecutions (DPP) (NSW) v Strang*** **[2011] NSWSC 259**, the accused was notified that he was prohibited from entering any Best & Less store due to some unspecified inappropriate behaviour. He was later found to have entered a Best & Less store that was located within a shopping mall. At the conclusion of the Crown case, a magistrate held that there was no prima facie case. The issue on appeal was whether the premises were "inclosed lands" under the definition in s 3 of the *Inclosed Lands Protection Act* 1901. Johnson J held that while the premises did not fall within the meaning of "prescribed premises" in s 3(a), they were within the more general description in s 3(b). His Honour applied an expansive construction of the definition and found (at [64]) that the definition of inclosed lands does not purport to exclude commercial or retail premises; nor does it purport to exclude premises which are contained within a larger building such as a commercial shopping centre or complex; nor does it require that the boundaries exclude members of the public. The appeal was allowed and the matter remitted.

Perverting the course of justice

The accused in ***Regina v OM*** **[2011] NSWCCA 109** was charged with offences concerned with the damaging of property as well as two offences of doing an act with the intention of perverting the course of justice (s 319 of the *Crimes Act* 1900). When police were investigating the former offences, it was alleged that the accused had asked two people to give false evidence to the investigators. The accused sought an advance ruling pursuant to s 192A of the *Evidence Act* 1995 that the evidence was incapable of establishing a prima facie case. The judge, in effect, agreed with that contention. The Crown appealed.

The Court was compelled to dismiss the appeal for lack of jurisdiction (because the trial judge had not in fact made an advance ruling, or any order amenable to appeal). Nevertheless, Whealy JA held that the trial judge had made a clear and substantial error in relation to the scope of s 319. His Honour referred to the decisions of *Einfeld v R* (2008) 71 NSWLR 31 and *The Queen v Rogerson* (1992) 174 CLR 268 and observed that whilst the scope of the offence under s 319 had not been enlarged beyond the common law concept, neither had it been diminished.

> [49] In other words, if the Crown, in the present matter, could establish that the respondent's actions were intended to deflect the police from prosecuting him for the criminal offence that he had allegedly committed, or from adducing evidence of the true facts relating to the alleged offence, the prosecution was clearly capable of being maintained. The fact that no judicial proceedings had been commenced at the time when the respondent spoke to Ms Ullah and Mr Sundarjee, did not preclude the finding of a prima facie case. …

Possession of a prohibited weapon – mental element

The DPP appealed to the Common Law Division of the Supreme Court against a magistrate's dismissal of a charge of possessing a prohibited weapon, namely a flick knife, contrary to s 7(1) of the *Weapons Prohibition Act* 1998: ***DPP (NSW) v Fairbanks*** **[2012] NSWSC 150**. The defendant was found to have the flick knife in a backpack when he attended an airport to catch a flight. He knew that he owned a flick knife but had packed hurriedly when his travel plans were changed at short notice and he had forgotten that it was in the backpack. That explanation was accepted.

"Possession of a prohibited weapon" is defined in s 4(1) to include any case in which a person knowingly (a) has custody of the weapon, or (b) has the weapon in the custody of another person, or (c) has the weapon in or on any premises, place, vehicle, vessel or aircraft, whether or not belonging to or occupied by the person.

Rothman J referred to *He Kaw Teh v The Queen* (1985) 157 CLR 523 for the proposition that knowledge of the accused is necessary in proof of possession; although the *Weapons Prohibition Act* definition itself has that requirement by the use of "knowingly". In this case, the defendant knew that he owned and possessed the knife; albeit that he did not know that it was in his bag at the airport. His Honour also referred to *R v Martindale* [1986] 3 All ER 25 which held that possession does not depend upon the alleged possessor's powers of memory and nor does possession come and go as memory revives or fails. It was observed that if that were the case, a person with a poor memory would be acquitted whereas the person with a good memory would be convicted. Here, the defendant was knowingly in possession of the weapon, even if he thought that the weapon was at home and not in his bag at the airport. The magistrate had wrongly applied a test that required the prosecutor to prove that the defendant knew that the knife was in the bag.

Unauthorised access to a computer system

In ***Salter v Director of Public Prosecutions (DPP) (NSW)*** **[2011] NSWCA 190**, the appellant, a police officer, accessed the "COPS" police computer system for personal reasons. He was convicted of multiple offences of unauthorised access to restricted data held in a computer under s 308H of the *Crimes Act* 1900. On appeal, it was submitted that s 308B(2) provides a statutory defence to persons who are authorised to access a computer system but do so for an ulterior motive. The appellant referred to the wording of the provision and to rules of statutory interpretation relevant to construing its meaning. The Court of Appeal rejected the submission and dismissed the appeal. McClellan CJ at CL held (at [19]) that the object of the provision is to protect an officer who has a legitimate entitlement to access particular data, but who may also have an ulterior motive. This was distinguished (at [24]) from the case at hand, where the applicant's conduct was found to have had no relationship with the exercise of any function she performed on behalf of the police.

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.

POLICE POWERS

Exercise of a police officer's powers of arrest

Section 99 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 provides for the power of police officers to arrest without warrant. Section 99(2) provides a general power to arrest without warrant if an officer suspects on reasonable grounds that a person has committed an offence, while s 99(3) provides that a police officer must not arrest a person unless the officer suspects on reasonable grounds that it is necessary to achieve one or more of the purposes set out in (a) – (f). In ***Williams, Robert Lee Anthony v Director of Public Prosecutions (NSW)* [2011] NSWSC 1085**, the issue arose as to whether a magistrate, in considering the question of whether police officers had acted in the execution of their duty when arresting a man without a warrant for a shoplifting offence allegedly committed three weeks earlier, was required to have regard to s 99(3). It raised the question as to the interplay between ss 99(2) and 99(3). Associate Justice Harrison held (at [23]) that s 99(3) restricts the circumstances in which the power under s 99(2) may be exercised. Consequently, the magistrate erred in failing to apply s 99(3) when determining the whether the police officers had acted in the execution of their duty.

PRACTICE AND PROCEDURE

Judge-alone trial - extent to which a trial judge can ask questions of witnesses

In ***FB v Regina; Regina v FB* [2011] NSWCCA 217**, there was a ground of appeal concerned with the trial judge's questioning of certain witnesses, which the appellant contended was excessive; at times inappropriate in that they bolstered the prosecution's case; and created a real danger that the trial was unfair. Whealy JA rejected the ground, finding (at [110]) that the trial judge's interventions were "moderate, balanced, necessary and proper in every respect". His Honour observed:

> [90] Most of the authorities which underline the caution to be properly exercised by the trial judge during a criminal trial relate to trials where there is a jury. On the other hand, as might be expected, there are cases that recognise the greater latitude to be afforded to the questions asked by a trial judge in the context of a civil trial. … In view of the statutory framework now

> surrounding criminal trials in New South Wales, it may be appropriate to restate the accepted principles, but with particular emphasis on the fact that it may be expected that henceforth more criminal trials will be conducted without the benefit of a jury. This may underline the proposition that, in appropriate circumstances, a judge sitting on a criminal trial without a jury will be entitled, within reasonable limits, to explore issues of fact with both Crown and defence witnesses.

Judgments - failure to give reasons in respect of a separate trial application

In ***Madubuko v R*** **[2011] NSWCCA 135**, the appellant was tried with two co-accused in relation to the importation of border-controlled drugs. Evidence of a police interview of one of the co-accused was admitted (with directions that it was only admissible in respect of that co-accused). Following the admission of the evidence against the other co-accused (with his consent), the appellant applied for a separate trial but was refused. The trial judge indicated that reasons would be published later but they never were. The appellant appealed against the trial judge's failure to give reasons. Hodgson JA held that while the failure to give reasons generally constitutes an error of law, it does not necessarily require that an appeal be upheld. For that to be the case there needed to be "such a fundamental procedural irregularity… to warrant the setting aside the appellant's convictions" (at [24], citing *Evans v R* [2006] NSWCCA 277 at [272]). In this case, the Court could determine for itself whether the decision was correct. It was.

Multiplicity of charges – whether oppressive

In *Salter v Director of Public Prosecutions (DPP) (NSW)* [2011] NSWCA 190, the appellant was charged with 22 offences. These were alleged to have occurred over an 11 minute period as the police officer viewed 22 screens of different data accessed on the COPS database. It was contended that charging 22 offences amounted to an abuse of process in that it was oppressive for the appellant to have a criminal record containing 22 convictions when only one offence could have been charged. McClellan CJ at CL held that charging 22 offences was not unfair in the circumstances. Rather, his Honour was of the view (at [29]) that it identified with precision the criminal acts asserted by the Crown.

Permanent stay of proceedings because delay caused difficulties for accused in obtaining evidence

The accused in ***RM v R*** **[2012] NSWCCA 35** was refused a permanent stay of a special hearing. It was alleged that he had committed child sexual assault offences between

1989 and 1992 when he was aged between 18 and 21. The matter was not reported to authorities until 2009. An issue in the special hearing was whether, at the time the offences were alleged to have occurred, he knew right from wrong. In this respect, he bore the onus of proof. He sought a stay of proceedings because of the loss of evidence and witnesses in relation to this issue. The trial judge refused to grant the stay and M appealed.

The appeal was allowed but on the limited basis that the trial judge appeared not to have considered the application in the context of M having lost evidence on an issue for which he bore the onus of proof. There was otherwise no error in the trial judge's assessment of the application insofar as it concerned the loss of evidence relating to the question as to whether the offences had been committed where the Crown bore the onus of proof. In the latter situation, a trial judge can give directions or warnings against the use of evidence or point to the danger, due to unacceptable delay, of a finding adverse to the accused. The Court remitted the matter for the trial judge to further consider.

SUMMING UP

Alternative verdict – when to leave to the jury

The accused in ***Carney v R; Cambey v R*** **[2011] NSWCCA 223** were alleged to have murdered a drug dealer. The Crown case was based upon admissions that they had made to others. In essence, it was that the accused had gone to the deceased's home with a view to assaulting him and robbing him of cannabis. He was struck with a metal bar and sustained head injuries that caused his death. The Crown was unable to say which accused did what, and the case went to the jury on the basis that each accused either caused the injuries or was an aider and abettor. The defence case for each accused was that he was not present at the scene at all. Manslaughter was not left the jury as an alternative. The trial judge was not asked to do so.

On appeal it was contended that manslaughter should have been left if it was "open" on the evidence, that is, whether a case of manslaughter was "viable". Here, striking the deceased over the head with a metal bar was clearly an unlawful and dangerous act. The Crown argued that there was "no viable case of manslaughter reasonably open" which could have been left to the jury. It was not "plainly open" on the evidence and this was reflected in the manner in which the trial was conducted. As can be seen, the difference between the Crown and the appellants was whether the test was "open on the evidence" or "reasonably open on the evidence".

In a joint judgment, Whealy JA, James and Hoeben JJ resolved this difference by drawing from what had been said by the High Court in *Gillard v R* [2003] HCA 64; 219 CLR 1:

> [25] The expression "a viable case of manslaughter to be left to the jury" (as stated by Gleeson CJ and Callinan J) is a useful shorthand expression expressing the correct approach to be taken. Similarly, the question is often asked "was manslaughter open to be left". That too is a useful shorthand manner of approaching the issue. While we consider that the correct position is more akin to that urged by the Crown on the present appeal, namely whether a verdict of manslaughter was "reasonably open" on the evidence, we would prefer to state the proper approach (based on Hayne J's statement) in the following terms:-
>
> > A viable case of manslaughter means that it was open on the evidence led at trial for the jury to conclude that the appellant was not guilty of murder but was guilty of the alternative charge of manslaughter.

Their Honours were of the view that the approach advocated by the appellants was "perhaps too wide" in that it would mean that in virtually every case of murder, manslaughter should be left.

The judgment then proceeded to an examination of the evidence in the trial. Their Honours concluded (at [66]) that "it was reasonably open on the evidence led at trial for the jury to conclude that each man was not guilty of murder, but was guilty of the alternative charge of manslaughter". A retrial was ordered.

Alternative verdicts – raised for the first time by the judge in summing up

In ***Sheen v R* [2011] NSWCCA 259**, the appellant was charged with break, enter and steal in circumstances of aggravation (armed with a knife). The possibility of the jury returning a verdict for break, enter and steal (unaggravated) was raised for the first time by the trial judge in his summing up. There was a possibility that the jury might not have accepted evidence relied upon by the Crown as to the appellant having been armed. The jury returned a guilty verdict on the alternative. Despite there having been no objection by the appellant's counsel at trial, it was contended on appeal that there had been unfairness. Johnson J surveyed authorities on the question of leaving alternative verdicts. Some of them referred to it being unwise for a trial judge to introduce the possibility of such a verdict on his/her own initiative. He concluded, however, that the test was whether there had been "practical unfairness" and held that there had not been in the circumstances of this case. His Honour specifically declined, however, to endorse what the approach taken by the trial judge.

Grievous bodily harm – recklessly inflicting - directions as to mental element

In ***Blackwell v Regina*** **[2011] NSWCCA 93**, the appellant was charged with the offence of maliciously inflicting grievous bodily harm with intent (s 33 *Crimes Act* 1900). It was open to the jury to convict of the alternative offence in s 35. Shortly prior to the offence having allegedly occurred, s 35 had been amended. The offence of malicious wounding or maliciously inflicting grievous bodily harm was replaced with reckless wounding or recklessly inflicting grievous bodily harm. Notwithstanding the amendment, the earlier form of the s 35 offence was presented to the jury as the alternative. The jury convicted the appellant of the primary count.

The issue on appeal was whether there was a miscarriage of justice because the jury had been directed on the wrong alternative count. The Court was required to examine whether the mental element for the new offence under s 35 was the same as for the repealed offence. Beazley JA held (at [82]) that the mental element for "reckless grievous bodily harm" does not involve foresight of the possibility of "some physical harm" but rather, foresight of the possibility of *grievous bodily harm*.

The Court allowed the appeal and order a new trial, endorsing the observation of Callinan J in *Gilbert v The Queen* [2000] HCA 15; (2000) 201 CLR 414 that "where there is a choice of decisions to be made [in this case, for the jury], the choice actually made will be affected by the choices offered" and accepted that there had been a denial of procedural fairness "of a significant kind".

Hansard records that when the *Crimes Amendment Act* 2007, which brought about, inter alia, the removal of "maliciously" from the principal Act, was introduced in the Legislative Assembly, it was said that, "It is not intended that the elements of any offence, or the facts that the prosecution needs to establish to prove the offence, will change substantially." The decision in *Blackwell* demonstrates that the amendments had an unforeseen and unintended consequence. The offence in s 35 previously only required proof of foresight of *some* harm.

Intoxication – some evidence but no error in trial judge not leaving the issue to the jury

The offender in ***Sullivan v R*** [2012] NSWCCA 41 was found guilty of murder. He said in his evidence that he had consumed illicit drugs on the day of the offence and that he was "cruising, just out of it, whacked". The trial judge directed the jury to take this into account on the issue of self-defence but did not direct that it was relevant to whether the Crown had proved the necessary intent. Blanch J (at [22] – [32]) reviewed authorities concerning intoxication and its relevance to specific intent. He referred to the obligation of a trial judge to alert the jury to all relevant legal considerations, even if the defence does not rely upon them. However, he concluded that in this case there

was such minimal and imprecise evidence on the issue that there was no error in the judge not having left it to the jury.

Majority verdicts

In the Criminal Trials Bench Book, the suggested direction in relation to the need for a jury verdict to be unanimous includes mention of the law providing in certain circumstances, which may not arise, for the judge to accept a majority verdict. Where it becomes necessary for the judge to give a *Black* direction (*Black v R* (1993) 179 CLR 44 - to persevere when the jury indicate that it cannot reach a verdict) the suggested direction includes that "the circumstances in which I may take a verdict which is not unanimous have not yet arisen and may not arise at all" and an exhortation to reach a unanimous verdict.

There have been a number of cases dealing with this issue in recent years. In *RJS v R* [2007] NSWCCA 241; 173 A Crim R 100 and *Hanna v Regina* [2008] NSWCCA 173; (2008) 191 A Crim R 302, error was found in the trial judge giving an indication to the jury as to the time at which a majority verdict could be accepted. In *Ngati v R* [2008] NSWCCA 3, directions were given in accordance with the Bench Book, which did not give any indication that a majority verdict would be accepted within a certain time. The issue in each case was whether anything was said which undermined the effect of the *Black* direction.

In *Doklu v R* [2010] NSWCCA 309**,** the trial judge gave a direction in accordance with the Bench Book suggestion. After the jury had been deliberating for six hours a note was received to the effect that a unanimous verdict could not be reached. The judge reiterated to the jury that the circumstances in which a majority verdict could be taken had not yet arisen and that their verdicts must be unanimous. She then proceeded to give the jury a direction in accordance with *Black v R* (1993) 179 CLR 44. The preconditions in s 55F(2) of the *Jury Act* 1977 for receiving a majority verdict had not at that stage been met. Later, when those preconditions were met, and the jury were told they could return a majority verdict, they did so.

On appeal it was contended that the trial judge had erred by telling the jury of the possibility that a majority verdict was an option before the time at which such a verdict could be accepted. Macfarlan JA held that there was no undermining of the *Black* direction. There was no lessening of the encouragement given to the jury to reach a unanimous verdict. He did, however, indicate (at [79]) his view that "it is better not to mention the possibility unless there is a reason to do so".

In *Ingham v R* [2011] NSWCCA 88, the trial judge made reference in Bench Book terms to majority verdicts in the summing up and again in the course of giving a *Black*

direction. The contention on appeal was confined to the reference in the latter. McClellan CJ at CL held (at [84] – [85]) that the trial judge's direction was in terms almost identical to those in *Ngati*. He noted that in contrast to *RJS v R* and *Hanna v Regina*, there had been no reference to the time or circumstances in which a majority verdict might become acceptable. For this reason there was no undermining of the effect of the direction to persevere in striving for a unanimous verdict.

In a joint judgment in ***Hunt v R*** **[2011] NSWCCA 152**, Tobias AJA, Johnson and Hall JJ held that the trial judge had undermined the effect of the *Black* direction. The jury had indicated that they were deadlocked well before the time at which acceptance of a majority verdict could be considered. In answer to a question from the judge, there was an indication that there was a possibility of a majority verdict. The judge told them that the circumstances in which he could accept such a verdict had not yet arisen. A short time later the jury sent a note indicating that they still could not reach a unanimous verdict but could return an 11/1 verdict. The jury returned to court and were told that such a verdict could not be accepted for another 1 hour 50 minutes. They were directed to return to the jury room and, in effect, wait for that period. 1 hour 55 minutes later, a majority verdict was returned.

For a thorough examination of the issues and the authorities on this topic, it is respectfully suggested that recourse should be had to the judgment of McClellan CJ at CL in *Ingham v R*.

Whether witnesses have an interest in the subject matter of their evidence

In ***Hargraves and Stoten v The Queen*** **[2011] HCA 44**, the appellants were charged with offences involving tax avoidance schemes and the only issue in dispute was whether they acted dishonestly. Both gave evidence at trial. The trial judge directed the jury as to how to assess the credibility of a witness, referring to whether they had an interest in the subject matter of the evidence, citing as examples "friendship, self protection, protection of the witness' own ego". On appeal to the Queensland Court of Appeal, it was held that the trial judge had misdirected the jury about how to assess the evidence of each accused, but dismissed the appeal on the basis that no substantial miscarriage of just transpired.

The High Court of Australia dismissed the appeal but held that the trial judge had not misdirected the jury, overturning the finding of the Queensland Court of Appeal. The Court considered its earlier decision in *Robinson v The Queen* (1991) 180 CLR 531, principally whether it created a new or a pre-existing principle. The plurality held that the principal in *Robinson* formed part of a broader over-arching principle relating to a trial judge's instructions, namely that "[t]he instructions which a trial judge gives to a jury must not, whether by way of legal direction or judicial comment on the facts,

deflect the jury from its fundamental task of deciding whether the prosecution has proved the elements of the charged offence beyond reasonable doubt": at [45]. The plurality went on to find that the trial judge's directions, as a whole, did not do so.

Unbalanced summing up

In ***Abdel-Hardy v R*** **[2011] NSWCCA 196**, the appellant was convicted of causing another to take a stupefying drug with attempt to commit an indictable offence, and indecent assault. The appellant contended that in dealing with the defence case, the trial judge presented an unbalanced account of the respective cases in favour of the Crown. The Court agreed and allowed the appeal, Adams and Fullerton J finding (at [140] – [141]) that the trial judge had undermined the defence case by, inter alia, subjecting many of defence counsel's submissions to adverse comment and putting arguments to counter them. It was held that there had been an impermissible undermining of the defence case. The jury were likely to have formed a powerful impression concerning the weakness of the defence case and the opinion of the judge as to its insubstantial character.

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