SUPREME COURT OF NEW SOUTH WALES 2012 ANNUAL CONFERENCE

Criminal Law Update

The Honourable Justice R A Hulme

Date: 8 September 2012

CONTENTS

SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning legislative activity and the range of issues that have been considered in appellate criminal decisions in the past 12 months.

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.

APPEALS

Approach on sentence appeal different to that taken before sentencing judge

***BT v R* [2012] NSWCCA** 128 involved an appeal against sentence in respect of a number of sexual offences, in part, on the ground that the sentence imposed for count 2 was manifestly excessive. It was submitted that the judge had not adequately accounted for the effect of the applicant's mental illness. But the submissions made were substantially different from those raised before the sentencing judge. Counsel had conceded in the District Court that there was no causal relationship between mental illness and the offence whereas on appeal an attempt was made to pursue such a finding. Dismissing the appeal, Adamson J stated, "An appeal to the [Court of Criminal Appeal] is not an opportunity to recast the case presented to the sentencing judge." Her Honour referred to *Zreika v R* [2012] NSWCCA 44 where the Court said at [81]:

> The Court will not lightly entertain arguments that could have been put, but were not advanced on the plea, and will have an even greater reluctance to entertain arguments that seek to resile from concessions made below or are a contradiction of submissions previously made.

Establishing jurisdictional error on the part of an inferior court

A defendant sought a costs order pursuant to ss 212-214 of the *Criminal Procedure Act* 1986 after charges brought against him were dismissed. However, the magistrate refused to make the order. Relief was sought pursuant to s 69 of the *Supreme Court Act* 1970 on the basis that the magistrate had fallen into jurisdictional error or error of law on the face of the record: ***O'Brien v Hutchinson* [2012] NSWSC 429**. In determining the appeal, Beech-Jones J discussed (at [4]-[14]) the matters relating to jurisdictional error on the part of an inferior court. His Honour referred to a relevant conception of jurisdictional error set out in *Craig v State of South Australia* [1995] HCA 58:

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that a jurisdiction does exist.

Under the *Criminal Procedure Act*, the power of a Court to issue a costs order pursuant to s 213(1) is limited to circumstances where the Court is satisfied of any of the conditions in s 214(1)(a) to (d). Beech-Jones J stated (at [7]) that the Court would fall into jurisdictional error if it misapprehended the limits placed on it by s 214.

In determining this, his Honour stated that six matters should be kept in mind (at [8]-[14]). First, it must be established that the Court below "misapprehended" the limits of its power

under s 214, not merely argued that the case in question sat beyond those limits. Second, matters of opinion in s 214, such as whether an investigation was "unreasonable", are not easily susceptible to errors of law. Third, errors may be found on the face of the record, in structure of the reasons, or in a disparity between those reasons and the Court's conclusion. However, where a finding of error relies on the phrases or terms of "common understanding" in s 214, it will be necessary to show that no other conclusion other than jurisdictional error is reasonably open. Fourth, that a Court failed to take account of a relevant matter, or relied on an irrelevant matter, will not in itself ordinarily establish jurisdictional error. Fifth, this may however constitute an error of law on the face of the record, so long as the "matter" was required to be considered (or prohibited from being so) as a matter of law. Sixth, his Honour reiterated the principle that the transcript of a Local Court's reasons are not to be read strictly,; rather, the substance of the reasons should be examined to determine whether the correct test was applied.

Procedure concerning stated cases from the District Court

In ***Lavorato v Regina*** **[2012] NSWCCA 61**, the secretary-manager of a registered club was convicted of three offences against the *Liquor Act* 2007. On 25 August 2010 he was unsuccessful in appealing to the District Court. He had sought dismissal without conviction pursuant to s 10 *Crimes (Sentencing Procedure) Act* 1999. He then requested the judge state a case pursuant to s 5B of the *Criminal Appeal Act* 1912, which requires that questions of law be submitted to the Court of Criminal Appeal within 28 days of the conclusion of the District Court proceedings. However, the stated case was not submitted until 2 June 2011 and it was necessary for an extension of time to be sought. Basten JA (at [20]) identified a number of factors to support an extension of time, including a lack of prejudice to the DPP, delay in receiving the transcript, that the District Court incorrectly required the parties submit objections and responses, the judge's decision to list the request for a stated case, and the judge's decision to make a preliminary assessment of the legal issues. Against the making the order to extend time was the failure to act promptly by the applicant, the DPP and the Court itself, contrary to the requirements of s 5B culminating in an unjustifiable delay. However, as all parties were at fault the extension was granted.

Schmidt J noted (at [68]-[70]) that there are difficulties with the stated case procedure that led to the issues arising in *Lavorato*. While the process is well established, it is complicated to implement and creates difficulties for the parties and the courts dealing with a request. Under the Act, the Court of Criminal Appeal cannot consider matters beyond the stated case, making it a burdensome process for the court below to make an adequate stated case. Her Honour pointed out (at [73]) that when materials, in this case the transcript, are not available delay inevitably follows. Schmidt J identified (at [74])the s 5B procedure as one that "could profitably receive the consideration of the legislature or perhaps the Law Reform Commission".

Crown appeals and the prospect of creating disparity

In *R v Green and Quinn* [2010] NSWCCA 313, Green, Quinn and Taylor were sentenced in relation to a cannabis cultivation offence. The sentencing judge had assessed the sentences for Green and Quinn with reference to that which had been earlier imposed upon Taylor who was referred to as having played a lesser, but nevertheless significant, role in the enterprise. The Crown appealed against the sentences imposed upon Green and Quinn but not in relation to the sentence imposed upon Taylor. The Court of Criminal Appeal (a five judge bench), by

majority, regarded the sentence imposed upon Taylor as manifestly inadequate, notwithstanding it was unchallenged. It increased the sentences for Green and Quinn despite this disturbing the relativity of their sentences with that of Taylor's.

Green v The Queen; Quinn v The Queen **[2011] HCA 49**: A majority in the High Court of Australia (French CJ, Crennan and Kiefel JJ) allowed the appeals. It was held that the Court of Criminal Appeal had failed to give adequate weight to the purpose of Crown appeals and the importance of the principle of parity. It had also erred on allowing the appeals, in part, on a basis that had not been raised at the hearing. It was not the case that a court must always dismiss a Crown appeal where intervention would give rise to disparity, but this is a powerful consideration enlivening the residual discretion of the court.

BAIL

A condition of bail requiring a person to submit to an alcohol breath test when requested by a police officer is unlawful

The plaintiff in ***Lawson v Dunlevy*** **[2012] NSWSC 48** had as a condition of his bail that he was "not to consume alcohol for any reason, and is to submit to a breath test when requested by a police officer." Garling J declared (at [48]) that the condition was not supported by the *Bail Act* 1978 and was unlawful. The Act provides that bail should be granted unconditionally, unless conditions should be imposed for one the purposes set out in s 37(1).

It was submitted that the purpose of the condition was two-fold: a ready means to detect a breach of the condition to refrain from consuming alcohol, and to deter a breach of the condition. Garling J (at [36]-[41]) held that the obligation to abide by a bail condition is not enforceable by the criminal law; rather a bail condition forms part of an agreement, a breach of which may be addressed by revocation of bail. A condition to assist the detection or deterrence of a breach of such an agreement could not therefore be for the purpose of "promoting effective law enforcement" (s 37(1)(a)). Further, it was held (at [42]-[48]) the condition was not one for the protection and welfare of the community, or any specifically affected person (s 37(1)(b) and (c)) as it was not directed at mitigating the threat or likelihood of future offences. It was a condition related only to the deterrence and detection of a breach of a bail condition, that is, refraining from the consumption of alcohol, and so did not fall within one of the purposes in s 37(1) and was invalid. The decision casts doubt over another commonly imposed bail condition that a person under a curfew condition must present themselves at any time for a compliance check.

Bail may be granted in order to allow an accused to prepare for trial

Although bail pending an appeal to the Court of Criminal Appeal was refused in ***Miles v R*** **[2012] NSWCCA 88**, the Court considered the difficulties faced by accused and appellants in custody when preparing for their appearance in Court and in obtaining legal advice. Both are matters to be taken into account under s 32 of the *Bail Act* 1978 when determining whether bail should be granted. RS Hulme J cast doubt on the ability of an accused person on remand or a convicted person in custody awaiting the determination of an appeal in NSW to adequately prepare their case. His Honour stated:

> [4] … what I have seen does tend to reinforce the impression I have derived in other cases that the Corrective Services Department do not provide what an outsider would regard as reasonable facilities for someone such as the applicant in the circumstances that he is in.
>
> [5] The Department must realise that if the only way that an accused person or appellant can prepare his case is by being granted liberty then that is the course which the Court might have to take.

DRUGS

Obligation to leave "Carey defence" where it was possible for the jury to conclude the intention was to return drugs

The appellant in ***Alliston v R*** **[2011] NSWCCA 281** had been travelling in a motor vehicle with her partners when police found 129 g of methylamphetamine in her handbag and a further 973.5 g under the vehicle's back seat. At trial, A denied knowledge of the larger quantity and did not directly give evidence about to her intentions for the quantity in her bag. She was charged with supplying a large commercial quantity of the drug (i.e. both quantities), but convicted on the alternative of supplying a commercial quantity. It was argued by counsel at trial that the "*Carey* defence" should be left to the jury in relation to the smaller amount but the trial judge declined on the basis that there was an absence of evidence that she intended to return the drugs to her partner. On appeal, it was contended that the judge had erred in this respect because the relevant inference was available from her testimony.

McClellan CJ at CL held (Fullerton J agreeing, Simpson J disagreeing as to whether the defence should have been left) that the defence should have been left but that no miscarriage of justice had occurred. Pursuant to the decision in *R v Carey* (1990) 20 NSWLR 292, before the appellant could be guilty of supply the jury must have been satisfied that she both had possession of the drugs and had them for the purpose of supply. She had been asked at trial, "You knew you were going to be stopped at Glen Innes?" She replied, "Well, I didn't know. I didn't know what he was doing with them. I didn't know if he was taking them back to Peter or who, where." It was contended that it was implicit in this that the drugs belonged to the partner and the inference was available that she intended to return them to him. McClellan CJ at CL found that the inference was open to the jury to conclude that she had the intention to return the drugs to her partner and the "*Carey* defence" should have been left. However, the Court concluded that the jury must have found that the appellant was in possession of the larger quantity of the drug (for which no *Carey* defence was claimed) so no miscarriage of justice had occurred.

EVIDENCE

Admissibility of telephone intercepts obtained in an investigation not involving accused

A trial judge refused to admit two telephone intercepts legally obtained pursuant to the *Telecommunications (Interception and Access) Act* 1979 (Cth) because they were obtained during an investigation into offences not involving H. In **R v Zhi Qiang Han [2011] NSWCCA 120**

(only recently published on Caselaw) the Court of Criminal Appeal allowed an appeal by the Crown pursuant to s 5F of the *Criminal Appeal Act* and held that the evidence was admissible. At [9] the Court found that intercepts were legally obtained as they were made under a warrant, and they fell within an exception to the prohibition against the interception of telecommunications (s 7(2)(b) of the Act). The Court then turned to consider whether admitting the intercepted evidence at trial was an exception to the prohibition against dealing with intercepted information under the Act (at [10]). Section 74(1) provides:

> A person may give lawfully intercepted information (other than foreign intelligence information)in evidence in an exempt proceeding.

Under the Act, an "exempt proceeding" includes a prosecution for any offence punishable by a maximum of at least three year (s 5(1)). As the trial was concerned with alleged offences punishable by a maximum of 10 years, there was authority to admit the intercepts under s 74. The Court held that there was no basis for reading a requirement into s 74 that there be a connection between the exempt proceeding and the information intercepted pursuant to the warrant (at [17]-[18]).

Causation between death of child born prematurely due to car accident and the subsequent death of the child

A man was convicted of dangerous driving occasioning death under the *Crimes Act* 1900, s 52A(1). He was the driver involved in a car accident, causing a woman travelling in the other car who was 24 weeks pregnant to give birth prematurely. The baby died 33 days later. The medical evidence was that his death was not caused by the accident, but by necrotizing enterocolitis to which preterm babies are highly susceptible. It was contended on appeal that the trial judge had erred by refusing to direct the jury to acquit and that occasioning of actual injury to the foetus in utero was a necessary element to satisfy the requirements of s 52A: **Whelan v R [2012] NSWCCA 147**

Schmidt J (Allsop P agreeing with additional reasons) dismissed the appeal. An element of s 52A(1) is that the impact of the vehicle must occasion the death of another person. Her Honour held that in the current scenario, that element would be made out if it could be shown that (1) the child was in utero at the time of the impact, (2) it was born alive due to the impact, and (3) it subsequently died as a result of the impact. In this case, it was a matter for the jury to determine whether impact between the two vehicles was a substantial and significant cause of the child's death.

Her Honour stated at [88]

> [E]ven if a premature birth is not itself considered to be an injury to a foetus, if the child is born alive as a result of the impact, but later dies because of the immaturity of its organs and systems at the birth which the impact caused, such a death may be treated as if it were the result of the impact.

Strict compliance with s 13 of the Evidence Act required before a witness can give unsworn evidence

In ***SH v R*** **[2012] NSWCCA 79** it was held by Basten JA that before a witness is competent to give unsworn evidence it is necessary that s 13(5) of the *Evidence Act* 1995 is strictly complied

with. The case concerned a charge of sexual intercourse with a child under 10 years and the trial judge permitted the complainant to give unsworn evidence. However, the judge failed to tell her that she should feel no pressure to agree with statements that she believed were untrue as required by s 13(5)(c).

Basten JA stated (at [13]) that the basis for s 13(5)(c) is a concern that a witness without the capacity to give sworn evidence may "feel under pressure to agree with statements put by adults in wigs and robes", regardless of whether they are correct. The section is not directed at the form of instruction to be given to the witness, but rather to its effect. There was no error in trial judge giving the other required instructions by way of questions put to the witness (at [33]). However, his Honour held (at [35]) that it was necessary that the directions required by s 13(5) be given in full, regardless of whether there was any substantial miscarriage of justice. The error in failing to give the instruction pursuant to paragraph (c) could not be rectified by the prosecutor telling the witness that she should not feel under any pressure "because we are grown-ups in funny clothes".

Discretion to admit unlawfully obtained evidence

The respondent in ***DPP v Langford*** **[2012] NSWSC 310** was a driver involved in a serious road accident. Despite her demonstrating heavy intoxication, alcohol was not registered by two roadside breath tests. She was taken for blood and urine sample tests by police, who (mistakenly) believed that they were acting pursuant to the *Road Transport (Safety and Traffic Management) Act* 1999, and she was subsequently charged with high range drink driving after testing positive to alcohol. However, a magistrate ruled that the Act did not authorise her detention and compulsory testing, and that the evidence from the tests was unlawfully obtained. The magistrate refused to admit the evidence and dismissed the charge.

Fullerton J, allowing the DPP's appeal, found (at [32]) that the magistrate had erred by placing undue weight on broad policy considerations, at the expense of those factors which are required to be taken into account pursuant to s 138(3) when determining whether to admit unlawfully obtained evidence. The magistrate was entitled to consider the need for police to adhere strictly to the statutory limits of their powers. However, her Honour failed to consider the gravity of the breach as required by s 138(3)(d). Citing McClellan CJ at CL in *R v Camilleri* [2007] NSWCCA 36 at [28]-[31], Fullerton J held that the intention of the arresting authorities was relevant in determine the seriousness of the contravention. In this case, the senior officer who directed the samples be taken had formed a genuine but mistaken belief about his authority to do so. Her Honour stated (at [38]) that where a contravention of the law is innocent and alleged offence is serious, there would need to be "powerful countervailing considerations before the evidence is rejected".

DNA evidence: admissibility of interpretation of by way of exclusion percentage

The appellant in *Aytugrul v R* [2010] NSWCCA 272 was convicted of murder. The prosecution at trial had linked him to the killing with a hair found under the deceased's thumbnail that matched his DNA. An expert interpreted the results of the DNA analysis in two ways: first, 1 in 1600 people had the same DNA profile as that found in the hair (a frequency ratio); and second, 99.9% of people would not have a matching DNA profile (an exclusion percentage). On appeal, it was argued that the DNA evidence was presented in a prejudicial way because of the use of the exclusion percentage. There was no question that the evidence of the DNA analysis

was correct. Simpson J (Fullerton J agreeing) held that the interpretation of the DNA evidence was appropriately put before the jury. McClellan CJ at CL, dissenting, regarded (at [99]) the expression of the interpretation of the evidence by way of exclusion percentages as being "too compelling". In his Honour's view this involved prejudice that substantially outweighed the probative value of the evidence, and it should have been excluded.

Mr Aytugrul appealed to the High Court, submitting that the DNA analysis expressed as an exclusion percentage should have been rejected pursuant to either s 135 or s 137 of the *Evidence Act* 1995. The appeal was dismissed: ***Aytugrul v The Queen*** **[2012] HCA 15** French CJ, Hayne, Crennan and Bell JJ (Heydon J agreeing with separate reasons). Their Honours held (at [20]-[22]) that there was not a sufficient basis for a general rule that DNA evidence expressed as an exclusion percentage should always be inadmissible because its probative value is always outweighed by unfair prejudice to the defendant. There was research identified by McClellan CJ at CL in his Court of Criminal Appeal judgment demonstrating that some formulations of DNA results could be more persuasive than others. However, the Court found that those results had not attained general acceptance to a level that would permit judicial notice pursuant to s 144 of the *Evidence Act* and no proof was put forward to support the proposed general principle.

Their Honours (at [23]) also rejected the more specific question of whether the exclusion percentage in this case, accompanied as it was by a frequency ratio, should have been excluded pursuant to s 135 or s 137. It was noted that the argument that unfairness may derive from "the subliminal impact of raw percentage figures" would carry some weight if the exclusion percentage had been considered in isolation. There are some circumstances where reliance on an exclusion percentage to express DNA analysis may demand consideration of the application of s 135 or s 137. However in this case, where the percentage was accompanied with the frequency ratio and there was an explanation of the relationship between them, there was no error in allowing the evidence.

Tendency evidence: assessment of admissibility

The appellants in ***DSJ v R; NS v R*** **[2012] NSWCCA 9** were charged with a number of insider trading offences. The Crown had sought to rely on the evidence relating to each offence as coincidence evidence to support the other counts, pursuant to s 98 of the *Evidence Act* 1995. The trial judge dismissed an application on behalf of the appellants that the charges be tried separately, and before a five judge bench of the Court of Criminal Appeal it was argued that the trial judge had erred in his approach to determining the probative value of the coincidence evidence. Whealy JA (McClellan CJ at CL and McCallum J agreeing, Bathurst CJ and Allsop P agreeing with additional comments) held (at [130]) that the decision should be set aside as the trial judge had fallen into error by "rejecting altogether the need to recognise, in the evaluation process, the existence of alternative inferences inconsistent with guilt arising from the Crown evidence."

Bathurst CJ (at [5]-[9]) set out the process of inquiry required of a trial judge by s 98. Once the judge has determined that coincidence evidence is relevant, the judge must determine whether the evidence "could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent." That determination is to be made considering the evidence on its own or having regard to the other evidence adduced by the party seeking to tender it.

The Court was asked to reconsider the judgment of Simpson J in *R v Zhang* [2005] NSWCCA 437. It was held that her Honour's approach to s 98 was the right one. However, Whealy JA clarified (at [71]-[72]) that the appropriate interpretation of that judgment was not that a trial judge is required to "second-guess a jury", but rather that the judge is to take the coincidence evidence at its highest and determine if it could be of importance in establishing a fact in issue. Whealy JA admitted that there was a tension between Simpson J's formulation and that of Allsop P in *DAO* [2011] NSWCA 63. However, he found that in substance the two approaches to s 98 were the same: the task of the trial judge is to rule on the capacity of the evidence to be important in establishing a fact in issue.

Whealy JA noted (at [78]-[81]) that when deciding whether the coincidence evidence has significant probative value, by reference to the evidence itself or with regard to other evidence adduced by the tendering party, the trial judge must consider whether there is a real possibility of an alternative explanation arising on the evidence other than the guilt of the accused. It must then be asked whether that possibility alters the assessment of the probative value of the evidence. However, at no stage may the judge assess the actual probability of the alternative theory, or make any comparison between the Crown's theory and the alternative one. The duty of weighing the evidence rests solely with the jury.

Admissibility of admissions by 15 year old to community support person

The appellant in ***JB v R*** **[2012] NSWCCA 12** was a convicted of murder. He was 15 years old at the time of the offence and of Sudanese background. At the police station after his arrest J told Mr Clayton, a Sudanese youth liaison officer, that he had stabbed someone. At trial, the judge allowed evidence of that admission to be led by the Crown after it was determined that there was no unfairness in admitting the evidence pursuant to s 90 of the *Evidence Act* 1995. On appeal, Whealy JA rejected (at [29]) argument that it was unfair to admit the evidence of admissions made to someone in the "unique position" of a support person. The relationship between a young accused and support person does not fall in any of categories of relationship protected by legislation. His Honour held (at [30]) that it could be distinguished from those special relationships, such as between lawyer and client, that receive "legislative protection because it is central to the function of those relationships that free and frank disclosure exist between the two persons involved." Whealy JA noted (at [37]) that there may be certain circumstances where s 90 would prevent an admission made to a support person being admitted, for example where the accused had been "cajoled or tricked" into giving the admission. However, in dismissing the appeal his Honour held that the trial judge was correct in finding the admission was an unguarded incriminating statement and his Honour was correct in allowing the Crown to lead the evidence.

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.

Consciousness of guilt: silence in the face of an allegation of child sexual assault

The appellant in ***McKey v R*** **[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 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.

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 that he should not respond to the allegations.

Admissibility of "body mapping" evidence

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".

LEGISLATION

Criminal Case Conferencing Trial Repeal Act 2012

The *Criminal Case Conferencing Act* was repealed on 14 March 2012. A new Part 22 of Schedule 2 of the *Criminal (Sentencing Procedure) Act* 1999 contains savings and transitional provisions. The repealed Act ceases to apply to proceedings to which it applied before the repeal date unless otherwise provided. The regime for sentence discounts in Part 4 of the Act is continued except if an offender pleaded guilty after committal for trial.

Crimes (Sentencing Procedure) Amendment (Children in Vehicles) Act 2011

A new subpara (2)(p) was inserted in s 21A to provide that it is an aggravating factor if an offence was "a prescribed traffic offence" and was committed while a child under 16 years of age was a passenger in the offender's vehicle. "Prescribed traffic offence" is defined in new subs 21A(6). The amendment took effect on 16 November 2011.

Director of Public Prosecutions Amendment (Disclosures) Act 2011

This Act was passed rapidly following the decision in *R v Lipton* [2011] NSWCCA 247. It amends s 15A of the principal Act by adding s 15A(6) to provide that police officers do not have to disclose to the DPP any information, documents or other things that are the subject of a bona fide claim of privilege, public interest immunity or statutory immunity. Officers do, however, have to inform the DPP that they have obtained information, documents or other things of that kind. The amendment has retrospective operation and it took effect on 25 November 2011. New s 15A(7) provides that s 15A(6) ceases to have effect on 1 January 2013.

Crimes Amendment (Consorting and Organised Crime) Act 2012

Several new offences were inserted in the *Crimes Act* 1900. They included firing at a house or building with reckless disregard for the safety of any person in the course of organised criminal activity (s 93GA(1B)). Offences of participating in criminal groups of graduated seriousness were created (s 93T(1), (1A) and (4A) as well as an offence of receiving a material benefit derived from criminal activities of criminal groups (s 93TA). The old consorting offence in s 546A was deleted and replaced with a new one in s 93X with an increased penalty. All the new offences may be dealt with summarily. These provisions took effect on 9 April 2012.

Criminal Procedure Amendment (Summary Proceedings Case Management) Act 2012

A new Division 2A was inserted in Part 5 of Chapter 4 of the principal Act to provide case management provisions for summary proceedings in the Land and Environment Court and the Supreme Court. The provisions took effect on 30 April 2012.

Courts and Crimes Legislation Amendment Act 2012

The amendments made by this Act included some to the *Criminal Procedure Act* 1986. A uniform maximum penalty of imprisonment for 2 years may be imposed by the Local Court for any indictable offence dealt with summarily. There were amendments to ss 289A and 289B to simplify the procedure for random samples of child abuse material to be used in child abuse material prosecutions. S 299B was amended to confirm that a court may examine documents in order to determine whether they include a protected confidence in relation to sexual assault communications privilege, despite ss 297 and 298 which provide constraints in relation to the production of such documents to a court. These amendments took effect on 21 March 2012.

Crimes Amendment (Reckless Infliction of Harm) Act 2012

The *Crimes Amendment Act* 2007 removed "malice" and "maliciously" from the principal Act. The offence in s 35 of malicious inflicting grievous bodily harm was regarded as requiring proof that the accused intended to inflict some harm. It was replaced with an offence of recklessly causing grievous bodily harm. A consequence of the amendment identified in *Blackwell v Regina* [2011] NSWCCA 93 was that it had become necessary to prove that the accused foresaw the possibility of grievous bodily harm being caused. This was regarded as a consequence Parliament had not intended. The *Crimes Amendment (Reckless Infliction of Harm) Act* 2012 amended s 35 (and ss 60, 60A and 60E) to provide that reckless causing of harm (and wounding) is established if the person is reckless to causing actual bodily harm. It took effect on 21 June 2012 and does not apply to offences committed previously.

OFFENCES

Encouraging non-Australians outside Australia to engage in child sex tourism

Section 50DB of the *Crimes Act* 1914 (Cth) (see now the *Criminal Code* (Cth)) made it an offence to encourage a person to commit an offence against Part 3A of the Act. Section 50BA

made it an offence for a person, while outside Australia, to engage in sexual intercourse with a person under the age of 16 years. But s 50AD provided that a person was not to be charged with an offence against Part 3A unless that person was, relevantly:

> (a) an Australian citizen; or
> (b) a resident of Australia …

The appellant in **Cargnello v DPP (Cth) [2012] NSWCCA 162** was convicted of a number of offences against Part 3A, including encouraging a person to have sexual intercourse with someone under the age of 16, based on emails he had sent to unidentified persons. It was contended that he could not have contravened s 50DB as it had not been established that the person he had encouraged was an Australian citizen or resident. It was argued that the limitation provided by s 50AD on prosecution created at least a sufficient ambiguity about the operation of s 50DB that the appeal should be resolved in favour of the appellant: see *Beckwith v The Queen* [1976] HCA 55.

The appeal was dismissed. Basten JA held that is was not a requirement that the recipient of the encouragement envisioned by s 50DB must be an Australian citizen or resident who would be liable for prosecution if they committed the encouraged offences (at [29]). He reasoned (at [24]-[28]) first that liability for an offence against s 50DB did not depend on another person committing an offence, so it should not be read down on the basis that a particular person could not have been prosecuted for the encouraged offence, had it been committed. Secondly, the provision criminalised encouragement to a general audience and it would be perverse to restrict it merely because it was directed at individuals in this case. Thirdly, s 50AD does not lead to a conclusion that Australian citizenship or residency is an element of an offence against s 50BA. It merely limited the scope of those who may be prosecuted.

Can a de facto partner of a child's parent be a "foster parent"?

JAD was charged with a number of aggravated sexual offences under s 73 of the *Crimes Act* 1900 and was the de facto partner of the complainant's mother. He was convicted on the basis that he fell within the definition of the child's "foster parent/father". He appealed on the basis the relationship was not one capable of being described as one of foster parent and foster child: ***JAD v R* [2012] NSWCCA 73**. It had been held in *R v Miller* 127 A Crim 344 that the de facto partner of a child's mother was not the child's "step-father".

Simpson J (with Hoeben J agreeing, allowing the appeal on another ground) held (at [166]) that the term "foster parent" may include a de facto of a natural parent of a child for the purposes of s 73, where the de facto is shown to play a role in the child's upbringing. Having recourse to a purposive approach to statutory construction, her Honour stated (at [148]) that a construction of s 73 that excluded a de facto in the position of JAD from the definition of "foster parent" would result in an interpretation that "failed to remedy the mischief that Parliament intended to deal with". In response to the argument that this may stretch the definition of "foster parent", she stated that this was a case where such a construction was justified. The failure to include persons in the position of the appellant in s 73 was the result of inadvertence and should be rectified by reading "foster parent" as extending to include that class of person (at [164]). Regardless, her Honour found that even on a literal approach a de facto, living in a familial relationship and shown to play a role in the child's upbringing, would fall within the definition (at [145]).

The definition of knuckle-dusters in the Weapons Prohibition Act 1998

While being screened on arrival at Sydney Airport, the respondent in ***DPP v Starr*** **[2012] NSWSC 315** was found with a belt buckle in the shape of knuckle-dusters. Knuckle-dusters are defined by cl 2(19), Sch 1 of the *Weapons Prohibition Act* 1998:

> "**Knuckle-dusters** or any other similar article that is made of any hard substance and that can be fitted over 2 or more knuckles of the hand of *the user* to protect the knuckles and increase the effect of a punch or other blow or that is adapted for use as such." (Emphasis added.)

Starr was charged with possessing a prohibited weapon in contravention of s 7 of the Act. At trial, the magistrate found that the item likely fell within the definition but there was doubt whether the item would actually fit the hand of the defendant, being "*the user*". On that basis, the charge was dismissed and the Director of Public Prosecutions appealed to the Supreme Court.

Adamson J (allowing the appeal) held it was not necessary to satisfy s 7 that a knuckle-duster in possession of a defendant actually fit the defendant's hand. Her Honour found (at [47]) that in a possession case, "*the user*" in the definition at cl 2(19) "must, as a matter of construction, refer to a notional user or members of a notional class of user rather than to a specific user, there being no actual user who is subject of the operative provision in s 7." An alternative construction, which permitted the possession of knuckle-dusters by large-handed individuals whom they did not fit, would frustrate the underlying purpose of the Act to improve public safety and strictly control the possession of such weapons.

Reckless and negligent navigation offences against the Marine Safety Act 1998

The respondent in ***Maritime Authority of New South Wales v Rofe*** **[2012] NSWSC 5** was responsible for conducting exercises on Lake Burrinjuck with officer cadets of the Australian Defence Force Academy, using an inflatable boat with an unguarded propeller motor. On a joy ride after a day's exercises, a cadet fell from the boat and suffered horrific injuries from the propeller. A magistrate dismissed two charges brought under the *Marine Safety Act* 1998 of operating a commercial vessel negligently occasioning grievous bodily harm (s 13(1)(a)), and of operating a commercial vessel recklessly occasioning grievous bodily harm (s 13(1)(b)).

The appellant argued that the magistrate had erred in holding, first, that the existence of a possibility of serious harm was insufficient to sustain a find of negligence or recklessness; and secondly, the degree of negligence required to contravene s 13(1)(a) was one of significant culpability, and higher than the civil law standard. Brereton J rejected the first ground, holding (at [122]) that regardless of how serious the potential consequences of an action, the risk of those consequences occurring must be "at least real, obvious and serious". Similarly, mere foreseeability was an insufficient ground for a finding of criminal negligence under the Act.

Conversely, his Honour found that the second ground was made out and that the magistrate had misdirected herself by demanding a higher degree of negligence to satisfy s 13(1)(a) than in a civil case. However, this point was not taken in the court below and, dismissing the appeal, Brereton J held that it would not be in the interests of justice for the appeal to be upheld on that ground alone.

Deficient advice to plead guilty to an offence of recklessly causing grievous bodily harm

The appellant had pleaded guilty and was sentenced for recklessly causing grievous bodily harm pursuant to s 35(2) of the *Crimes Act* 1900. His account of the incident was that he had impulsively struck the victim when the victim entered his field of vision during a fight with a third person. The victim fell and hit his head, causing serious injury. His solicitor advised him that a plea of guilty was appropriate on this version of the events. Schmidt J (RS Hulme J agreeing, Basten JA agreeing with separate reasons) held in ***Lawton v R*** **[2012] NSWCCA 16** that the advice was wrong.

In *Blackwell v R* [2011] NSWCCA 93, handed down three weeks after the appellant was sentenced, it was explained (at [82]) that to prove recklessly causing grievous bodily harm, it is necessary that the offender had foresight that his recklessness might cause grievous bodily harm to the victim. However, it had been submitted for Mr Lawton in the District Court that, because he was involved in an unlawful act, he was guilty of anything flowing as a consequence. Schmidt J held (at [32]) that this supported the conclusion the legal advice was not in accordance with the position in *Blackwell*. Further, the appellant's affidavit disputed that he had foresight that his recklessness might cause grievous bodily harm. As a result, the Court found that there had been a miscarriage of justice as the plea of guilty was made without a full understanding of the nature of the charge or admitting all elements of the offence. Leave was granted to withdraw the plea of guilty and the conviction and sentence were set aside.

Possession of a prohibited weapon – mental element

The DPP appealed 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.

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 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.

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. (Special leave to appeal was granted by the High Court on 22 June 2012).

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 a 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 v DPP (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

No requirement to re-arraign accused following empanelment

In ***DS v R*** **[2012] NSWCCA** 159 it was contended that the trial was a nullity because the accused had not been re-arraigned after the jury was empanelled. The Court rejected this rather novel argument.

Decision to continue trial with jury of eleven

In ***BG v R*** **[2012] NSWCCA 139** it was contended that the discretion of a trial judge to discharge a juror and continue with a jury of eleven had miscarried. Early in their deliberations, the jury indicated that they could not reach a unanimous verdict. Shortly after, the judge discharged a juror after receiving a series of notes concerning the juror's business commitments. Later on, the jury indicated that it still could not reach a unanimous verdict. The judge told the jury that she would accept a verdict of 10 out of 11 and they subsequently returned a guilty verdict. Adamson J rejected (at [89]) the first ground of appeal that the trial judge had erred by not taking sworn evidence of the juror's business commitments before she was discharged. It was conceded that is was open to judge to discharge a juror even when deliberations have begun, and there is no requirement that reasons for a request by a juror to be discharged must be verified by sworn evidence (at [87]).

It was also argued that the discretion to continue with a jury of less than twelve had miscarried. Section 53C of the *Jury Act* 1977 provides discretion to continue with a jury of less than twelve, depending on an assessment of whether there is a substantial risk of miscarriage. This is a distinct determination to be made separate from the decision to discharge a juror: *Wu v The Queen* [1999] HCA 52 at [6]. But in this case the judge failed to give specific consideration to the issue of whether the trial should continue after discharging the juror. Adamson J held (at [101]) that the lack of reasons was not determinative of whether a miscarriage had occurred. In *Evans v The Queen* [2007] HCA 59, Heydon J stated at [247] that while a failure to give reasons for a decision on a procedural matter may give rise to procedural unfairness, it will not necessarily lead to a miscarriage of justice has occurred. The issue for an appellate court to determine is not whether there were reasons for the decision of the court below, but whether the decision was the correct one.

Her Honour found there were three scenarios where an issue might arise about whether a trial should continue after a juror has been discharged (at [103]):

(1) Where there is no indication how the juror would have voted;

(2) Where there is evidence from which it can be inferred prospectively that the discharged juror would, if not discharged, have voted for an acquittal; and

(3) Where it can be inferred, but only with the benefit of hindsight, that the juror who was discharged would, if not discharged, have voted for an acquittal.

In the second and third scenarios, it would not be appropriate for the trial to continue. As opposed to the first scenario, there is information from which it can be inferred that there was miscarriage of justice. Although her Honour found that the present case fell into the first scenario and the decision to discharge was correct. However, it was also observed that it is preferable for a trial judge to give reasons for a decision of this nature (at [138]).

Public interest immunity from disclosing identity of police informer

Prior to sentencing for two offences of supplying a commercial quantity of prohibited drugs, an offender sought documents by way of subpoena from the Commissioner of Police that recorded conversations between police and an informer. The purpose was to determine whether there were records of the informer encouraging the offender to supply greater quantities of drugs that could assist in mitigation of sentence. The Attorney General appealed against an order of the District Court that the Commissioner provide the documents on grounds that they were protected by public interest immunity (*Evidence Act* 1995, ss 130, 131A): ***Attorney General (NSW) v Lipton*** **[2012] NSWCCA 156**. The Attorney General argued that the only available exception to the public interest immunity against disclosure of an informant's identity was where the immunity would prevent an accused from properly defending himself, and the exception would not apply to sentencing proceeding. Basten JA, rejecting the proposition, said,

> [39] Whatever may be the principle applicable under the general law, the test to be applied under s 130 is clearly a balancing exercise which requires the court to be satisfied that, relevant to the present circumstance, the public interest in preserving secrecy or confidentiality in relation to a category of documents outweighs the public interest in their production… That exercise is not to be constrained by unexpressed rules derived from the common law.

But it was held that the judge in this case had erred in considering the factors relevant to the balancing exercise and allowed the appeal.

Non-publication order in the nature of an internet take down direction

A District Court judge made an order pursuant to the *Court Suppression and Non-publication Orders Act* 2010 prohibiting publication within the Commonwealth of Australia of material containing any reference to other criminal proceedings or unlawful conduct with which three accused men had been involved. Section 8 of the Act provides the grounds upon orders may be made with each expressed in terms of whether they are "necessary" to achieve a certain purpose; for example, "necessary to prevent prejudice to the proper administration of justice" (s 8(1)(a)). An appeal was brought by media companies: ***Fairfax Digital Australia and New Zealand Pty v Ibrahim*** **[2012] NSWCCA 125**. Basten J (at [71] ff) identified a number of problems with the order, not limited to but including the terms in which it was expressed. One of the problems was that the order was ineffective and so, could not be said to be "necessary". The order was set aside.

Trial by judge alone

A decision to grant a judge alone trial was overturned following a Crown appeal in ***R v Belghar*** **[2012] NSWCCA 86.** The respondent was charged with offences of violence and he applied for

a trial by judge alone pursuant to s 132 of the *Criminal Procedure Act* 1986 on the basis that he may not get a fair trial before a jury. The offences were alleged to have been committed against his sister-in-law in the context of his conservative religious beliefs. McClellan CJ at CL found (at [104]) the respondent's submission that he feared not having a fair trial by a jury due to his religious beliefs was not supported by evidence before the trial judge. While there may be prejudices harboured by some Australians against Muslim people, there was no evidence before the trial judge that such a prejudice existed or that could not be neutralised by the directions to the jury. It was to be assumed that the normal protections afforded an accused would protect the respondent from an unjust trial. McClellan CJ at CL held that it was therefore not open to the trial judge to allow the application under s 132 (at [108]).

Subpoenas and public interest immunity

In the context of a prosecution for cocaine supply a subpoena was issued to the registrar of the Local Court for production of documents to the District Court, including an application for a search warrant. The Commissioner of Police raised a claim of public interest immunity. The claim was rejected and the Commissioner appealed: ***Derbas v R*** **[2012] NSWCCA 14**. Meagher JA held (at [31]-[32]) that the primary judge was correct in finding that it was "on the cards" that the search warrant application would set out why the police believed that the respondent had cocaine and firearms and the circumstances in which he had come into possession of them. However, the judge erred in only considering whether the identity of a confidential informer identified in the application would be relevant to defences raised, and not in considering the significance of this and other confidential information to the respondent's ability to pursue those defences. The primary judge also erred in taking into account the potential consequences of disclosing the informer's identity. It was held (at [36]) that this was not relevant to balancing the interests of the respondent and the public interest. After analysing the evidence, his Honour (at [44]) determined that the disclosure of the informer's identity "might" be of "some assistance", depending on what happened at trial, but that this was not sufficient to justify disclosure. The appeal was allowed.

Denial of procedural fairness

In a defended hearing on the charge of disobeying a red traffic light, the prosecutor indicated to the magistrate that he intended to call four police witnesses. When her Honour was informed that only two of the officers witnessed the offence, she indicated that she did not want to hear from the other two, although they were able give evidence to resolve an issue about whether it was the defendant's vehicle that was involved in the offence. She said that calling the additional officers would not assist and that she believed the first two officers were not credible. The charge was dismissed and the DPP appealed.

In ***DPP (NSW) v Elskaf*** **[2012] NSWSC 21**, Garling J found that the prosecution had been denied procedural fairness by the magistrate peremptorily refusing to admit the evidence of the two officers. His Honour held (at [44]) that the magistrate should have permitted the witnesses to be called and, if the evidence was not relevant, it could have been objected to. Alternatively, its relevance could have been tested on a voir dire. At [42], Garling J stated:

> It is no part of the a presiding judicial officer's function to take over the conduct of the case of one or other party and, in effect, summarily to prevent the calling by the prosecutor of any evidence

> where the prosecutor considered the evidence to be relevant to making out the charge: see *Director of Public Prosecutions v Wunderland* [2004] NSWSC 182 at [21] per Sully J.

Correct procedure for determining a criminal case by a magistrate or judge sitting alone

The judgment of Johnson J in ***Director of Public Prosecutions (NSW) v Wililo and Anor*** **[2012] NSWSC 713** includes a comprehensive review of the requirements for the proper conduct of a criminal case by a magistrate or by a judge sitting alone (at [35] – [65]). In this particular case it was found that there was a failure of a magistrate to accord to the prosecutor procedural fairness, to properly consider whether there was a prima facie case, and to provide sufficient reasons for dismissing the charge. Strong comment was also made about the importance of complying with the doctrine of precedent in the context of the same magistrate having had similar errors she had made identified in a number of previous Supreme Court judgments.

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

In ***FB v R; R v FB*** **[2011] NSWCCA 217**, a ground of appeal concerned the trial judge's questioning of certain witnesses. It was contended that this was excessive; at times inappropriate, in that it bolstered the prosecution's case; and that it 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.

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.

The appeal was allowed but on the limited basis that the trial judge appeared not to have considered the application in the context of the appellant 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.

SENTENCING – GENERAL ISSUES

Transitional provisions following the increase of a standard non-parole period

When D committed an offence against s 61M(2) of the *Crimes Act* 1900, the standard non-parole period was 5 years. But when he was convicted it had been increased to 8 years by the *Crimes (Sentencing Procedure) Amendment Act* 2007. The sentencing judge applied the longer non-parole period. On appeal in ***DS v R* [2012] NSWCCA 159**, the Crown conceded that the lower non-parole period applicable at the time the offence was committed should have been applied and so the Court reduced the sentence. The Court was clearly misled by the parties. No reference was made to the transitional provision in Pt 17 of Sch 2 of the *Crimes (Sentencing Procedure) Act* 1999 which provides that the amended 8 year non-parole period applied "to the determination of a sentence for an offence *whenever committed*", unless the offender was convicted or had pleaded guilty prior to the commencement of the amending legislation.

Extension of sentence for preventative detention

The appellant in ***JT v R* [2012] NSWCCA 133** had a significant and violent criminal history, and he was convicted of offences of violence and sexual assault against his partner. It was contended that the sentencing judge had incorrectly applied the decision in *Veen v The Queen (No 2)* [1988] HCA 14; (1988) 164 CLR 465 and imposed a sentence reflecting, inter alia, preventative detention. The appeal was dismissed, Rothman J finding that although the judge "may have used slightly infelicitous terminology" he did not extend the sentence otherwise to be imposed to implement any form of preventative detention (at [63]).

Double punishment

In ***Portolesi v R* [2012] NSWCCA** 157 the appellant had pleaded guilty to offences concerning a cannabis cultivation operation at his vineyard in regional NSW. He was sentenced to 5 years imprisonment for an offence of cultivating a commercial quantity of cannabis, 12 months for diverting electricity and 3 months for possession of a mobile phone jamming device. The terms were to be served concurrently. When considering the seriousness of the cultivation offence, the sentencing judge had regard to the sophistication of P's operation, including his possession of the jamming device and diversion of electricity.

It was contended that it was double punishment to treat this conduct as an aggravating factor in the first offence, and as the basis for two separate offences. In *Pearce v R* [1998] HCA 57 a majority of the High Court stated (at [40]) that where an offender is convicted of two offences with common elements, it would be wrong to impose punishment twice for the elements that are in common. The majority also stated that ordering the sentences be served concurrently would not rectify such an error. The correct approach is for an appropriate sentence to be fixed for each offence before turning to the question of concurrence.

Beech-Jones J found that the appellant had been punished twice for possession of the jamming device and diverting electricity (at [47]). But he held that they were relevant aggravating features to be considered in the cultivation offence; error in double punishment only arose later in sentencing for the possession and diversion offences (at 51]). By the time the appeal was decided sentences for these offences had already been served in their entirety and the appeal was dismissed.

Order that a sentence be served in a juvenile detention centre past offender's 18th birthday

In ***JM v R*** **[2012] NSWCCA 83** the appellant had committed a number of violent offences as a minor and was sentenced to 7 years imprisonment with a non-parole period of 4 years. The judge made a recommendation that the sentence be served in juvenile detention until he was 21 years and 6 months, purportedly under s 19 of the *Children (Criminal Proceedings) Act* 1987. Whealy JA (with whom Hoeben J agreed) held that the sentencing judge should have made an order pursuant to s 19 rather than a recommendation. His Honour also stated (at [23]) that it would be contrary to the principle set down by Howie J in *TG v R* [2010] NSWCCA 28 to impose "a sentence which has in contemplation a statute which prohibited a person from remaining in a juvenile detention centre unless the non-parole period is below a certain figure… even where that is merely one consideration and the sole determinant". A sentence cannot be structured in order to avoid a statutory outcome: *R v Zamagias* [2002] NSWCCA 17.

Distinction between legal responsibility and moral culpability

The appellant in ***KR v R*** **[2012] NSWCCA 32** pleaded guilty to a murder that occurred when he and another (LR) had kicked a man to death during a robbery. In the course of sentencing KR the judge stated that he was satisfied that "both offenders were equally responsible for the death" but proceeded to impose a longer sentence on KR than on his co-offender. KR appealed arguing that the finding that they were "equally responsible" should have resulted in an equal or relevantly similar sentence.

Latham J, dismissing the appeal, discussed the difference in law between criminal responsibility and culpability (at [15]-[22]). In the case of a joint criminal enterprise each participant will bear equal *legal responsibility* for the acts carried out all participants to the joint enterprise. However, the conduct of the individual participant to a joint criminal enterprise will be relevant to the level of *culpability* for which an offender is to be sentenced, culpability being the moral responsibility for an offence (at [19]-[21]). Latham J held that the sentencing judge's finding that the co-offenders were "equally responsible" related to their legal responsibility, while it was clear that the judge found KR was more morally culpable than LR for the offence (at [24]-[25]).

Parity - offenders not engaged in a common enterprise

The appellant in ***Henderson v R*** **[2012] NSWCCA 65** had been sentenced for possessing an unauthorised firearm and supplying ecstasy. Other firearm offences had also been taken into account. He contended that the sentencing judge erred in not applying the parity principle in relation to the sentence imposed on a man who had been convicted of possessing an unauthorised firearm based on his having secreted it for a few days for the appellant. R A Hulme J referred to the principle in cases such as *Jimmy v R* [2010] NSWCCA 60 that the parity principle will be applied to offenders engaged in the "same criminal enterprise" or a "common

criminal enterprise". It was contended on behalf of the appellant that the effect of the decision in *Green v R; Quinn v R* [2011] HCA 49 was that strictures of the parity principle had been relaxed, and the approach was one of substance over form. However, R A Hume J found (at [60]) that as a matter of "substance" it was doubtful whether a "criminal enterprise" existed at all in the circumstances of the case, let alone one common to both the appellant and the other man.

Rule in R v De Simoni can be breached even when maximum penalties are the same

In ***Cassidy v R*** **[2012] NSWCCA 68** the appellant was sentenced on the basis that he had pleaded guilty to intentionally destroying property with intent to endanger life, contrary to s 198 of the *Crimes Act* 1900. In determining the seriousness of the offence, the sentencing judge relied on evidence that showed the offender had wanted the people in the destroyed property to die. On appeal it was argued that the rule in *R v De Simoni* [1981] HCA 31 had been breached. The Crown argued that the appeal should not succeed on the basis that maximum penalty for an offence against s 198 and for attempted murder under ss 27-30 are both 25 years imprisonment. Blanch J rejected the Crown's argument. His Honour stated (at [24]) that the Crown had failed to account for the impact of the standard non-parole period of 10 years for offences under ss 27-30, whereas there is no standard non-parole period for an offence contrary to s 198. Therefore, despite the offences all having the same maximum penalties, the offences of attempted murder under ss 27-30 are "more serious" pursuant to the rule in *De Simoni* and therefore the rule had been breached (at [26]).

Impact of a conviction upon an offender's employment and ability to travel overseas

In ***R v Mauger*** **[2012] NSWCCA 51** the respondent to a Crown appeal was a senior analyst at an Australian investment company who travelled to the United States for work. He was found guilty of drug supply and possession, and the judge made an order pursuant to s 10 of the *Crimes (Sentencing Procedure) Act* 1999 that no conviction be recorded on the condition of him entering into 2 year good behaviour bond. Harrison J stated (at [18]) that the power available under s 10 to not record a conviction demonstrated a willingness on the part of the legislature to allow an offender to maintain their reputation and "avoid the otherwise rigid application of inexorable laws" in appropriate circumstances.

In this case, the sentencing judge appeared to be influenced in her decision to make a s 10 order by the consequences that the respondent might otherwise have lost his job and been prevented from travelling oversees (at [26]). There was no evidence led at sentence about restrictions that are placed on those with drug-related convictions travelling to the US, nor is it a matter appropriate for judicial notice: *United States Surgical v Hospital Products International* [1982] 2 NSWLR 766 at 801. Harrison J found (at [32]) that the judge had erred in relying on these unsupported considerations, although he noted that it may be different where actual evidence was led about loss of livelihood or inability to visit family due to travel restrictions in foreign countries. Regardless, the sentence was not regarded as manifestly inadequate and the Crown appeal was dismissed.

Availability of summary disposal as an argument on appeal where no such submission was made to the sentencing judge

Z pleaded guilty to an offence of reckless wounding in the District Court and was sentenced to imprisonment for 1 year and 11 months. It was argued on appeal in ***Zreika v R*** **[2012] NSWCCA 44** that the sentencing judge had erred in failing to take into account that the offence could have been dealt with summarily, although this was not raised before the District Court. Johnson J, dismissing the appeal (with McClelland CJ at CL agreeing, Rothman J agreeing with separate reasons) held that it was difficult to see how the appeal might succeed where the sentence imposed did not reach the jurisdictional limit of the Local Court of 2 years imprisonment (at [123]).

Johnson J also made a number of remarks about the frequency with which this ground of appeal is relied upon without it being raised in the court below. His Honour noted (at [78]) that the failure of a sentencing judge to mention that a matter could have been dealt with at the Local Court could not itself amount to an error, citing *R v Jammeh* [2004] NSWCCA 327 and *R v Pickett* [2004] NSWCA 389. There is also an expectation that at an offender's counsel will make submissions at first instance as to the factors relevant to mitigation (at [80]). There may be rare cases where a failure to rely on a mitigating factor in determining sentence will result in a serious injustice to the offender. However, his Honour stated (at [83]) that it would only be in exceptional circumstances that a case prosecuted in the District Court clearly ought to have been dealt with summarily. In such a case, that fact would be so obvious that it would be expected a submission would be made to the judge about it.

Intensive correction orders inappropriate where rehabilitation is irrelevant

In ***R v Boughen; R v Cameron*** **[2012] NSWCCA 17** the Crown appealed against sentences imposed against B and C for tax evasion, to be served by way of Intensive Correction Orders. The appeal was allowed. Simpson J held (at [110]) that the new Intensive Correction Order regime should not be used as a substitute for the no longer available option of periodic detention. The orders are targeted at rehabilitation and were inappropriate in this case where there was little risk of reoffending. (The correctness of this is currently the subject of a reserved judgment of a five-judge bench). Further, her Honour found that inherent leniency of such orders was contrary to the sentencing principles to be applied in cases of tax evasion.

Hardship for a foreign national on a criminal justice visa

In ***Van Eeden v R*** **[2012] NSWCCA 18** it was argued that the sentencing judge had failed to give due weight to the appellant's circumstances as a foreign national who had been placed on a criminal justice visa. The result was that while he was on bail he had been unable to obtain employment or receive social security, and his family had been unable to visit him. Schmidt J, dismissing the appeal, referred (at [37]-[38]) to the decisions in *R v Hinton* [2002] NSWCCA 405 and *R v Togias* [2001] NSWCCA 522, where it was held that the effect of a sentence on an offender's family could only be considered where the hardship was "exceptional". Similarly, her Honour held (at [40]-[42]) that there was no error in the sentencing judge giving little weight to consequences flowing from being a foreign national convicted of a crime in Australia.

No requirement for a judge to mechanically consider alternatives to full time imprisonment in every case

In *R v Zamagias* [2002] NSWCCA 17 at [24]-[28], Howie J set out the process to be followed when determine a sentence to be imposed pursuant to the *Crimes (Sentencing Procedure) Act* 1999. His Honour stated at [25]:

> The preliminary question to be asked and answered is whether there are any alternatives to the imposition of a sentence imprisonment. Section 5 of the Act prohibits the court from imposing a sentence of imprisonment unless the court is satisfied, having considered all the alternatives, that no other penalty other than imprisonment is appropriate.

In ***Hardie v R; Phillipsen v R*** **[2012] NSWCCA 6** the appellants argued that the sentencing judge had failed to consider this preliminary question. Basten JA, dismissing the appeal, held (at [6]) that while Howie J had accurately expressed process as set out by the Act, it was not encumbent on a sentencing judge to expressly state each step in the judge's reasoning. A failure to advert to one of the steps referred to by Howie J may increase the risk of error, but there were cases where a sentence of imprisonment was so obviously demanded that a consideration of the alternatives was not required.

Dysfunctional upbringing a mitigating factor

In sentencing for aggravated dangerous driving causing death and grievous bodily harm, a judge referred at length to the offender's severely dysfunctional upbringing. The Crown appealed against the sentence: ***R v Millwood*** **[2012] NSWCCA 2**. It argued that the sentencing judge had given excessive weight to the respondent's personal circumstances where they provided little ground for mitigation for this offence. Simpson J rejected the argument and dismissed the appeal. Her Honour stated at [69]:

> I am not prepared to accept that an offender who has the start of life that the respondent had bears equal moral responsibility with one who has had a "normal" or "advantaged" upbringing. […] I consider that the DPP's submission significantly underestimates the impact of a dysfunctional childhood.

Her Honour held that this was consistent with the approach of Wood J in *R v Fernando* (1992)76 A Crim R 58.

Abuse of trust and abuse of a position of authority – distinct concepts

The offender in ***MRW v R*** **[2011] NSWCCA 260** was convicted of having sexual intercourse with a child (his daughter) aged over 10 and under 16 who was under his authority. The sentencing judge took into account as an aggravating feature that the offender had abused a position of trust. It was contended that this was to double count a matter that was an element of the offence ("under authority"). Bathurst CJ held (at [77] – [78]) that abuse of trust and abuse of authority are distinct concepts but his Honour indicated that caution is necessary where they arise from the same facts.

Backdating commencement of sentence

McClellan CJ at CL held in ***Aiken v R*** **[2011] NSWCCA 208** that it was erroneous to backdate an offender's sentence to commence after the expiry of an earlier parole period where no

decision had been made to deny release on parole. In this situation the offender was being punished twice for the latter offence. On re-sentence, the commencement date was put back to the date of expiry of the earlier non-parole period.

Comparable cases and statistics

Whilst caution has often been expressed about the use of comparable cases and statistics in assessing the appropriateness of a sentence, Blanch J explained (at [13] – [23]), with considerable reference to authority, in ***Smith v R*** **[2011] NSWCCA 290** that it is in the context of the principle of consistency of approach than an analysis of past decisions is useful. This concept was acknowledged in a judgment delivered 2 days later by Hoeben J in ***Papworth v R*** **[2011] NSWCCA 253**. However, while consistency in sentence is an important consideration and a desirable goal, his Honour reminded (at [54]) that the relevant question on appeal is whether the sentences are within a proper range. It is not a question of whether other sentences can be said to be more or less lenient.

However, in ***Ritter v Regina*** **[2012] NSWCCA 121** there was firm criticism of the submissions made on behalf of the appellant in an attempt to establish that a sentence was manifestly excessive. Counsel relied upon sentencing statistics and eight cases which were said to be comparable. R S Hulme J, with whom Hoeben J agreed, Fullerton J dissenting, was critical of reliance upon such material with no attempt to put the argument in the context of the maximum penalty prescribed for the offence and the purposes of sentencing specified in s 3A *Crimes (Sentencing Procedure) Act* 1999. His Honour also noted that there was rarely an incentive for counsel making submissions in support of such a ground to identify a fair or representative sample of comparable cases and "rarely is such a sample produced". The sample produced in this particular case was described as "positively misleading".

Duress as a mitigating factor in sentencing

In ***Tiknius v R*** **[2011] NSWCCA 215**, the offender was a foreign national who came to Australia to facilitate the recovery and distribution of imported drugs. The sentencing judge found that the offender was motivated by a need to settle a substantial debt owed by him to his cocaine dealer, and that the cocaine dealer had threatened him and his girlfriend with serious harm unless he performed the "job". On appeal, it was contended that the sentencing judge, whilst finding that the offences were committed under duress, had not taken it into account in assessing the objective seriousness of the offences and had given it inadequate weight in allowing an appropriate reduction in the sentences imposed. The Court allowed the appeal. Johnson J held that the findings of the sentencing judge as to duress should have resulted in a significant reduction in the moral culpability of the offender and a corresponding reduction in the objective seriousness of the offences. His Honour provided a succinct distillation of the principles concerning offences committed under duress at [31] – [54] of his Honour's judgment.

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

In ***Yang v R*** **[2012] NSWCCA 49**, a question arose as to the relevance of Y's mental condition to the assessment of the objective serious of a drug supply offence. R A Hulme J stated (at [28]) that the High Court decision in *Muldrock v The Queen* [2011] HCA 29 appears to overturn the

position in *R v Way* [2004] NSWCCA 131 that personal characteristics, such as mental illness, affect the objective seriousness of the offence. However, his Honour noted that this interpretation had not been universally accepted and cited a number of decisions that reach the opposite conclusion, including *MDZ v R* [2011] NSWCCA 243 and *Ayshow v R* [2011] NSWCCA 240. The present case did not call for determination of the issue.

Price J, however, bit the bullet in ***Williams v R* [2012] NSWCCA 172** in relation to an issue as to whether a claim to have acted under provocation was relevant to the assessment of the objective seriousness of a murder. He said:

> [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.

Non-parole periods and special circumstances – risk of institutionalisation

In ***Barrett v R* [2011] NSWCCA 213**, the offender committed a number of offences, some of which were committed while on parole. The offender was also still subject to suspended sentences imposed by the Drug Court. In addition to finding that the sentencing judge had erred in imposing a sentence with an effective non-parole period in excess of 75 per cent of the total term without providing reasons, Hidden J held that the risk of institutionalisation warranted a finding of special circumstances to assist in the rehabilitation of the offender.

Plea of guilty – erosion of discount after disputed facts hearing

The Court in ***R v AB* [2011] NSWCCA 229**, determined that "as a matter of general principle … the utilitarian value flowing from a plea of guilty is not a fixed element, and is capable of erosion as a result of the manner in which the sentencing hearing is conducted": at [33] per Johnson J. The circumstances were that the offender had pleaded guilty, but then put the Crown to proof on certain facts, which resulted in the matter being heard in the District Court on multiple occasions and led to the calling of evidence under rather trying circumstances. His Honour drew a comparison with the situation faced by a person on trial, who may not be penalised for the manner in which the defence is conducted but who is not entitled to mitigation for a plea of guilty. His Honour concluded (at [32]) that a person who pleads guilty but puts the Crown to proof on certain factual issues and loses is not entitled to the same discount for a plea, on utilitarian grounds, as a person who does not require a contested hearing.

Plea of guilty – allowance for delay because of question of fitness to stand trial

The appellant in ***Hatfield v Regina* [2011] NSWCCA 286** pleaded guilty 2 years after his arrest and 5 months after he had been found fit to stand trial. It was held (per Hall J at [43] – [54]) that the sentencing judge erred in only allowing a reduction of 15% because it would not have

been reasonable for the pleas to have been entered until after the appellant had been found fit. The maximum reduction of 25% was not available because of the 5 month delay after that time but on re-sentence an allowance of 20% was made.

Plea of guilty – no discount in a Commonwealth case

The applicant in ***Lee v R*** **[2012] NSWCCA 123** complained that the sentencing judge had erred by failing to indicate that a discount had been allowed on account of his pleas of guilty. Hoeben JA held (at [56] – [60]) that there was no such error. It is *Cameron v R* [2002] HCA 6; 209 CLR 339 that applies to Commonwealth offences, not *R v Thomson, R v Houlton* [2000] NSWCCA 309; 49 NSWLR 383. The plea is taken into account as reflecting the offender's willingness to facilitate the course of justice, not on the basis that it had saved the cost of a contested hearing. In this case, the plea was not indicative of a willingness to facilitate the course of justice because it was simply recognition of the strength of the Crown case and the inevitability of conviction. The plea was not indicative of remorse either; it was entered late and the applicant still tried to downplay his role.

Procedural fairness

The offender in ***Ng v R*** **[2011] NSWCCA 227** was convicted of offences of murder and aggravated armed robbery. The offences were committed in the company of a co-offender who had pleaded guilty and assisted the prosecution. When sentencing the co-offender, the sentencing judge calculated a starting point of 30 years for the offences. During the offender's sentencing proceedings, the judge proposed to use the same 30 year starting point. The Crown agreed with that approach and the offender's counsel was invited to make submissions as to why a lesser sentence should be imposed. Ultimately, a sentence of 35 years was imposed, based partly on a finding that the offender was a "markedly more dangerous man" than the co-offender.

The appeal was allowed. In a joint judgment, Bathurst CJ, James and Johnson JJ held (at [48] – [50]) that practical injustice had occurred for two reasons: first, by the sentencing judge having imposed a sentence longer than that which had been indicated during the course of submissions, without providing an opportunity for submissions; and secondly, the judge's finding as to the dangerousness of the offender had not emanated from the parties' submissions or from the judge's provisional thought process conveyed throughout the proceedings.

Remorse - assessment in a case of "gross moral culpability"

A woman drove a vehicle which was involved in a collision where two of the passengers were killed and three others suffered serious injury. She pleaded guilty to two counts of manslaughter and three counts of dangerous driving occasioning grievous bodily harm in circumstances of aggravation. In ***Duncan v R*** **[2012] NSWCCA 78** it was argued that the sentencing judge erred in the manner in which he dealt with evidence of the applicant's remorse. Basten JA dismissed the appeal and held (at [22) that trial judge's decision to place little weight on remorse in a case of "gross moral culpability" was in line the approach set down in *R v Dhanhoa* [2000] NSWCCA 256; *R v Koosmen* [2004] NSWCCA 359. His Honour did not find (at [23]) that the approach was inconsistent with the statement of Murphy J in *Neal v*

R [1982] HCA 55 at [12], nor that Murphy J's general statement was applicable in the circumstances of the case.

Restitution – a promise to repay is entitled to some mitigating weight

The appellant in ***Job v R*** **[2011] NSWCCA 267** pleaded guilty to fraud type offences which caused a substantial loss to his employer. He gave evidence that he would repay the proceeds that he had received. This would necessitate the sale of the family home as well as an investment property. The sentencing judge declined to accept that this was a matter of mitigation. He did not consider the sale of the investment property has a hardship but he did note that selling the family home meant that his wife and children would have to live in rented accommodation; this the judge described as a hardship that was not "in any way unusual". Hidden J referred (at [36]ff) to a number of authorities concerning the relevance of an offender having made reparation, or having undertaken to do so. He concluded (at [48] - [49]) that the judge in this case had been wrong to dismiss the matter out of hand. It was entitled to "some weight" in the appellant's favour.

Standard non-parole periods – R v Way overruled

The offender in ***Muldrock v The Queen*** **[2011] HCA 39** pleaded guilty to a child sexual assault offence that had carried a maximum penalty of 25 years and a standard non-parole period of 15 years. A non-parole period of 96 days was imposed so as to allow for immediate release. The total term was 9 years. A Crown appeal was allowed and a new non-parole period of 6 years 8 months was substituted. The High Court of Australia held that the CCA had erred in its approach concerning the standard non-parole period. It was also held that the total term was manifestly excessive. The approach to the assessment of sentence for an offence with a standard non-parole period that had been set out by the CCA in *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 was held to be wrong. (Special leave to appeal was refused in *Way v The Queen* [2005] HCATrans 147).

The appellant submitted that *Way* was wrongly decided and that the standard non-parole period had no role in sentencing for an offence that was not in the middle of the range of objective seriousness. That assumed that s 54B(2) prima facie mandated imposition of the standard non-parole period for a midrange offence. The Crown submitted that there was nothing in the legislation to suggest that the standard non-parole period only applied to a particular category of offence by reference to where in the range of seriousness it fell. It also submitted that decisions subsequent to *Way* had adopted a categorical two-stage approach. There was also the submission that s 54B(2) was not mandatory in terms ("the court is to set the standard non-parole period…"). Rather, there remained the full range of judicial discretion to impose a longer or shorter period.

The Court accepted that submission. It followed that *Way* was wrongly decided. When sentencing for a standard non-parole period offence it was wrong to commence by asking whether there are reasons for not imposing that period. It was also wrong to "proceed to an assessment of whether the offence is within the midrange of objective seriousness" (at [25]). Earlier (at [17]) it was said that "fixing the appropriate non-parole period is not to be treated as if it were the necessary starting point or the only important end-point in framing a sentence."

As to the correct approach, reference was made to what was said by McHugh J in *Markarian v R* [2005] HCA 25 [51]: "The judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case". In taking into account the full range of factors the court is mindful of the two legislative guideposts, the maximum sentence and the standard non-parole period.

One matter that is somewhat difficult is that at [27] the court said that having regard to the standard non-parole period as one of the guideposts required "that content be given to its specification as 'the non-parole period for an offence in the middle of the range of objective seriousness'". Then, at [29] there was reference to the requirement of s 54B(4) for the court to make a record of its reasons for increasing or reducing the standard non-parole period. It was said that this did not suggest, inter alia, a need "to classify the objective seriousness of the offence". Regrettably there was no explanation as to how a court is to give "content" to the standard non-parole period being for a middle range offence without "classify[ing] the objective seriousness of the offence". In the next paragraph ([30]) there is reference to a "full statement of reasons for the specification of non-parole periods either higher or lower than the standard" assisting appellate review, promoting consistency in sentencing, and increasing public awareness of the sentencing process. One might think that specifying where within the range of objective seriousness the offence at hand falls would promote each of those objectives.

The important point, however, is that the Court held (at [28]) that Div 1A does not require, or permit, a court to engage in a two-stage approach to sentencing, commencing with an assessment of whether the offence falls within the middle of the range and, if it does, inquiring whether there were matters justifying a longer or shorter period.

The Court also acknowledged (at [31]), as did the CCA in *Way*, that the specification of standard non-parole periods may lead to a move upwards in the length of the non-parole period as a result of adding the court's awareness of the standard to the various other considerations bearing on the determination of the appropriate sentence. It was not because the standard non-parole period is the starting point in sentencing for a midrange offence after conviction at trial.

Standard non-parole periods – the approach to sentencing post-Muldrock

Some observations were made about *Muldrock v The Queen* [2011] HCA 39 by Basten JA in ***R v Koloamatangi*** **[2011] NSWCCA 288**. They included that it "weakens the link between the standard non-parole period and the sentence imposed in a particular case" as well a limited the range of factors to be considered in determining the "objective seriousness" of the offence ([18]). It remained in doubt as to "whether the sentencing court is required or permitted to classify, or [is] prohibited from classifying, the particular offence by reference to a low, middle or high range of objective seriousness" ([19]). A number of matters in this respect were noted, including that the High Court did not "suggest that a conventional assessment of the objective offending, according to a scale of seriousness, was to be eschewed" ([19]). "One consequence of *Muldrock* is that a sentencing judge will need to bear the standard non-parole period in mind as a marker, whether or not there are reasons why it should not be applied". "(T)he standard non-parole period cannot have "determinative significance – see *Muldrock* at [32] – nor even, as the Court also noted, much weight at all in circumstances such as those which

arose in *Muldrock* itself" ([21]). Further, in ***Beveridge v R* [2011] NSWCCA 249,** James J held that *Muldrock* had wholly undermined as grounds of appeal the failure of the trial judge to precisely identify the degree to which an offence has departed the notional mid-range of objective seriousness.

The case of **Bolt v R [2012] NSWCCA 50** involved an appeal against sentence handed down seven months prior to the High Court's decision in *Muldrock v R* [2011] HCA 39. McCallum J held that the sentencing judge had engaged in a two stage reasoning process that, although correct at the time, was now erroneous given the High Court's decision.

However, Davies J in ***Butler v R* [2012] NSWCCA 23** held that merely because an offender was sentenced prior to *Muldrock* did not establish an error in sentencing. The sentencing judge had held the standard non-parole period was simply a "guideline or yardstick" in determining the sentence. Further, his Honour had not engaged in the two-step reasoning process as set down by *Way*. It was the appellant's case that as the sentence had been imposed prior to *Muldrock*, and so had miscarried. However, Davies J found that there had been no error in the sentencing judge's approach.

His Honour stated at [26]:

> Merely showing that a sentencing judge sentenced pre-*Muldrock* following the dictates of *Way* will not be sufficient to demonstrate error. What should be ascertained in each case is whether a reliance on *Way* has sufficiently infected a sentence with such error that this court must intervene. Ordinarily this might occur in cases where an applicant is found guilty by a jury, with the result that the sentencing judge will have considered that a two-stage process must be applied and that the standard non-parole period is mandatory unless factors can be found to justify a variation from it. It is far less likely that intervention will be required from this court where a sentence has been imposed following a plea of guilty and the sentencing judge has referred to the standard non-parole period as simply a guideline or yardstick.

The appellant in ***Zreika v R* [2012] NSWCCA 44** had pleaded guilty to reckless wounding. It was contended that the sentencing judge and followed the approach set out in *Way* in relation to the standard non-parole period. Johnson J (at [36]-[42]) set out the unusual fashion in which the High Court overturned the approach in *Way*, without arguments against the approach ever being put before the Court of Criminal Appeal for determination. His Honour then returned to consider two alleged errors in the sentencing judge's approach in *Zreika*. First (at [43]), it was found that the judge's reference to the standard non-parole period as a "reference point" and "useful guide" was entirely consistent with *Muldrock*. Secondly, the sentencing judge had asked whether "there are reasons for not imposing the standard non-parole period". Johnson J (at [44]) held that this statement does not conform to the *Muldrock* approach. However, an assessment of the objective seriousness of the offence still forms part of the process of instinctive synthesis undertaken by a sentencing court (at [46]-[47]). Rejecting this ground of appeal, Johnson J held that, looking at the whole decision, the sentencing judge had not misused the standard non-parole period in determining sentence.

In ***Mendes v R* [2012] NSWCCA 103**, error was identified in the latter of the two categories of case described by Davies J in *Butler v R* (above) (sentencing after a plea of guilty). The judge had posed for herself the question whether it was appropriate to impose the standard non-parole period, characterised the offence as being of mid-range objective seriousness, and then gave reasons, including the plea of guilty, for not imposing the standard. Using the standard

non-parole period as a starting point was held by Davies J (at [57] – [63]) to be erroneous. The judge had engaged in the two-stage sentencing process proscribed by *Muldrock*.

Totality - concurrence and accumulation of sentences

In ***R v Cutrale*** **[2011] NSWCCA 214**, the offender pleaded guilty to two offences: attempting to choke or strangle with intent to commit an indictable offence, and sexual intercourse without consent. The offender had placed his hand across the victim's mouth and nose causing her to lose consciousness, and then had sexual intercourse with her. The sentencing judge imposed wholly concurrent sentences on the basis that the offences comprised "one course of criminal conduct". The Crown successfully appealed, contending that the concurrency of the sentences failed to reflect the totality of criminality.

Hidden J held that partial accumulation was warranted. His Honour referred to a passage from the judgment of Howie J in *Cahyadi v R* [2007] NSWCCA 1 at [27] which posed the question in the following terms: "can the sentence for one offence comprehend and reflect the criminality for the other offence?" His Honour answered the question in the negative, finding (at [33]) that the attempt to choke the victim involved a measure of criminality separate from the sexual intercourse.

Totality - no error in non-parole period for offence of perverting the course of justice being subsumed within sentences for disqualified driving

In ***R v Moore*** **[2012] NSWCCA 3**, the respondent to a Crown appeal had been sentenced for a number of offences of driving while disqualified and for having perverted the course of justice. The commencement dates of the sentences were such that the non-parole period, and most of the parole period, for the pervert the course of justice offence was to be served concurrently with the sentences for the driving offences. It was argued that by wholly subsuming the non-parole period for the pervert the course of justice offence there had been no real penalty imposed. Simpson J found (at [35]) that the offence was at the lower end of the range for offences of this type, though some punishment additional to the sentence for the driving offences was called for. However, the Crown had focused too narrowly on the non-parole period without recognising an additional 4 month parole period exclusively referable to the pervert the course of justice offence. Her Honour stated that a parole period is a sentence in itself and it could not be said that there was no additional penalty imposed for the offence.

SENTENCING - SPECIFIC OFFENCES

Armed robbery, conspiracy to commit: permissible to take into account that the offence was going to be committed in company

It was held by Hoeben J in ***Auimatagi v R*** **[2011] NSWCCA 248** that there was no error for a sentencing judge to have taken into account as an aggravating feature when sentencing for an offence of conspiracy to commit armed robbery that the offence was intended to be committed whilst the offender was in company.

Child sexual assault (persistent): permissible to sentence for more than three foundational offences

The appellant in ***ARS v R*** **[2011] NSWCCA 266** was found guilty of an offence of persistent sexual abuse of a child which is contrary to s 66EA(1) *Crimes Act* 1900. The offence requires proof that a person has committed sexual offences on "3 or more separate occasions occurring on separate days during any period". The Crown relied upon a multitude of offences. The sentencing judge expressed himself as being satisfied beyond reasonable doubt that all but one of the offences had been established and sentenced on that basis. The appellant contended that this was erroneous and that he should only have been sentenced on the basis of having committed three offences. It was argued that he had been sentenced for offences for which he had not been found convicted. The submission was rejected: per Bathurst CJ at [226] – [234]. It was the duty of the judge to determine the facts relevant to sentence in a manner not inconsistent with the verdict of the jury and this is what had occurred.

Drug supply: relevance that drugs supplied to an undercover officer and not disseminated into the community

In ***R v DW*** **[2012] NSWCCA 66** the respondent had pleaded guilty to conspiracy to manufacture amphetamines. An undercover police officer had prevented the drugs from being disseminated into the community. RS Hulme J considered (at [107-[114]) a number of Court of Criminal Appeal cases that held no diminution, or only very limited diminution, of criminal culpability could result from the fact that drugs were not ultimately disseminated into the community. His Honour stated:

> [115] With due respect to the authors of these statements, a number of them appear to be inconsistent with the long-standing principle that the criminal law is concerned with the consequences of offending. Thus is *Savvas v R* [1995] 183 CLR 1 at 6 the High Court embraced the proposition that, "A considerable number of more recently reported cases illustrate the imposition of sentences by reference to what was actually done in the transition of the conspiracy"…
>
> [117] … if the involvement of authorities prevents the transaction from resulting in harm, it is illogical not to afford appropriate weight just as in the converse situation on would take account of any damage that was a consequence of the offending.

Escape from custody: consideration of mandated accumulation of sentences on question of special circumstances

In ***Mattar v R*** **[2012] NSWCCA** 98 the offender had escaped from custody while serving a sentence for drug supply of 5 years with a non-parole period of 3 years. A sentence of a further 2 years with an 18 month non-parole period was imposed. Pursuant to s 57(2) of the *Crimes (Sentencing Procedure) Act* 1999 the sentence for escape commenced at the end of the non-parole period for the principal offence. The result was a total sentence of 4.5 years imprisonment without parole, with only a 6 month non-parole period. The appeal was upheld, Harrison J finding that the judge had failed to take in account the mandatory accumulation of the sentence for escape when determining that the appellant's circumstances did not warrant special consideration. The trial judge had also erred in not accounting for other circumstances that translated in harsher than normal custodial conditions(at [24]).

Kidnapping

The Crown appealed against the asserted inadequacy of a suspended sentence imposed in the District Court for an offence of aggravated kidnapping: ***R v Speechley*** **[2012] NSWCCA 130**. The appeal was allowed and the respondent was re-sentenced. The judgment of Johnson J contains a very useful analysis of the basic, aggravated and specially aggravated offences of kidnapping contained in s 86 of the *Crimes Act* 1900 and the approach to sentencing for them (at [47] – [64])

Manslaughter: changes in sentencing patterns since 2000

In ***Scott v R*** **[2011] NSWCCA 221**, the offender committed offences in 2000 for which he was not charged and ultimately sentenced until 2008 and 2010 respectively. The question arose during the offender's sentencing proceedings whether the sentencing patterns for manslaughter had moved adversely to the offender between 2000 and the sentencing date in 2010. If they had, then *R v MJR* (2002) 54 NSWLR 368 is authority for the proposition that the offender should be sentenced in accordance with the standards prevailing as at the time of the offence. The sentencing judge held that they had changed, yet seemingly proceeded to sentence the offender in accordance with standards prevailing as at the date of sentence.

On appeal, James J discussed the relevant principles. His Honour referred to, inter alia, the onus of proof resting on the offender to establish that sentencing patterns had moved adversely, and the evidentiary materials that can be used to discharge this onus (i.e sentencing statistics, individual sentencing decisions, recollections of judges having knowledge of what sentencing practices were at the time of the commission of the offences, legislative changes in the nature of the offence including changes to the maximum penalties and imposition of standard non-parole periods). His Honour concluded that the evidence did not establish that there had been any significant change in the sentencing patterns for the offence of manslaughter during that period. Consequently, his Honour held that no lesser sentence should have been imposed and dismissed the appeal, notwithstanding the sentencing judge's error.

Manslaughter - motor manslaughter – highest ever sentence not excessive

A 23 year old man was sentenced to a total of 15 years for two counts of manslaughter. He had stolen a high performance vehicle while under the influence of methylamphetamine and amphetamine. The following morning, without sleep and suffering from drug withdrawal, he drove the vehicle in wet conditions through busy suburban streets at speeds of up to 185 km/h. Police were forced to terminate a pursuit. Subsequently, there was a collision with another vehicle instantly killing its two occupants and the offender suffering significant injuries as well. To make matters worse, at the time he was on conditional liberty for a similar offence.

In ***Spark v R*** **[2012] NSWCCA** 140 it was observed that the sentences are the highest ever imposed in NSW for motor manslaughter but they were not manifestly excessive. Fullerton J found that the level of recklessness exhibited was "extreme" and level of overall criminality was "high" (at [48]). The sentencing judge had regard to a number of motor manslaughter cases that attracted lower sentences, each with similarities and differences from the present case. However, they did not fix an upper limit on the sentencing discretion of the judge (at [51]). Fullerton J noted that referring to sentences imposed in other cases was of limited utility

when arguing on appeal that a sentence was manifestly excessive (at [49]-[50]). Ultimately, she found that it was open to the sentencing judge to find that the offences were at the higher end of seriousness for the cases comprehended by the offence of manslaughter (at [52]).

Perjury - when committed in relation to another offence, the sentence need not be cumulative on the sentence for that other offence

While awaiting sentence for arson, an offender was charged with perjury after telling lies during the sentencing proceedings at the District Court. He had given evidence that he had been emotionally affected by the death of his brother at the time of the offence, but his brother had not died until a week later. The judge imposed a sentence of imprisonment for the perjury which was entirely concurrent with the sentence imposed for the arson: ***R v King* [2011] NSWCCA 274**. A Crown appeal was dismissed when an argument that the sentences should not have been made entirely concurrent was rejected. The Crown contended that as the sentence for arson was appropriate, an additional term should have been imposed for the discrete, though connected, offence of perjury. However, Adams J held (at [21]) that this argument mistakenly turned "mere chronology into a substantive rule". The correct approach was to assess whether the sentence imposed, considering the overall criminality involved in all the offences, was manifestly too lenient. On this approach, his Honour could find no error with the decision of the sentencing judge.

Perverting the course of justice – pretending to have cancer to get a reduced sentence

A woman committed an assault and then began falsely claiming to have cancer, aware that she may be convicted for the assault. At sentence, she failed to correct a statement by her solicitor to the magistrate that she had cancer. A magistrate imposed a section 9 bond for the assault, saying, "The only thing stopping you from going to goal is because of your medical condition." After her ruse was discovered, she pleaded guilty in the District Court to making an omission intending to pervert the course of justice. She appealed against the sentence imposed of 12 months imprisonment: ***Church v R* [2012] NSWCCA 149**. It was contended that the judge had considered a hypothetical outcome of the Local Court proceedings had she not lied. Button J found that the sentencing judge had not determined what "*would*" have happened had she not made the omission (at [26]); that would have been an erroneous inquiry. Rather his Honour determined what "*ought*" to have happened taking into account all the evidence now before him. In doing so, he was making a determination relevant to the seriousness of the offence of perverting the course of justice. Button J noted that it would also have been an error to make up for the jail sentence evaded in the Local Court in imposing the sentence at the District Court. But there was no evidence that this had occurred.

Sexual assault: no need for specific evidence before judge can find that victim will would suffer as a result

The appellant in ***Enriquez v R* [2012] NSWCCA 60** pleaded guilty to sexually assaulting a girl under the age of 16. At sentencing, the judge remarked that "this young girl will suffer for the rest of her life. … The impact upon her in later life is likely to be an inability to trust men, to form satisfactory relationships and it may well impact upon her ability to bond with her own children." It was contended on appeal that there was no evidence to support this finding. McClellan CJ at CL held (at [48]-[49]) that although there was no specific evidence provided to the Court on this point, the consequences of offences of this nature on teenagers and young

women is well known and it was open to the sentencing judge to draw on her general experience in these matters. That approach was supported by the decision of *R v Scott* [2003] NSWCCA 28.

SUMMING UP

Confusing direction on extended joint criminal enterprise

In ***May v R*** **[2012] NSWCCA 111**, Bathurst CJ (Simpson J agreeing) found that a trial judge had erred by leaving murder to the jury on the basis of extended joint criminal enterprise (at [260]). At issue was whether the accused would be guilty of murder if the jury were satisfied that there was an agreement between him and one Burnes that the latter would shoot the deceased on the accused's signal, but that the signal had not been given. Bathurst CJ held that if the jury found the accused was aware that Burnes could shoot the deceased absent the signal, they could have found him guilty of a joint criminal enterprise to murder the deceased (at [251]). However, this was not a case of *extended* joint criminal enterprise.

For liability to arise on the basis of extended joint criminal enterprise there must be an agreement between the accused and another person to commit an offence (the foundational offence), and then the other person commits a different offence (the actual offence) where the accused knew of the possibility that the actual offence might be committed. In this case the foundational offence and actual offence were the same, namely the murder of the deceased. By directing the jury to consider extended joint criminal enterprise, the trial judge invited the jury to consider an agreement between the accused and Burnes other than one to kill the deceased. Bathurst CJ held that this would have likely caused confusion in the minds of the jury (at [260], [269]).

Failure to direct jury on matters relevant to a finding of dishonesty

In ***Krecichwost v*** **R [2012] NSWCCA** 101, the applicant was found guilty by a jury of dishonestly using his position as a director of a company to gain personal advantage. The trial judge directed the jury that dishonesty was to be judged according to "the standards of ordinary, decent people". In seeking leave to appeal it was contended that the judge had erred in failing to direct the jury to consider a number of factors relevant to the dishonesty of a company director. No such directions were sought at the trial. Macfarlan JA, refusing to grant leave, found that the applicant had been well represented at trial (at [64]-[65]). His Honour stated that it was too late argue that reference should have been made to further factors by the trial judge in her summing-up. Factors relevant to a finding of dishonesty vary according to the circumstances of the case and there are no prescribed matters that must be taken into account.

Directions to a jury concerning an accused's earlier acquittal

Jeffrey Gilham's parents and brother were stabbed to death in the family home: ***Gilham v R*** **[2012] NSWCCA 131**. He claimed that his brother killed their parents and he, under provocation, then killed his brother. He was charged with murder but the Crown accepted his plea of guilty to manslaughter, conceding that it could not disprove his explanation. Many

years later he was charged with the murder of his parents, the Crown now contending that his explanation was false and that he was responsible for the three killings. One of the many issues at his trial, and on appeal, was whether he was given the full benefit of his earlier acquittal on the charge of murder in respect of his brother. The Court (McClellan CJ at CL, Fullerton and Garling JJ) found that the conduct of the Crown case had not involved impermissible controverting of the acquittal, it being a necessary step in the attempt to prove that Gilham murdered his parents to contend that he had also murdered his brother. However, it was held (at [150] – [155]) that in explaining the effect of the earlier acquittal to the jury the trial judge had erred by failing to tell them that it constituted a formal acknowledgement by the sentencing court that the Crown could not, as at the time of sentencing, negative the reasonable possibility that the brother had killed the parents and that, in doing so, he provoked Gilham to kill him. The trial judge had in fact told the jury that the reason the Crown accepted the plea to manslaughter was "neither here, nor there".

Dangerous driving causing death - the irrelevance of negligence

King v The Queen [2012] HCA 24 was concerned with the Victorian equivalent of the offence in s 52A of the *Crimes Act* 1900 of occasioning death by dangerous driving and a Victorian Court of Appeal decision concerning it (*R v De Montero* (2009) 25 VR 694). It was contended by King that the trial judge's directions to the jury at his trial, which occurred before *De Montero*, were deficient. It was held in the High Court (French CJ, Crennan and Kiefel JJ at [44] – [50]), that dangerous driving is not a species of the genus of criminal negligence and does not depend upon the degree to which the driving falls short of the standard of care owed to other road users. It was not necessary for the judge to direct the jury that it must be shown to be conduct that is deserving of criminal punishment

Being together does not constitute being "in company"

The appellant in ***Markou v R*** **[2012] NSWCCA 64** had been convicted at a judge alone trial of assault occasioning actual bodily harm in company. He and another man had approached the victim and others in a nightclub. He hit the victim while the other man punched someone standing next to victim. The trial judge found that the appellant was accompanied by the other man when he struck the accused and therefore held that the offence was "in company". The appeal was allowed and a verdict substituted for assault occasioning actual bodily harm. Referring to Kirby J in *R v Button; R v Griffen* [2002] NSWCCA 159 at [120], Macfarlan JA held (at [26]-[27]) that for an offence to be committed "in company" there must be some relevant common purpose. This could not exist without some express or implied arrangement or understanding between accused and the others accompanying him or her. The trial judge did not recognise that this element needed to be proved to establish the charged offence, and the evidence did not establish beyond reasonable doubt an agreement between the appellant and the other man.

Joint criminal enterprise manslaughter

The appellant in ***TWL v R*** **[2012] NSWCCA 57** was convicted of manslaughter. It was the Crown case that he had entered into a joint criminal enterprise with AC, and AC had subsequently punched the victim who fell and died when he hit his head. It had been agreed that the punch was an unlawful and dangerous act. In summing up, the trial judge said that the Crown alleged that there was a joint criminal enterprise "to visit physical violence" on the victim, or an

arrangement to physically assault him. Macfarlan JA held that it was necessary for the Crown to establish that the agreement between the appellant and AC was that an act would be committed that would expose the victim to an appreciable risk of serious injury. A general agreement to "visit physical violence" would not necessarily have exposed the victim to this risk.

Alternative verdict – when to leave manslaughter 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, the case 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 and 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. 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 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.

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.

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-Hady 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.

Unbalanced and unfair summing up

In ***Magoulias v R*** **[2012] NSWCCA 160 a** jury had found the appellant guilty of two offences, including committing an act of indecency. He had been working as a painter on the exterior of a unit building at the time of the offences. The complainant lived in one of the units and gave evidence that when she was in her bathroom, the appellant had entered the premises and moved towards her with his penis out of his trousers. He told her that he simply needed to use the bathroom, but he did not give evidence at trial. It was held that the trial judge's summing up had been unbalanced. Allsop P found that the trial judge had erred in directing the jury that the only evidence of intention came from the complaint. He had failed to direct the jury that a determination of intent was to be inferred from findings about the objective circumstances, including the appellant's location and the movement of his arm. Some of these objective circumstances were the subject of inconsistencies between the complainant's prior statements and her evidence at trial (at [11]). Allsop P found that the summing up must have left the jury with the impression that a finding about intention turned only on the complainant's truthfulness and the failure of the appellant to give a contrary version. Instead, the case depended on doubts about the complainant's accuracy based on past inconsistencies. This was not fairly put to the jury (at [13]).