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Criminal Law Update

The Honourable Justice R A Hulme
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The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions and some of the more significant legislative enactments 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

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.

Conviction appeals in circumstances where the court has already ruled on an issue under s 5F of the Criminal Appeal Act 1912

The trial judge in **DAO v R [2011] NSWCCA 63** ordered that the accused be tried on an indictment containing allegations made by three separate complainants. The accused appealed under s 5F. A five judge bench was convened (Spigelman CJ, Allsop P, Simpson, Kirby and Schmidt JJ). In considering whether to grant leave to appeal, consideration was given to whether arguments advanced by the applicant and decided adversely on a s 5F appeal could be considered in any subsequent conviction appeal. Different views were expressed.

Spigelman CJ (at [15]) was of the view that a decision under s 5F does not preclude further consideration of the same issue under ss 5(1) and 6(1) of the Act. Allsop P expressed the view, inter alia, (at [107]) that his reasons for dismissing the appeal “should not have an effect on the scope of any argument or issues in any appeal under ... ss 5 and 6”. He found it unnecessary to decide the relationship, if any, between reasons for dismissal of a s 5F appeal and the disposition of any final appeal under ss 5 and 6. Simpson J, however, disagreed with Spigelman CJ and said that “once leave is granted, the Court has before it an appeal in the usual way” (at [206]). Her Honour felt that “a real question exists as to whether, if leave is granted, and the appeal dismissed, that issue is foreclosed, in the event of conviction, from any appeal against that conviction” (at [207]). Schmidt J (at [213]) was of the view that if the same issue as to admissibility of evidence be raised in a post-conviction appeal, considerations of issue estoppel would appear to arise for consideration.

DAO v R is also significant for its consideration of the principles guiding the review by the Court of Criminal Appeal of a trial judge’s decision under ss 97 and 101 of the Evidence Act 1995. The court examined the conflicting authorities on the subject and held that such a review should follow the principles stated in *House v R* (1936) 55 CLR 499 and not the approach first raised in *Warren v Coombes* (1979) 142 CLR 531.

Erroneous consideration of a ground asserting that a verdict was unreasonable and not supported by the evidence

In **SKA v The Queen [2011] HCA 13**, the appellant was convicted of a number of counts of sexual assault against a child. He appealed to the Court of Criminal Appeal on the ground that the verdicts of the jury were unreasonable and not supported by the evidence but the appeal was dismissed.

There was a real issue in the trial as to when two of the offences were alleged to have incurred. The indictment alleged a period of 25 days but the complainant suggested, without being dogmatic, that they occurred on a particular day. SKA adduced alibi evidence that accounted for his movements on that day and the days either side of it. The Court of Criminal Appeal did not make any finding as to when the offence had occurred. It did find that the complainant’s evidence, if accepted, was sufficient to enable the jury to conclude that the offence had occurred. It was concluded that it was open to the jury to arrive at the verdicts that it did. Simpson J added, “[t]o the extent that it is relevant, I would also be satisfied

beyond reasonable doubt, on the evidence, that the [applicant] committed each of the offences charged.”

An appeal to the High Court was upheld by a majority (French CJ, Gummow and Kieffell JJ). It was held that there had been a failure to determine the issue as to when the offences in question occurred and then to adequately evaluate the competing evidence which was the task required in determining whether the verdicts were unreasonable or unsupported.

Two other issues were considered in *SKA*: (a) whether the Court of Criminal Appeal was in error in not viewing a recording of the police interview of the complainant which amounted to the complainant’s evidence in chief; and (b) whether regard should have been had to a report by the trial judge. As to (a), it was held that it was correct for the Court to have not viewed the recording. As to (b), it was said that a report by a trial judge should be confined to matters that are not apparent from the record. The judge’s view of the evidence was irrelevant when it was the task of the Court to make its own assessment.

Section 5F appeal against evidentiary ruling and refusal of stay

The accused in ***JG v R* [2011] NSWCCA 198** had, during the trial, sought to have evidence from a witness excluded under s 138 of the *Evidence Act* 1995 and the proceedings permanently stayed. The trial judge rejected both requests and the accused applied for leave to appeal under s 5F of the *Criminal Appeal Act* 1912. The Court refused leave to appeal. Their Honours provided a discussion of the Court’s position concerning appeals against a refusal of a stay where that decision is based upon a ruling as to the admissibility of evidence, namely that leave to appeal is only granted in exceptional circumstances.

EVIDENCE

“Body mapping” evidence – admissibility

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

Compellability of a parent to give evidence against their child

In ***LS v Director of Public Prosecutions (DPP) (NSW)* [2011] NSWSC 1016**, a 15 year old boy was charged with having damaged household property belonging to his mother during the course of an argument. The charges were heard in the Children’s Court. The mother applied to be excused from being required to give evidence for the prosecution pursuant to s 18 of the

Evidence Act 1995, to which the prosecutor objected. The prosecutor contended that section 19 of the *Evidence Act 1995* applied as an exception to s 18 as the offence fell within the definition of a domestic violence offence under the *Crimes (Domestic and Personal Violence) Act 2007*. Section 19 provides that, inter alia, the exception to compellability in s 18 of the *Evidence Act 1995* does not apply to proceedings for an offence against or referred to in, inter alia, s 279 of the *Criminal Procedure Act 1986* (the provision is headed “Compellability of spouses to give evidence in certain proceedings”). Subsection 279(1)(b) makes reference to domestic violence offences. The magistrate accepted the prosecutor’s submission and ruled that it was not open to the mother to object to being required to give evidence.

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

Visual identification evidence – identification parades

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

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

DNA evidence - description of statistical conclusions

The appellant in ***Aytugrul v R [2010] NSWCCA 272*** was linked to a murder by a strand of hair found on the body of the deceased. DNA recovered from the hair matched the appellant’s DNA. The significance of the evidence was explained to the jury in two ways: “random occurrence ratios” and “exclusion percentages”. The former involved evidence that 1 in 1600 people had the same DNA profile. The latter involved the description that 99.9 per cent of people would not be expected to have that DNA profile. Simpson J, with whom Fullerton J agreed, referred to the contention that the evidence should have been rejected pursuant to either s 135 or s 137 of the *Evidence Act 1995*. There was no question that the evidence of the DNA analysis was correctly admitted. What was in contention was the interpretation of the evidence. Both of the formulations were mathematically accurate. Accordingly, Simpson J held that either forms of interpretation of the evidence were appropriately before the jury.

McClellan CJ at CL dissented. He regarded the expression of the interpretation of the evidence by way of exclusion percentages as being “too compelling” (at [99]). In his Honour’s view this involved prejudice which substantially outweighed the probative value of the evidence. On the other hand, Simpson J posed the question (at [177]) “how can evidence expressed in one way be such as not to attract the operation of s 135 or s 137 ... but, when expressed in another way, become unfairly prejudicial?”

Special leave to appeal to the High Court of Australia was granted on 2 September 2011. The appeal was heard on 8 December 2011 and judgment presently remains reserved.

Confession to custody manager – whether made in the course of “official questioning”

In ***Bryant v R* [2011] NSWCCA 26**, the appeal enlivened the question of whether evidence of a confession by an accused to a custody manager was considered to be made in the course of “official questioning” and therefore inadmissible pursuant to s 281 of the *Evidence Act* 1995. Under the Act, “in the course of “official questioning”” means “in connection with the investigation of the commission or possible commission of an offence”. Howie AJ (at [139]) was prepared (albeit with heavy reservation) to accept that the police officer was “questioning” the suspect. However, giving effect to the broad meaning of “questioning” contemplated by s 281, his Honour rejected the proposition that the confession was made in the course of “official questioning”. The police officer had no involvement in the investigation of the offences in question other than to ask the suspect the formal questions at the end of the recorded interview and as custody manager. Furthermore, his Honour found that the questions asked were, in essence, merely a part of supplying the appellant with information about the bail proceedings.

Fingerprints and photographs taken of a juvenile suspect in custody

The three juveniles in ***R v SA; DD and ES* [2011] NSWCCA 60** were arrested for allegedly committing an offence of causing grievous bodily harm with the intent. Whilst in custody, police took photographs for inclusion in an array of photographs to be shown to witnesses. Fingerprints were taken for comparison with those left at the crime scene. The trial judge held the evidence to be inadmissible. The Crown appealed under s 5F(3A) of the *Criminal Appeal Act* 1912. It was necessary for the Court to consider the interplay between the provisions of the *Criminal (Forensic Procedure) Act* 2000 (CFPA) which prohibit the carrying out of forensic procedures upon a child without an order from a magistrate or authorised officer, and s 133 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPRA) which provides that police may take “all particulars necessary to identify a person who is in lawful custody for any offence” over the age of 14 (including the taking of fingerprints and photographs).

The appeal was allowed. Blanch J held, in effect, that suspects in custody are governed by the LEPRA, in this case s 133, and that the prohibition of forensic procedures on a child under the CFPA did not apply because of s 112 of the LEPRA. His Honour also rejected (at [38]) a submission that the police powers under s 133 were limited to establishing the identity of the suspect. Longstanding authority established that police had power under the *Crimes Act* 1900 to take fingerprints and photographs not only to establish the identity of a suspect but also to use that evidence to prove the suspect had committed the crime. That proposition remains after the enactment of the LEPRA.

Exclusion of evidence where unfairly prejudicial despite no objection to admissibility

Chand v R [2011] NSWCCA 53 concerned an alleged offence of violence committed by the appellant against a neighbour. A police officer gave evidence regarding a number of COPS entries concerning complaints made by the appellant against neighbours. Notwithstanding that no objection was taken to the evidence, Hoeben J held that the evidence should have been excluded. There was a risk of unfair prejudice in that the jury could have been led to believe that the appellant was a vexatious complainant; a person suffering from some paranoia or otherwise undiagnosed mental illness; a person who felt victimised by neighbours; or a person whose credibility due to his beliefs was diminished. No reference was made to *R v FDP* (2008) 74 NSWLR 645; [2008] NSWCCA 317, where it was held that there was no duty upon a trial judge to reject evidence where no objection was taken.

Admissibility of admissions in a summary hearing in the Children's Court where no electronic recording made

In **CL v Director of Public Prosecutions (NSW) [2011] NSWSC 943**, the accused was charged with aggravated break, enter and steal (s 112(2) *Crimes Act* 1900). The prosecution relied upon admissions made by the accused during an interview with a police officer at his home that were recorded in the officer's notebook. There was an opportunity to electronically record the interview but the officer elected not to. CL objected to the tender of the admissions on the basis that there was no recording and no reasonable excuse as to why there was not (s 281 *Criminal Procedure Act* 1986). The magistrate, however, allowed the evidence on the basis that s 281 only applies to admissions that relate to an indictable offence, "other than an indictable offence that can be dealt with summarily without the consent of the accused": s 281(1)(c). While the offence is strictly indictable in the case of an adult, it is an offence that pursuant to the *Children (Criminal Proceedings) Act* 1987 is ordinarily dealt with summarily in the Children's Court.

Fullerton J allowed the appeal and quashed the orders of the magistrate. Resolution of the issue turned upon the proper construction of s 281(1)(c) of the *Criminal Procedure Act* 1986. Her Honour held (at [16]) "that the qualification in s 281(1)(c) is to the type of offence to which the admission relates (namely an indictable offence that can be prosecuted without the accused's consent under Tables 1 and 2 of Schedule 1 of the *Criminal Procedure Act*) and not the nature of the proceedings where the admission is sought to be led as might have been the case were the exception in s 28(1)(c) to read 'other than an indictable offence that is dealt with summarily without the consent of the accused'".

Tendency evidence and related issues

In **Stubley v Western Australia [2011] HCA 7**, the appellant, a psychiatrist, stood trial in the Supreme Court of Western Australia and was convicted of multiple sexual offences committed against two female complainants during treatment sessions. The Crown sought to lead evidence of three other women who alleged that the appellant engaged in sexual activity with them as patients. The prosecutor contended that the evidence was relevant to establish a tendency to act in a particular way namely "bringing about a situation where sexual activity occurs, without consent in its legal sense but without opposition or resistance from the particular complainant" The trial judge held the evidence to be admissible as propensity or

relationship evidence within the meaning of s 31A of the *Evidence Act* 1906 (WA). That section is in different terms to s 97 of the *Evidence Act* 1995 (NSW) but in common is the requirement for “significant probative value”.

The High Court (Gummow, Crennan, Kiefel and Bell JJ in a joint judgment; Heydon J dissenting) allowed the appeal and set aside the convictions. It was noted that the only live issue at trial was the consent of the complainants and so the evidence ceased to have probative value once the fact that these sexual acts took place was no longer challenged.

LEGISLATION

Court Suppression and Non-publication Orders Act 2010

This Act, which came into force on 1 July 2011, confers a statutory power on all courts exercising criminal jurisdiction to make non-publication and suppression orders. A non-publication order is defined to mean an order that prohibits or restricts the publication of information, but that does not otherwise prohibit or restrict the disclosure of information. A suppression order is defined to mean an order that prohibits or restricts the disclosure of information, by publication or otherwise. Information includes any document.

An order can be made where it is necessary to prevent prejudice to the proper administration of justice; to prevent prejudice to national or international security; to protect the safety of any person, or to avoid causing undue distress or embarrassment to a party or a witness in proceedings concerning sexual offences. The legislation also provides for the exercise of the power when it is otherwise necessary in the public interest if that interest significantly outweighs the public interest in open justice. In deciding whether to make an order, the court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. It is an offence to contravene an order.

Section 292 (power to prohibit publication of evidence in prescribed sexual offence proceedings) and s 302(1)(c) and (d) (power to prohibit publication relating to a protected confidence) of the *Criminal Procedure Act* 1986 are repealed. Statutory provisions which of their own force prohibit publication of certain matters (e.g. s 578A of the *Crimes Act* 1900 and s 15A of the *Children (Criminal Proceedings) Act* 1987) are unaffected.

Crimes Amendment (Murder of Police Officers) Act 2011

A new section 19B provides for mandatory life sentences to be imposed for the murder of a police officer. In addition to the mens rea and actus reus specific to the offence, knowledge (actual or constructive) that the victim was a police officer is specifically an element of the offence. The provision does not apply if the offender is under 18 at the time of the murder or had a significant cognitive impairment at the time. The provision applies to offences committed on or after 23 June 2011.

Crimes (Sentencing Procedure) Amendment Act 2010

Section 22 of the principal Act was amended so as to include a requirement that the court taken into account the “circumstances” in which an offender indicated an intention to plead

guilty as well as the existing requirement that the Court take into account that an offender has pleaded guilty and when the plea was entered or was indicated. It is also now provided in this section that a lesser penalty imposed because of a plea of guilty must not be unreasonably disproportionate to the nature and circumstances of the offence.

Section 23 was amended so as to require a court to indicate that a sentence is being reduced for assistance either in the past, or in the future, or both. The court is required to state the penalty that would otherwise have been imposed and where both past and future assistance is involved, the court is required to state the amount by which it has been reduced for each.

Another amendment of note was the insertion of s 35A which provides restrictions upon a court taking into account any agreed facts or offences listed on a Form 1 that is the result of charge negotiations unless the prosecutor files a certificate verifying that consultation with any victim and the police has taken place, or explaining why it has not. The certificate must also verify that any agreed facts constitute a fair and accurate account of the objective criminality of the offender.

Perhaps the most significant amendment is the creation of a method for a court to impose an “aggregate sentence of imprisonment” when sentencing for multiple offences. New s 53A provides that a court may impose an aggregate sentence of imprisonment and by new s 44(2A) may impose a single non-parole period in respect of that aggregate sentence. There are ancillary provisions, including that if an aggregate sentence is imposed the court must indicate the sentence that would have been imposed for each offence if separate sentences had been imposed. There is no requirement to indicate the non-parole period of individual sentences. If any of the offences the subject of an aggregate sentence attract a standard non-parole period the court must indicate what non-parole period would have been set if a separate sentence had been imposed with the usual indication of whether it would have been the standard non-parole period or something greater or lesser, with reasons given for any departure.

These provisions took effect by proclamation on 14 March 2011.

Evidence Amendment (Journalist Privilege) Act 2011

A new Division 1C was inserted in Part 3.10. The new division provides that a journalist, or his/her employer, is not compellable to disclose an informant’s identity unless the public interest in favour of disclosure outweighs any adverse effect on the informant or third party and/or the public interest in the communication of facts and opinion by the news media. The provisions took effect upon assent on 21 June 2011.

OFFENCES

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

Two of the offences for which the appellant in **Riley v R** [2011] NSWCCA 238 was convicted were against s 39 *Crimes Act* 1900. (The terms of the offence were recast in 2008 but the concept of causing another person to take remains). The allegation was that the appellant had provided prescription drugs to the victims which had dangerous effects when they were taken

in combination. There was also a manslaughter charge in relation to another victim which also required consideration of the concept of “cause to be taken”. The trial judge directed the jury that the victim must have been “substantially influenced” by the accused in taking the substances. This was held to have been erroneous. The reasoning of Howie J in *R v Wilhelm* [2010] NSWSC 334 (2010) 200 A Crim R 413 was accepted as being correct. That is, there is a difference between a person being in a position of influence over a person and a person influencing the other person. “Cause to be taken” is to cover a situation where a person in authority over another (e.g. an adult over a child) orders, commands, or directs the other person to take the substance.

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

The accused in ***Agius v R; Abibadra v R; Jandagi v R; Zerafa v R* [2011] NSWCCA 119** were charged with two counts of conspiracy. Count 1 was said to have existed from 1 January 1997 to about 23 May 2001 whilst count 2 was said to have existed from 24 May 2001 to about 10 April 2008. The trial judge refused an application for a permanent stay of count 2 upon a contention that it was foredoomed to fail because the agreement was alleged to have been entered before the dates specified in the indictment. An appeal was brought under s 5F of the *Criminal Appeal Act* 1912. Johnson J agreed (at [62]) with the observations of the trial judge as to the nature of conspiracy being a “continuing offence” such that the offence depends upon the existence of, or participation in, an agreement, and not the precise timing of its formation.

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

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

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

Manslaughter – gross criminal negligence where drug supplier owes duty of care to a person to whom drugs are supplied

In **Burns v R [2011] NSWCCA 56**, the appellant was tried, inter alia, for manslaughter. One of the bases for this count that was relied upon by the Crown was gross criminal negligence arising from an alleged duty of care owed by the appellant to the deceased. It was contended that the appellant failed to provide reasonable assistance to the deceased when he became ill and died as a result of the effects a drug supplied to him by the appellant.

On appeal it was contended that the trial judge should have removed the charge from consideration by the jury and erred in directing the jury that there was a duty of care owed by the appellant. A question for resolution by the Court was whether “the supplier of a prohibited drug owes a duty of care to a person to whom they supply a drug and who, in their presence, ‘takes’ the drug” ([105] of the judgment of McClellan CJ at CL and Howie AJ, with whom Schmidt J agreed). The approach taken in the United Kingdom in analogous circumstances (in particular, that of *R v Evans (Gemma)* [2010] 1 All ER 13; [2009] 1 WLR 1999) was adopted. The submission that no duty of care arose from the circumstances of this case was rejected. Their Honours observed some of the relevant circumstances:

[114] The provision of methadone to the deceased was a breach of the law. The drug was known to the appellant to be dangerous and it was plainly open to the jury to conclude that the deceased was vulnerable, both because of his naivety as a user of methadone and his physical condition at the time...

It was further held (at [118] – [119]) that the trial judge’s direction was appropriate and that the existence of a duty of care is a matter of law for the judge to determine, whose responsibility it also is to give instructions to the jury as to the elements of the duty. The appeal was dismissed.

Pervverting the course of justice

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

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

[49] In other words, if the Crown, in the present matter, could establish that the respondent’s actions were intended to deflect the police from prosecuting him for the criminal offence that he had allegedly committed, or from adducing evidence of the true facts relating to the alleged

offence, the prosecution was clearly capable of being maintained. The fact that no judicial proceedings had been commenced at the time when the respondent spoke to Ms Ullah and Mr Sundarjee, did not preclude the finding of a prima facie case. ...

Unauthorised access to a computer system

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

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

Letters were sent to the wives and relatives of military personnel killed in Afghanistan that were critical of the involvement of Australian troops in that country and referred to the deceased in a denigrating and derogatory fashion. Two men were charged with using a postal service in a way that reasonable persons would regard as offensive (one as a principal in the first degree and the other for aiding and abetting). It was contended that the offence infringed the implied constitutional freedom of political communication. The trial judge rejected this and refused to quash the indictments. The accused appealed pursuant to s 5F *Criminal Appeal Act 1912*: ***Monis v R; Droudis v R [2011] NSWCCA 231***. Bathurst CJ, Allsop P and McClellan CJ at CL delivered separate judgments but each held that the offence in s 471.12 of the *Criminal Code 1995* (Cth) was not constitutionally invalid.

POLICE POWERS

Exercise of a police officer’s powers of arrest

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

magistrate erred in failing to apply s 99(3) when determining the whether the police officers had acted in the execution of their duty.

PRACTICE AND PROCEDURE

Browne v Dunn

In ***Llewellyn v R* [2011] NSWCCA 66**, the appellant was tried for an offence of sexual intercourse without consent. The appellant's defence at trial was that the complainant was a willing participant. In cross-examination, counsel for the appellant put it to the complainant that one of a number of ways in which she had indicated her consent was that she had "helped push down his pants", without actually putting to her the manner in which she had done so. The appellant subsequently gave evidence that the complainant had used her feet on the outer sides of his legs to remove his jeans. The Crown Prosecutor put to the appellant that there was no suggestion in the cross-examination of the complainant that this is what had occurred, a question which was objected to but allowed by the trial judge. In re-examination, the appellant confirmed that he had given instructions to his counsel before the trial consistent with his evidence. The Crown Prosecutor never suggested that the appellant's evidence was a recent invention.

Hall J (McClellan CJ at CL agreeing, Garling J also but with different reasoning) held that the rule of *Browne v Dunn* was not breached by the appellant's counsel in failing to put to the complainant whether she had used her feet in pushing down the appellant's pants. His Honour reasoned that the proposition as to whether the complainant had helped the defendant remove his pants was squarely put to the complainant, despite not expressly putting to her the alleged use of her feet.

Drug Court program eligibility

In ***Director of Public Prosecutions (DPP) v Hilzinger* [2011] NSWCA 106**, the offender pleaded guilty to an offence of aggravated break, enter and commit serious indictable offence, namely damage property. The offence involved five men attending a hotel in the middle of the night wearing balaclavas, confronting and detaining a cleaner and then causing property damage in a failed attempt to steal a safe and an ATM. The circumstances of aggravation were that the offence was committed in the company of the four other men. The offender had been referred to the Drug Court when an issue arose as to whether the offender was "eligible" pursuant to s 5 of the *Drug Court Act* 1998 to be entered into the Drug Court program, as "an offence involving violent conduct" excluded a person from eligibility under s 5(2). The question for determination was whether the provision in s 5(2) is concerned with the elements of the offence, or whether it is concerned with the circumstances of it. The senior judge of the Drug Court held that it is concerned with the element of the offence.

On appeal, the Court agreed with the interpretation of the senior judge of the Drug Court and dismissed the appeal. At [45] to [50] of the judgment, Whealy J set out the sequence of steps taken under the legislation, before making the following observations at [52]:

There is every reason to suppose that the legislature had in mind that a constant and certain test would be set for eligibility. The elements of the offence test meet that criterion. The facts test would be far less certain. It would have the capacity to interrupt the sequential nature of the Drug

Court program and, to that extent, disturb the beneficial flow of treatment and counselling for addiction. The legislature does not appear to have had in contemplation, in the normal case, a revisiting of eligibility at the sentencing or later stages, enabling a reversal of the original finding, based on some circumstance of behaviour not necessary for the establishment of the elements of the offence.

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

In **FB v R [2011] NSWCCA 217**, there was a ground of appeal concerned with the trial judge's questioning of certain witnesses, which the appellant contended was excessive, at times inappropriate in that they bolstered the prosecution's case, and created a real danger that the trial was unfair. Whealy J rejected the ground, finding (at [110]) that the trial judge's interventions were "moderate, balanced, necessary and proper in every respect". His Honour earlier referred to the principles concerning inappropriate questioning by the judge, enunciated by Kirby ACJ in *Galea v Galea* (1990) 19 NSWLR 263 in the context of civil trials, and drew some parallels with criminal trial conduct without a jury: "This may underline the proposition that, in appropriate circumstances, a judge sitting in a criminal trial without a jury will be entitled, within reasonable limits, to explore issues of fact with both Crown and defence witnesses".

Judgments - obligation of a magistrate to give reasons

In **Director of Public Prosecutions v Abouali [2011] NSWSC 110** a magistrate upheld a no case submission in a prosecution for not stopping at a stop line at a red light (*Road Rule* 56(1)(a)). She held, in effect, that the defendant had committed the offence of entering an intersection against a red light (*Road Rule* 59) and had been charged under the wrong rule. On appeal, Schmidt J held that the two rules were not mutually exclusive and that the defendant could be guilty of a breach of either of them. One of the grounds of appeal was that the magistrate had failed to give adequate reasons for her determination. There was no judgment as such; the magistrate had indicated her view of the matter in exchanges with the prosecutor and the defendant's solicitor during their submissions.

On the requirement to give reasons, Schmidt J noted the observation of Johnson J in *Director of Public Prosecutions (NSW) v Illawarra Cashmart Pty Ltd* [2006] NSWSC 343; (2006) 67 NSWLR 402 at [15] that ex tempore remarks in a busy magistrate's court should not be picked over and appropriate allowance should be given to the pressures under which magistrates are placed. Johnson J referred to *Adecco v Gemvale Constructions Pty Limited* [2004] NSWCA 449 in which Santow JA spoke of the duty to give reasons as being a necessary incident of the judicial process, without which justice will not be seen to be done. He added that this does not require spelling out in minute detail every step in the reasoning process, or reference to every single piece of evidence. It is sufficient if the reasons adequately reveal the basis of the decision, with expression of the specific findings that are critical to the determination of the proceedings. In *Abouali*, the magistrate had not given reasons for stating "this matter does not fit clearly under road rule 56(1)" and did not explain why she concluded that one of the essential elements of the offence was missing. What element she had in mind was not identified.

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

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

Multiplicity of charges – whether oppressive

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

Power of the District Court to make screening orders

In **BUSB v Director-General of Security [2011] NSWCA 49**, the appellant was charged with a number of offences arising out of an allegation that he shot at a police officer. At trial, the judge ordered that, inter alia, certain witnesses being ASIO officers give their evidence in such a way that the witnesses could not be seen by the appellant, but could be seen by all other persons permitted to be present in court. Ultimately, the jury could not agree on a verdict and the so a re-trial was ordered. Similar screening orders were made in respect of those witnesses by the new trial judge, and the orders were challenged by way of an appeal under s 5F of the *Criminal Appeal Act 1912*.

Spigelman CJ held (at [36]) that since the appellant accepted that the District Court had the power to make screening orders, it was unnecessary to consider the issue further. The Chief Justice observed (at [54]) that the question was "not one of power, but of the exercise of a power", and proceeded to consider whether the trial judge had erred in making the orders. His Honour (at [83] – [85]) outlined some of the competing interests involved, including the right to a fair trial (i.e. the prejudice to the accused, the protection of witnesses) and the administration of justice.

The Chief Justice at [81] rejected the submission that the orders impinged upon the effective cross-examination of the witnesses:

The only identified effect of the accused seeing the faces of the two ASIO eyewitnesses was the possibility that the accused's memory may be triggered about their ability to observe what they say they observed. I am not satisfied that the degree of impingement of effective cross-examination in the present case is of significance.

SENTENCING – GENERAL ISSUES

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 in 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.

Addiction to drugs/medication - whether a matter of personal choice

In **Turner v R [2011] NSWCCA 189**, the offender was sentenced for an offence of armed robbery with an offence of larceny subject to a Form 1. The primary offence concerned the offender attending the emergency department of a hospital and threatening a doctor and nurse with a syringe in order to steal narcotic analgesic medication, whilst the Form 1 offence involved the offender snatching a prescription and some prescribed medication from a pharmacist. Evidence was led during the sentencing proceedings that the offender had developed an opioid addiction following a serious accident some years prior. The evidence was led in support of the submission that the judge should take into account as a mitigating factor that the offender's addiction had not arisen from personal choice. The sentence judge found that even though the offender's addiction had not started out of personal choice, there must have been choice at points throughout the seven years that the offender had been abusing the medication. Her Honour also referred to authority for the proposition that self-medication by the use of illicit drugs to overcome psychological or physical trauma is not a mitigating factor.

The Court held that the sentencing judge had erred in not taking into account the circumstances of the addiction as a mitigating factor. Simpson J held that the offender's addiction arose from an event for which he was not primarily responsible and so it was not a matter of personal choice, referring to [273] of the judgment of Wood CJ at CL in *R v Henry* [1999] NSWCCA 111, in particular at [273(c)(ii)]. Her Honour also held (at [62]) that the sentencing judge was in error in having regard to cases concerned with the abuse of illicit drugs when his addiction was to drugs "that had been legitimately prescribed for very serious pain". Finally, her Honour noted (at [63]) that given that the offender had sought assistance and had taken steps to try and overcome his addiction, and that there was no evidence (other than the circumstances of the Form 1 offence) that he had abused the drug, the sentencing judge's finding that the offender must have had a choice was an unfair one.

By way of contrast, in **Jodeh v R [2011] NSWCCA 194**, the sentencing judge's finding that the offender's addiction to illicit drugs was not a mitigating factor was upheld on appeal. The circumstances were that offender had suffered serious injuries in an accident requiring a series

of surgical procedures. The offender led evidence that the accident had caused him to suffer from mental and psychological pain which led him to use illicit drugs and commit the offences for which he was charged. McCallum J held (at [33]) that, on the evidence presented by the offender, it was open to the sentencing judge to make the finding that the offender made a deliberate decision to resort to illicit drugs and that such behaviour did not reduce his culpability to any significant extent. For instance, her Honour referred (at [32]) to, inter alia, there being no evidence that the offender had “made any attempt to address the issues of pain and depression with professional assistance and legally prescribed drugs”, apart from evidence from the offender’s sister that the prescribed medication he received provided inadequate pain relief, although there was no ability for the sentencing judge to assess the strength of the assertion.

Amendment of commencement dates of sentences pursuant to s 59 of the Crimes (Sentencing Procedure) Act 1999

In **Allan v R (No 2) [2011] NSWCCA 27**, the appellant was convicted of multiple offences and sentenced by two different judges. He successfully appealed against the sentences imposed by one judge, the result of which was that he was due for parole on those sentences 6 months earlier. Despite this, due to the commencement dates for the other sentences, the effect was that his earliest release date did not change. An application was made pursuant to s 59 for the commencement dates of the sentences imposed by the second judge to be varied. The Crown opposed the application, contending that s 59 only applied where it was necessary to rectify a hiatus in periods of imprisonment. That argument was rejected by Price J (at [18]). He referred, inter alia, to the characterisation by Spigelman CJ in *Regina v Pham* [2004] NSWCCA 269 of s 59 as a provision designed to serve pragmatic purposes, to ensure the efficiency and expedition of the administration of justice.

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 – use of

In striving for consistency in sentencing, the court may examine comparable cases to determine whether patterns exist and to shed light on the proper sentence in any case under consideration: *Director of Public Prosecutions (Commonwealth) v De La Rosa* [2010] NSWCCA 194 per Basten JA at [123] – [124] and McClellan CJ at CL at [197]. The question in **Wilcox v R [2011] NSWCCA 42** was whether a sentence of 19 years (non-parole of 14 years) imposed in relation to multiple offences including robbery with a dangerous weapon (s(97(2) of the *Crimes Act* 1900) was manifestly excessive. Barr AJ endorsed the above remarks of the court in *De La Rosa* and annexed to his judgment a very useful schedule of cases concerning sentences for offences under s 97(2).

His Honour also examined the circumstances in which the Court of Criminal Appeal determines the limits of appropriate sentence ranges:

[108] When this court allows an offender's appeal against sentence and reduces the sentence it enters upon the sentencing process a second time, and it becomes manifest that the substituted sentence lies within the range the court considers appropriate. The substituted sentence does not indicate the limits of the range, however, unless the court says so. When the court dismisses an offender's appeal against what is claimed to be an excessive sentence it does not thereby imply where the sentence lies, or whether it lies, within the appropriate range. It simply declares that the sentence is not excessive.

[109] There are cases, however, where the remarks of the court indicate the upper limits of the appropriate range. Two such cases are *Penfold & Ward* and *McKeon*.

[110] When the court allows a Crown appeal against the inadequacy of a sentence, the substituted sentence will often indicate the lower limit of the appropriate range.

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.

Concurrency/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.

In ***R v Hendricks*** [2011] NSWCCA 203, the offender pleaded guilty to two offences of sexual assault against a person with whom he had been in a relationship, the offences having occurred some two months apart. The sentencing judge imposed sentences whereby the two non-parole periods were entirely accumulated, finding that the two offences were entirely discrete and separate by a period of time. On appeal it was successfully contended that the judge had failed to consider the principle of totality, resulting in a sentence that was manifestly excessive. Garling J held that the sentencing judge fell into error in only taking into

account the fact that the offences were discrete and separate in time. There is a useful discussion of the principle of totality at [68] – [72] of his Honour’s judgment.

Disqualification of licence – ability to backdate and postdate

The respondent in ***Roads and Traffic Authority of New South Wales v O’Sullivan*** [2011] NSWSC 1258 was convicted for a PCA offence and a speeding offence. The magistrate dated the disqualification for the PCA offence from the date of arrest because her licence had been suspended by the arresting officer at that point and accumulated the disqualification for the speeding offence so that it took effect from a date in the future. The magistrate refused a request to re-open to the proceedings and so the RTA brought an appeal in the Common Law Division of the Supreme Court. James J held (at [14] – [20]) that the magistrate had erred in relation to the speeding offence. The disqualification for that offence was governed by r 10 of the *Road Rules* 2008 which, in r 10-9 provided that a period of disqualification commences on the date of conviction. His Honour also held (at [26] – [30]) that there was error in relation to the PCA disqualification. Section 188 of the *Road Transport (General) Act* 2005 does not provide any power to order that disqualification take effect from other than the date of conviction. In both cases, there is power to reduce the automatic period of disqualification so as to take into account any period in which the offender’s licence has been suspended.

Duress as a mitigating factor in sentencing

In ***Tiknius v R*** [2011] NSWCCA 215, the facts were that 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.

Hardship to third parties

It is settled that hardship to members of an offender’s family is generally irrelevant and can only be taken into account in “highly exceptional circumstances” per *R v Edwards* (1996) 90 A Crim R 510: ***Mokhaiber v R*** [2011] NSWCCA 10 per Price J at [30]. Following the sentencing of the appellant, the appellant’s daughter was diagnosed with metachromatic leukodystrophy, a deteriorative and terminal condition requiring increasing care. The court held that fresh evidence that the appellant’s wife, as full-time carer for the daughter in addition to caring for their other two children, would suffer overwhelming hardship as a result of the appellant’s incarceration, could be regarded as exceptional circumstances. The court also gave modest weight to the appellant’s distress at being unable to assist his wife. Together these justified a reduction in the appellant’s sentence.

In contrast, the court in **Winter v R [2011] NSWCCA 59** rejected an appeal seeking a reduction in sentence based on “fresh evidence” of hardship to one of the appellant’s sons. The fresh evidence led was that since the appellant’s sentencing proceedings, the appellant’s son had undergone an operation to correct his spinal problems and that his prospects of walking again were very slim. The evidence also indicated that the appellant’s son was cared for by his grandmother and younger brother, both of whom had their own health problems. These circumstances gave rise to the submission that the appellant needed to care for her son. The Court took into account the authorities on hardship to third parties and emphasised the proposition that hardship to third parties must be “highly exceptional”, before concluding that the evidence did not meet the threshold. Blanch J (at [17]) noted that the son was being cared for; he was eligible for rehabilitation treatment; and he was living in a house modified to assist with his needs. Further, the applicant had her own health problems which did not make her an ideal carer.

The circumstances in **R v NJK [2011] NSWCCA 151** were somewhat different to the two aforementioned cases. The offender was convicted for the indecent assault and the use for pornographic purposes of his 5 year old step-daughter. The sentencing judge imposed a suspended sentence. One of the matters referred to in the sentencing remarks was that the offender was continuing to make payments on the mortgage of the marital home occupied by the victim and her mother, as well as on a loan relating to renovations of the home. Since his arrest he had separated from the victim’s mother and had moved elsewhere. The Crown appealed, submitting that the sentencing judge had placed excessive weight on this matter in deciding to suspend execution of the sentence and that the alleged hardship did not amount to the “exceptional” kind necessary as per *R v Edwards*.

The appeal was dismissed. Hoebe J was of the view that there were a number of other factors in addition to this which the sentencing judge had taken into account. As to the question of hardship, Hoebe J concluded that the circumstances were unique in that victim was one of the beneficiaries should the offender be able to continue working and paying off the mortgage in that she could continue to live in the home.

General deterrence in sentencing for alcohol-fuelled offences of violence

In **R v West [2011] NSWCCA 91**, the appellant pleaded guilty to the manslaughter of his sister’s partner, an act that resulted from an argument between the two that escalated into a fight following from a day of drinking and using cannabis. The judge imposed a sentence of 6 years with a non-parole period of 2 years. A Crown appeal was upheld by a majority of the Court (Johnson J, Whealy JA agreeing, Hidden J dissenting). It was found (at [52]) that the sentencing judge’s failure to refer to general deterrence supported the conclusion that the appellant’s subjective circumstances (aged 18 and in need of rehabilitation for long standing alcohol and drug abuse issues) dominated the calculation of the non-parole to an impermissible extent. Johnson J then noted importance of general deterrence in sentencing for manslaughter resulting from alcohol-fuelled violence:

[52] This Court has observed, in the context of sentencing for manslaughter by unlawful and dangerous act, that alcohol-fuelled offences of violence are frequently committed by young men and that general deterrence has a particular application for this reason: *R v Carroll* [2010] NSWCCA 55; 200 A Crim R 284 at 299 [61].

Mental condition of offender

In **Watts v R [2010] NSWCCA 315**, the appellant was convicted of, and sentenced for, an offence of maliciously damaging a house owned by the Department of Housing by means of fire. There was evidence that the appellant suffered from at least one mental disorder, albeit there was no consensus between the psychiatric experts on the severity of his mental condition. The sentencing judge gave consideration to the evidence only in respect of the question of mitigation. The appellant appealed on the grounds that the sentencing judge erred in her treatment of this evidence.

McClellan CJ at CL and Howie AJ (Schmidt J agreeing) allowed the appeal, finding that the sentencing judge had incorrectly applied the evidence. Their Honours held that a person's mental disorders, which need not amount to a serious psychiatric illness to be relevant to the sentencing process, transcend a matter of mitigation in sentencing. Their Honours endorsed the position of the Court in *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 (at [177]) as to the significance of an offender's mental disorder in sentencing.

A similar issue arose in **LB v R [2011] NSWCCA 220**. The sentencing judge there gave consideration to the offender's mental condition in giving less weight to general deterrence than would otherwise be the case. The offender's appeal was allowed, Hoeben J finding that the sentencing judge did not sufficiently take into account the offender's mental condition. His Honour held (at [36] – [37]) that in addition to the consideration of general deterrence, the mental condition was relevant to the assessment of the offender's moral culpability and the relationship between the offender's mental state and the commission of the offence.

Non-parole periods and special circumstances – small reductions in non-parole periods where a finding of special circumstances

In **Caristo v R [2011] NSWCCA 7**, the appellant pleaded guilty to two drug manufacturing offences, one relating to ecstasy and other to cocaine. The sentencing judge imposed a non-parole period that was 70.6% of the total sentence. In my judgment, I found that any intervention to reduce the non-parole period was unnecessary. The sentence was consistent with the findings provided by the sentencing judge which sought to extend the parole period for the ecstasy offence "because a longer period of supervision following release from custody was required" (at [36]), distinguishable from the circumstances in *R v Sutton* [2004] NSWCCA 225.

The decision was endorsed in **Chen v R [2011] NSWCCA 85**. The appellant had pleaded guilty to maliciously inflicting grievous bodily harm with intent and the sentencing judge imposed a non-parole period that was 60% of the total sentence. The severity appeal was dismissed. Garling J noted (at [50]) that the Court is slow to intervene in relation to findings of special circumstances, which are of a discretionary nature. The issue again emerged in **Kwong v R [2011] NSWCCA 58**, where it was argued that a sentence of 13 years with a non-parole period of 9 years for two offences of drug supply, a ratio of 69.2% of the overall sentence, did not reflect the judge's finding of special circumstances. The Court again demonstrated its reluctance to interfere in the circumstances, Harrison J noting at [44] that there is "no arithmetical or mathematical precision [that] can be applied to the exercise of the sentencing discretion".

Non-parole periods and special circumstances – the fact that offences were committed whilst on bail is an irrelevant consideration

In **Bellchambers v R [2011] NSWCCA 131**, the offender committed two of the four offences for which he was sentenced whilst on bail for the other two offences. Hoeben J held that the sentencing judge was wrong to have declined to make a finding of special circumstances for this reason. It was an irrelevant consideration.

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% 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.

Objective seriousness assessment for offences that do not carry standard non-parole periods

There was a spate of decisions of the Court of Criminal Appeal, particularly in the latter half of 2010, in which comments were being made to the effect that it is unnecessary for a sentencing judge to analyse where an offence lay in the range of objective seriousness where no standard non-parole period is prescribed. One example is **Dagdanasar v R [2010] NSWCCA 310** where the sentencing judge held that the offence was “slightly above the mid-range of offending of its type”. Price J commented that the finding was unnecessary and referred to the remark by Howie AJ in *Georgopolous v R* [2010] NSWCCA 246 at [30] that making such a finding was, “likely to lead to confusion and misinterpretation when the offence does not carry a standard non-parole period”.

Other cases in which similar criticisms have been made include *Civell v R* [2009] NSWCCA 286; *Okeke v R* [2010] NSWCCA 266; *Gore v R*; *Hunter v R* [2010] NSWCCA 330; *Black v R* [2010] NSWCCA 321; *King v R* [2011] NSWCCA 46 and **Hunter v R [2011] 141** (12 July 2011). It is worth noting that Hodgson JA (agreeing substantially with the reasons of Adams J, though providing separate reasons on this point) expressed the view in *Hunter v R* (at [3]) that it is not necessarily inappropriate to specify ranges of objective seriousness in relation to offences that do not carry standard non-parole periods and can in some cases promote transparency of decision-making, “[s]o long as this does not obscure the need for an instinctive synthesis”.

In **Khoury v R [2011] NSWCCA 118**, the applicant was critical of the sentencing judge’s finding that non-standard non-parole period offences were “well above the mid-range” of objective seriousness for offences of their type. Simpson J observed (at [70]) that this reflected a practice developed and sponsored by the introduction of the standard non-parole period legislation. It was erroneous, however, to assess objective gravity, select a sentence, and then step down bit by bit to take into account mitigating person circumstances: *Markarian v R* [2005] HCA 25; 228 CLR 357. Reference was made to authorities for the proposition that an assessment of the objective gravity of an offence has traditionally been an essential element of sentencing. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 introduced the additional step: evaluation of where, on a putative or notional scale of objective gravity an offence falls. The remarks of Howie AJ in *Georgopolous v R* should not be read as discouraging judges from

undertaking the traditional task of making an evaluation of objective gravity. They ought to be taken as suggesting that the two-step approach mandated by the standard non-parole period legislation is inappropriate where that legislation did not apply to the offence at hand.

The remarks of Buddin J in **Charbaji v R [2011] NSWCCA 181** support the proposition that while it is the task of a sentencing judge to determine the objective gravity of an offence, it is not necessary to make a precise finding as to where it lies on the spectrum of offending.

Objective seriousness assessment – aggravated break, enter and steal

In **Cohen v R [2011] NSWCCA 165**, the offender pleaded guilty to an offence of aggravated break, enter and commit serious indictable offence. The circumstance of aggravation was that the offence was committed in company, namely his 15 year old brother who was said to have, in effect, tagged along. The sentencing judge had assessed the conduct at the mid range of objective seriousness. The Court allowed the appeal against sentence, Simpson J stating two matters relevant to a conclusion that the sentencing judge erred in determining the appropriate range of criminality. First, her Honour noted (at [43]) that the “serious indictable offence” of larceny was one of the comparatively less serious indictable offences relative to offences of violence, and offences such as rape and property damage. Secondly, her Honour observed that the circumstance of aggravation in this case can be regarded as of a lower order than some of the other prescribed circumstances of aggravation.

Objective seriousness assessment – firearm possession offences

The appellant in **R v Mezzadri [2011] NSWCCA 125** pleaded guilty to the possession of eight firearms, none of which were registered in NSW and four of which were prohibited. The offence is against s 51D(2) of the *Firearms Act 1996* for which there is prescribed a maximum penalty of 20 years imprisonment and a standard non-parole period of 10 years. The appellant was sentenced to a term of imprisonment of 1 year and 10 months, the execution of which was suspended. The Crown appealed against the leniency of the sentence, contending, inter alia, that it was erroneous for the sentencing judge to have assessed the objective seriousness of the offence as “falling towards the bottom of the range”. Adams J (with whom Hall J agreed, Hodgson JA substantially agreeing with additional reasons) held (at [19]) that the serviceability of the weapons is of considerable significance in assessing the objective seriousness of the offence. His Honour was of the view that the unserviceability of some of the weapons indicated that the objective seriousness of the offence was well below the middle of the range, and that if evidence led by the Crown that the weapons were serviceable was accepted, the appellant’s belief that they were not, together with a lack of intention to repair, use or dispose of them, pointed to the offence being in the “lower end of objective seriousness”.

Objective seriousness assessment - murder

The Court considered the assessment of the objective seriousness for the offence of murder in **Tran v R [2011] NSWCCA 116**. Hidden J reviewed a number of decisions on the subject and observed:

[39] What emerges from these cases is what one would expect. Whether a killing was premeditated or, in any event, whether it was accompanied by an intention to kill are important questions in an assessment of where a murder lies in the range of objective gravity, but of themselves are not

necessarily determinative. Invariably, there will be other circumstances in the particular case bearing on that assessment.

Johnson J made similar observations at [44] when comparing the objective criminality for an intention to inflict grievous bodily harm with an intention to kill. The former is generally less culpable than the latter, but that is not always so.

Objective seriousness assessment – recklessly causing grievous bodily harm

In **Reberger v R [2011] NSWCCA 132**, the offender was sentenced to the offence of recklessly causing grievous bodily harm. The circumstances were that the offender glassed the victim, an act that resulted in the victim losing an eye and suffering significant scarring of the face. Evidence was led that the offender was mildly to moderately retarded and also suffered from attention deficit disorder. The evidence also indicated that the act was impulsive and was, to an extent, caused by the offender's mental deficiencies. The sentencing judge primarily focused her consideration on the injuries sustained.

Campbell JA held that the sentencing judge erred in her Honour's consideration of the objective seriousness of the offence by having regard exclusively to the injury. His Honour found that the sentencing judge failed to consider such matters as the mental capacity of the offender, the absence of premeditation in the act and that it involved only one blow. Reference was made to the principles for assessing objective seriousness set out in *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [85] - [88].

Obligation for sentencing judge to accept exculpatory material to which the Crown had not objected

In **Ballard v R [2011] NSWCCA 193**, the question arose whether the sentencing judge had denied the offender procedural fairness by rejecting exculpatory material that had not been objected to by the Crown without informing the parties of his intention to do so. The material concerned was the report of a psychiatrist who examined the offender, which contained, inter alia, an assertion from the offender that others were involved in the offence. The Court did not accept the submission. Harrison J held that in the circumstances it was open to the judge to treat the evidence with considerable caution, and ultimately reach the conclusion to reject the assertion that the offender acted in concert with others. His Honour noted (at [21]) that the offender made the forensic decision not to give evidence in the sentencing proceedings and that "[r]esponsibility for the consequences of that decision rests with him".

Penalty not to be increased for false claim of innocence

In **Kumar v R [2011] NSWCCA 139**, the appellant had been convicted of offences relating to child pornography on a computer. The defence at trial had been that the prosecution had not established beyond reasonable doubt that the appellant had downloaded and accessed the material. It was argued that others, in particular his 14 year old daughter, could have done so. Following conviction, the appellant told a psychologist and the author of his pre-sentence report that his daughter had confessed to downloading the material. The sentencing judge took into account the need to deter others from making false claims of innocence. The appeal against sentence was allowed and the sentence reduced. Adams J held (at [23]) that while the continuation of the appellant's claims of innocence was relevant to the subjective factors of remorse, contrition and rehabilitation, they were in no sense aggravating factors. His Honour

observed that they cannot be an element of general deterrence as deterrence for the purposes of sentencing is directed at deterring the commission of the offence in question rather than deterring the continuation of false claims.

Plea of guilty - discount when entered after capture following escape

The appellant in **Visser v R [2011] NSWCCA 146** pleaded guilty in March 2009 to drug supply offences for which he was charged on 3 April 2007. Between 5 April 2007 and 14 May 2008, he was at large following an escape. He complained on appeal that he was entitled to a reduction of 25 per cent, rather than 12.5 per cent, because of his waiver of committal proceedings and his early plea. The submission was rejected. Grove AJ held (at [19]) that “utilitarian benefits are collateral to the efficiency and effectiveness of the criminal justice system as a whole”, and that because of the delay caused by the appellant’s escape, there was an absence of any benefit to the efficiency and effectiveness of the system.

Plea of guilty – discount when a previous offer to plead guilty to the same offence was rejected by the prosecution under the Criminal Case Conferencing Act 2008

Section 17 of the *Criminal Case Conferencing Act 2008* provides that pleas entered before committal entitle the offender to a 25% discount, whilst pleas after committal are entitled to a maximum of 12.5%. A court has the discretion to allow a greater discount than 12.5% if there are “substantial grounds”, and these can include where “the compulsory certificate records an offer by the offender to plead guilty to an alternative offence that was refused by the prosecutor at any time before committal for trial and accepted by the prosecutor after committal for trial”: s 17(5)(b). In **Passaris v R [2011] NSWCCA 216**, the offender participated in a compulsory conference under the Act and offered to plead guilty to an offence, putting forward a set of facts that he submitted would form the basis of the plea. The prosecution did not accept the facts and rejected the offer. On the day of the trial, the offender pleaded guilty to the offence but on different agreed facts.

The Court unanimously dismissed the appeal but the bench was divided in its reasons. Harrison J accepted (at [104]) the offender’s submission that where the charge for which the offender offers to plead remains the same as the charge which the Crown is willing to accept, there is no basis for preventing the offender from establishing the “substantial grounds” under s 17(5)(b) merely because the facts which are in dispute are not particularised on the compulsory conference certificate. Hall J was of the view that the offenders offer to plead guilty was not captured by s 17(5) because the compulsory conference certificate had not been signed by the prosecution and the offender, and because the offer was not an unequivocal one. Bathurst CJ agreed in large part with Harrison J but provided separate reasons considering, inter alia, the construction of s 12 of the Act, which sets out the procedure in respect of compulsory conference certificates.

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.

It had been held, similarly, in ***Hawkins v R* [2011] NSWCCA 153** that a delay in the entry of pleas of guilty that was attributable to the offender's mental illness should not lead to a reduction in the utilitarian value of the pleas (per Hidden J at [26]).

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 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.

Provocation – relevance of

The facts in ***Dwayne William Smith v R* [2011] NSWCCA 209** were that the offender's mother had received "anonymous" late night phone calls from a work colleague of a highly offensive nature. After having obtained the identity of the caller, the offender was alerted to the situation. The following morning the offender attended the caller's address in the company of his brother and mother. He broke into the house, searched the bedrooms for the caller (who he did not know), found the caller's brother in a bedroom and proceeded to give him a severe

beating. The sentencing judge held that the offender's motive underscored the importance of specific and general deterrence, alluding to the condoning of vigilantism.

On appeal, the offender contended, inter alia, that the sentencing judge had given inadequate weight to provocation as a mitigating factor. The Court allowed the appeal and held that the sentencing judge had erred in his conclusions on personal deterrence and objective gravity. As to objective gravity, Hidden J found that the offender's motive lessened his culpability, despite it being misguided. As to personal deterrence, his Honour concluded that the offence was the product of unusual circumstances and out of character such that the community is unlikely to be at risk of his violent conduct, and thus the need for personal deterrence was overemphasised.

Re-opening sentence proceedings to correct errors

In ***Davis v DPP* [2011] NSWSC 153**, the appellant was convicted of a drink-driving offence that carried an automatic disqualification period of 12 months, although there was discretion to order a longer or shorter period, but not less than 6 months. The appellant's licence had been suspended upon his arrest on 14 June 2008. On 19 November 2008 a magistrate imposed no penalty pursuant to s 10A of the *Crimes (Sentencing Procedure) Act* 1999, and ordered that the appellant's licence be returned to him. He stated his intention, for the benefit of the RTA, that there should be no disqualification. Subsequently, however, because of the absence of any order as to disqualification, the RTA recorded the automatic 12 month period against the appellant's licence.

On three subsequent occasions the magistrate purported to re-open the sentencing proceedings, first to make an order specifying a period of disqualification, then to reduce the period ordered, then to revoke such orders. Both the defendant and the prosecutor appealed.

Hoeben J dismissed the defendant's appeal (and allowed the cross-appeal), finding that there was no jurisdiction to re-open the original sentence proceedings as the decision had not been contrary to law. His Honour concluded as well that there was no inherent or general jurisdiction for a Local Court to review, rehear, vary or set aside a judgment or order once formally made.

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.

Section 21A - without regard for public safety (s 21A(2)(k)) and planned or organised criminal activity (s 21A(2)(n))

In **Mansour v R [2011] NSWCCA 28**, the appellant was sentenced for a number of drug supply offences which included ongoing supply for financial or material reward, contrary to s 25A *Drug Misuse and Trafficking Act 1985*. The offences involved sales of relatively small quantities of drugs to undercover police officers, either directly or via members of his family. The issue on appeal was whether the sentencing judge erred in taking into account as aggravating factors that the offences were committed without regard for public safety and were part of a planned or organised criminal activity (s 21A(2)(i) and (n)).

Price J held (at [46] – [56]) that the offence of ongoing supply of cocaine is of a kind for which the failure to have regard for public safety, and the element of planning and organisation, are both inherent features which are not to be taken into account as aggravating factors unless their nature or extent in a particular case is unusual. His Honour found (at [51] and [56] respectively) that in neither respect did the nature or extent of the act exceed the norm to warrant a finding that they were aggravating factors.

Section 21A – victim vulnerability (s 21A(2)(l))

In **Ollis v R [2011] NSWCCA 155**, the offender was convicted of a number of sexual assault offences and the offence of detain for advantage. The victim was a 17 year old foreign student with a limited command of English. When boarding a train, the offender assisted her with her luggage and purported to befriend her, before forcing her into a toilet cubicle and committing the sexual assaults. The sentencing judge took into account as an aggravating factor the vulnerability of the victim, citing her foreign nationality, relatively young age and linguistic and cultural disadvantage as factors. The Court upheld the sentencing judge's finding on this point. Johnson J held (at [97]) that the circumstances (i.e. that the victim was a 17 year old foreign student, travelling alone on public transport, and that the offender could speak some Japanese and approached the victim in a friendly and helpful manner) were such that the victim's characterisation as "vulnerable" was appropriate.

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; (2005) 228 CLR 357 at 378 [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 – post Muldrock v The Queen

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]).

Statistics

The decision of the court in *McCarthy v R* [2011] NSWCCA 64 evinces the continuing utility of the Judicial Commission’s sentencing statistics despite the High Court’s observations in *Hili v R*; *Jones v R* [2010] HCA 45. Adams J interpreted the High Court’s criticisms towards the use of sentencing statistics as being confined to the context of the case in which the decision was made, where it held that the number of offences each year were very small and the circumstances varied widely. This was distinguished from the available statistics for armed robberies, which his Honour observed to “demonstrate a marked similarity of characteristics, both in respect of facts and the subjective features of the offenders though, of course, there are also substantial variations”. On this point, his Honour concluded:

[42]... It seems to me that in this area of crime the cases are of such a kind, the experience of the court in respect of them so extensive and the numbers of cases in the sample so substantial that the statistics are indeed useful.

Summary disposal – having regard to the possibility of

In *Ruano v R* [2011] NSWCCA 149, the appellant was sentenced in the District Court for three offences of stealing from the person. The offences have a maximum penalty of 14 years imprisonment but if finalised in the Local Court, depending upon the amount of money involved, were subject to jurisdictional ceilings of imprisonment for either 12 months or 2 years. Grove AJ rejected a contention that the sentencing judge erred by not having regard to the fact that the appellant could have been sentenced in the Local Court. Having regard to such a matter does not require a reduction in sentence. In this case, having regard to the penalties that could be imposed in the Local Court would have been erroneous. The offender, and his co-offenders, had been working as a part of a highly organised syndicate of thieves across Sydney.

Uncharged offences - De Simoni principle breached

The *De Simoni* principle (*R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383 at 389.7 per Gibbs CJ) was considered in *Tu v R* [2011] NSWCCA 31, where the appellant was sentenced for the

offences of possessing prohibited imports, and attempting to possess prohibited imports (substantial trafficable quantities of crystal methamphetamine).

The appellant submitted that, in finding the offences to be in the worst category and imposing the maximum penalty for each offence, the sentencing judge had breached the *De Simoni* principle by taking into account the appellant's involvement in the importation of the prohibited imports, even though he was not charged with such an offence. The appellant relied on the remarks of the sentencing judge, who said, "but as far as importing of trafficable quantities of drugs is concerned it must be regarded in that way [as an offence of the worst type]". McCallum J (McClellan CJ at CL agreeing, Hall J dissenting on this point but agreeing as to the result) allowed the appeal and reduced the appellant's sentences. Her Honour (at [140]) reasoned that there did not appear to be any conceivable basis for determining that the offences fell within the worst category without having regard to the appellant's involvement in the importation.

Uncharged offences - error in taking into account injuries inflicted in a separate, uncharged, assault

In ***Adams v R* [2011] NSWCCA 47**, the appellant was convicted of an offence of malicious wounding with intent to cause grievous bodily harm for his part in the joint attack on the victim with two other offenders in which he was found to have struck the victim on the top of the head using a baseball bat. The appellant, however, was also responsible for fracturing the victim's left forearm with a blow using a curtain rod. That incident took place soon after, when the other two offenders had exited the dwelling in which the attacks had taken place.

On appeal, it was contended that the sentencing judge had erred in taking into account the injuries from this later incident in imposing a higher sentence on the appellant. The appeal was allowed. Latham J noted that the injuries to the victim in the later incident were independent of the joint assault and needed to be the subject of a separate charge for which the appellant was convicted to be taken into account. Her Honour at [31] drew distinctions between this case and that of *Bourke v R* [2010] NSWCCA 22 on the basis that in *Bourke* the "relevant grievous bodily harm was inflicted at the same time as, and as a consequence of, the blows causing the wounding".

SENTENCING - SPECIFIC OFFENCES

Conspiracy to commit armed robbery – 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.

Drug offences – the continued utility of R v Wong and Leung

The Court in *R v Nguyen; R v Pham* also endorsed the utility of the range of sentences referred to in the decision of *R v Wong and Leung* [1999] NSWCCA 420; 48 NSWLR 340. Six days later, a

differently constituted Court in ***R v Cheung and Choi [2010] NSWCCA 244*** rejected that proposition. This difference of views was considered by Davies J in ***Youssef v R [2011] NSWCCA 104***. Ultimately, his Honour expressed a preference for the view of the Court in *R v Cheung and Choi* and preferred having regard to the cases collected by McClellan CJ at CL in *Director of Public Prosecutions 9Cth v De La Rosa*. Simpson J agreed with Davies J. Grove AJ, however, was of the view that the contrast in views should not be resolved, given that the parties had not made submissions on the point.

Drug offences – When is a person a “principal”?

In ***Hanh Thi Nguyen v Regina [2011] NSWCCA 92***, the appellant pleaded guilty to an offence of cultivating cannabis plants by enhanced indoor means. 317 plants (more than double the large commercial quantity) were found growing in a house that the appellant was renting. The appellant gave evidence at trial that she became involved in the operation at the behest of another man who had convinced her to lease the premises and it was supposedly he who had set up the electrical and hydroponic systems. The judge ultimately accepted that the appellant did not have the skills to install the systems, but was satisfied that she had intended to profit from the venture, was involved in the day-to-day management of it, and had recruited an assistant. The sentencing judge concluded that there were at least two principals involved in the operation, the appellant being one of them.

On appeal, the Court was divided on the question of whether the appellant was a principal. Grove J distinguished conceptually between “principal roles” and “subordinate roles” and concluded that the evidence of the appellant’s activities in the operation supported the sentencing judge’s findings. Simpson J, with whom Davies J agreed on this point, held that the sentencing judge had erred. Her Honour at [4] set out a non-exhaustive list of the characteristics that may indicate that an offender’s role was that of a principal and went on to conclude that the evidence fell short of establishing those characteristics. The characteristics included, but were not limited to: the extent to which the offender contributed financially to setting up the operation; stood to share profits (as distinct from receiving payment); participated in day-to-day management; and had a hand in decision-making.

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.

Persistent sexual abuse of a child – permissible to sentence for more than 3 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.

Sexual assault upon a child - the younger the child the more serious the offence

Case law on the subject over the last two decades supports the general proposition that, in sexual offence cases, the younger the child, the more serious the criminality: **PWB v R** [2011] NSWCCA 84, per Beazley JA at [11]. Her Honour also observed (at [12]) that case law recognises that where the age of the victim is an element of the offence (i.e. indecent assault), while the court must endeavour to avoid double counting, a judge may still take into account the age of the child within the ranges of ages specified in the offence. Her Honour's analysis also involved a consideration of psychological research relating to a child's memory in the context of sexual abuse. Her Honour concluded:

[15] ... it seems to me that if a 6 year old child's memory is reliable, the likelihood that the child, both at the time and more particularly later in life, will have a real sense of violation, is a real one. I see no basis for differentiation, in this regard, in the impact on children of different ages.

The appellant in **PWB** was sentenced for offences of indecent assault against his younger sisters, aged somewhere between 10-12 and 5-6 respectively at the times of the respective offences.

The above in the judgment of Beazley JA may be contrasted with the view of RS Hulme J:

[85] ... I am also not persuaded that a 5 or 6 year old would have the same sense of violation as would a child of, say 9, or 15. Although I do not suggest the circumstances are on all fours, in that connection one has only to reflect on the gay abandon with which young children are prepared to run around naked and those at, or approaching puberty, guard their personal privacy with zeal.

Harrison J agreed with the reasoning of Beazley JA. There was a slight divergence in views as to the appropriate re-sentence; in that respect, Harrison J agreed with RS Hulme J.

SUMMING UP

Alternative verdict – when should be left to the jury

The appellants in **Carney v R; Cambey v R** [2011] NSWCCA 223 were convicted of murder. The complainant on appeal that the trial judge should have left manslaughter as an alternative (although they did not raise this at the trial). The Crown put the issue as posing the question whether it was reasonably open on the evidence at the trial. For the appellants it was characterised as a question of whether manslaughter was open on the evidence at the trial. In a joint judgment, Whealy JA, James and Hoeben JJ held that the “whether it was open” test was perhaps too high. Reference was made to *Gillard* [2003] HCA 64; (2003) 219 CLR 1. After saying that “viable case of manslaughter to be left to the jury” and “was manslaughter open to be left” were useful shorthand expressions, the joint judgment concluded (at [25]) that the proper approach was: “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”.

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.

Grievous bodily harm – intent to cause - error in directing jury that offence could be proved on the basis of recklessness

The trial judge in **Davies v R** [2011] NSWCCA 19 was held to have fallen into error when he misdirected a jury about the element of intent to cause grievous bodily harm under the offence of malicious wounding with intent to do grievous bodily harm (s 33 of the *Crimes Act* 1900, as it was at the time of the offence). The judge directed the jury that they could find the accused guilty if satisfied either that the accused intended to do grievous bodily harm or that the accused was reckless, “reckless” meaning a realisation of the possibility of some physical harm (not necessarily grievous bodily harm) resulting from the action and following through with the action. James J said (at [76]), “the jury should have been directed that they could not convict the accused of the s 33 offence, unless they were satisfied that the accused had the intent to do grievous bodily harm. Recklessness, although it might be sufficient to satisfy the element of “maliciously” in the offence would not be sufficient to satisfy the element of “intent to do grievous bodily harm”. Notwithstanding the misdirection, the Court applied the proviso and dismissed the appeal.

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

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

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

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

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

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

The offender in **Sullivan v R [2011] NSWCCA 270** 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 that the offender had claimed 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 a specific intent. He referred to the obligation of a trial judge to alert the jury to all relevant legal considerations, even if they are not relied on by the defence. However, he concluded that in this case there was such minimal and imprecise evidence on the issue that there was no error in the judge not having left it to the jury.

Majority verdicts

In the Criminal Trials Bench Book, the suggested direction in relation to the need for a jury verdict to be unanimous includes mention of the law providing in certain circumstances, which

may not arise, for the judge to accept a majority verdict. Where it becomes necessary for the judge to give a *Black* direction (*Black v R* (1993) 179 CLR 44 - to persevere when the jury indicate that it cannot reach a verdict) the suggested direction includes that “the circumstances in which I may take a verdict which is not unanimous have not yet arisen and may not arise at all” and an exhortation to reach a unanimous verdict.

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

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

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

In ***Ingham v R* [2011] NSWCCA 88**, the trial judge made reference in Bench Book terms to majority verdicts in the summing up and again in the course of giving a *Black* direction. The contention on appeal was confined to the reference in the latter. McClellan CJ at CL held (at [84] – [85]) that the trial judge’s direction was in terms almost identical to those in *Ngati*. He noted that in contrast to *RJS v R* and *Hanna v Regina*, there had been no reference to the time or circumstances in which a majority verdict might become acceptable. For this reason there was no undermining of the effect of the direction to persevere in striving for a unanimous verdict.

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

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

Manslaughter by criminal negligence – relevance of cultural factors to the “reasonable person test”

The appellants in ***Thomas Sam v R; Manju Sam v R* [2011] NSWCCA 36** were convicted of manslaughter by criminal negligence. They were the parents of the victim, the case against them being that they neglected to properly care for their child and obtain appropriate medical attention concerning her eczema, which combined with malnutrition, were antecedent to septicaemia, the cause of death. On appeal it was contended that the trial judge erred in failing to give directions to the jury that in applying the “reasonable person test” they should take into account the cultural background of the accused.

The appeal was dismissed. McClellan CJ at CL held (at [54]) that it *may* be that, in some circumstances, the fact that a parent comes from a culture which approaches the nurture of infants in a different way to what is expected in Australia, may be relevant to the standard of care. Notwithstanding, his Honour found that the evidence did not support such a finding in this case. There was nothing in the evidence to suggest that the fact that the appellants were born and educated in India, or that the father was educated as a homeopath, could justify the expectation which the law imposed on their conduct as being different from that of the ordinary Australian.

Reliance by Crown on failure to cross-examine Crown witness

In ***Homsí v R; Karamalakís v R* [2011] NSWCCA 164**, the appellants were convicted of a number of offences relating to allegations that they had assaulted and detained Homsi’s wife. During the trial, Homsi’s arresting officer gave evidence for the Crown that upon being arrested, he had replied, “I didn’t touch her”. There was no cross-examination to suggest that he was mistaken and the Crown made reference to this in its closing address to the jury. The trial judge also referred to this matter during the summing up and at neither stage did counsel for Homsi object. On appeal, it was submitted that the trial judge erred in repeating the Crown’s submissions on the point and in suggesting to the jury that the failure to cross-examine the officer could be used to support a conclusion that Homsi’s evidence was less credible. The Court dismissed the appeal. Hodgson JA held (at [63]) that the trial judge’s comments were not directions and could not give rise to a miscarriage of justice unless there was a realistic possibility that they could have influenced the verdict. His Honour then went on to find (at [64]) that in the circumstances it could not have influenced the jury verdict and so no miscarriage of justice arose.

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 justice had occurred.

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 principle 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.

Unreliability of evidence of a co-accused

In ***Oliveri v R* [2011] NSWCCA 38**, the appellant was convicted of a drug supply offence after a joint trial with three co-accused. Evidence given by one of the co-accused was damaging to the appellant's case. It was submitted on appeal that the trial judge erred in not cautioning the jury to take great care with the evidence of the co-accused as he had an interest in seeking to direct blame away from himself and towards the appellant. The appeal was dismissed. McClellan CJ at CL held (at [18]) that a warning was unnecessary since it would have been patently obvious to the jury that the appellant and the co-accused were trying to escape criminal liability and blame each other.