LOCAL COURT OF NSW ANNUAL CONFERENCE 2013

Criminal Law Update

A Year of Legislative Activity and Appellate Decisions Concerning the Criminal Law Relevant to the Local Court

The Honourable Justice R A Hulme

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SCOPE OF PAPER

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

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

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

BAIL

Meaning of "exceptional circumstances"

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

EVIDENCE

Probative value of evidence in relation to s 137

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

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

VSCA 328. The controversy was that *Shamouil* was argued to stand for the proposition that a trial judge should not take into account the weight a jury might give to evidence when considering whether to exclude it under s 137, while *Dupas* suggested a trial judge should make that assessment. Their Honours each delivered separate judgments.

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

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

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

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

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

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

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

his cross-examination. The remaining offences had occurred, regardless, in the area of 50 years ago. Notice was not given to the defence of the cross-examination, nor was permission sought from the trial judge. Mr Montgomery appealed his conviction and argued, among other things, that the conduct of the prosecutor was unfair.

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

Using DNA evidence where analysis reveals relatively common profile

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

Contemporaneous statements and the presumption of continuance

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

Protected confidence adduced without leave

In a trial for sexual assault, a social worker gave evidence for the Crown of a protected confidence within the meaning of s 296(1) of the *Criminal Procedure Act 1986*. The Crown had not sought leave of the court to adduce the confidence. The accused was convicted and appealed on this error, among other things. In ***KSC v R*** **[2012] NSWCCA 179**, McClellan CJ at CL pointed out, first, that defence counsel had not objected to the evidence and had, in fact, wanted it adduced. Secondly, the complainant had no objection to the evidence being given. In the context of the trial, it led to no substantial miscarriage of justice.

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

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

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

A man was found guilty by a jury of sexually assaulting the daughter of his partner. He had participated in a recorded police interview and the whole of the recording was admitted in evidence. It included him responding "no comment" to numerous questions. On appeal, it was argued that those sections if the interview should not have been admitted under s 89 of the *Evidence Act* 1995.

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

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

Requirement for an identification parade – s 114 of the Evidence Act

In ***Walford v Director of Public Prosecutions (NSW)*** **[2012] NSWCA 290**, the appellant was the subject of an apprehended violence order that prevented him from being in the vicinity of the complainant. The complainant reported to police that she had seen Mr Walford approaching her apartment block and looking towards her apartment. Mr Walford was charged with breaching the order and at trial the Magistrate rejected the complainant's evidence on the basis that s 114 of the *Evidence Act* 1995 required an identification parade be conducted unless it was unreasonable to do so.

On appeal to the Supreme Court, Davies J in *Director of Public Prosecutions (NSW) v Walford* [2011] NSWSC 759 held that the critical time to determine whether it would have been reasonable to hold an identification parade was when the identification was made. In this case, that was when W had approached the complainant's home and it would not have been reasonable to hold the identification parade then. Davies J (at [36]) differentiated between "identification" and "identification evidence" in s 114. He said, "If the witness has made an out-of-court identification it is at that time at which the reasonableness of holding the identification parade is to be considered."

Beazley, Basten and Hoeben JJA (in separate judgments) dismissed an appeal against the judgement of Davies J. Hoeben JA held that Davies J's was correct, and concluded the following.

> [55] … the word "identification" as used in s 114(2)(a) does not refer to the giving of visual identification evidence in court but to "the act of identifying the defendant in some way as the person whom the witness could link in some way to the offence (that is making an assertion of the kind described in para (a) of the definition of 'identification evidence' in the dictionary to the Evidence Act)"…

Coincidence evidence – steps in determining admissibility

In ***R v Gale; R v Duckworth*** **[2012] NSWCCA 174** Simpson J set out the steps to be taken when determining whether evidence should be admitted as coincidence evidence in a criminal trial under s 98 of the *Evidence Act*.

A decision to admit such evidence requires consideration of; firstly, whether there is evidence capable of establishing the occurrence of two or more events; and secondly whether there is evidence capable of establishing similarities in those events, or in the circumstances in which they occurred. It may be that there is evidence capable of establishing similarity between both the events themselves and the circumstances of their occurrence.

Her Honour (at [31]) set out the six steps in determining whether to admit the evidence.

1. Identify the particular act or state of mind of a person that the tendering party seeks to prove.
2. Identify the two or more events from which the tendering party tendering seeks to prove that the person in question did the particular act or had the particular state of mind.

3. Identify the similarities, in the events or circumstances in which the events occurred, by reason of which the endering party asserts that it is improbable the events occurred coincidentally.
4. Determine whether "reasonable notice" has been given of the intention to adduce the evidence.
5. Evaluate whether the evidence, either by itself or in conjunction with other evidence, has significant probative value.
6. In a criminal proceeding, if it is found that the evidence would have significant probative value, determine whether the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant (s 101(2)).

Examining "relationship evidence" for relevance

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

LEGISLATION

Bail Act 2013 No. 26

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

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

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

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

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

Road Transport Act 2013 No. 18

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

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

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

> (5) A previous offence is an "equivalent offence" to a new offence for the purposes of subsection (2) (a) (iii) if:
>
> (a) where the new offence is an offence against section 54 (1)-the previous offence was an offence against section 53 (3) or 54 (3) or (4) or a corresponding former provision or a major offence, or
>
> (b) where the new offence is an offence against section 54 (3)-the previous offence was an offence against section 53 (3) or 54 (1) or (4) or a corresponding former provision or a major offence, or
>
> (c) where the new offence is an offence against section 54 (4)-the previous offence was an offence against section 53 (3) or 54 (1) or (3) or a corresponding former provision or a major offence, or
>
> (d) where the new offence is an offence against a provision of Chapter 5 or Schedule 3-the previous offence was a major offence, or
>
> (e) a provision of this Act (in the case of offences against this Act) or the statutory rules (in the case of offences against the statutory rules) declares the offence to be an equivalent offence to another offence for the purposes of this section.

OFFENCES

Intent to cause harm and "reckless wounding"

***Chen v R* [2013] NSWCCA 116** concerned a finding that the appellant, who had been convicted of reckless wounding contrary to s 35(3) *Crimes Act*, had *intended* to cause some injury. The appeal was conducted on the basis that the finding was inconsistent with the meaning of "recklessness" as defined in *Blackwell v R* [2011] NSWCCA 93; (2011) 81 NSWLR 119. The appeal was dismissed by Button J (Hoeben JA agreeing, Campbell J finding it unnecessary to decide). *Blackwell* was concerned with the offence of recklessly causing grievous bodily harm. It decided that, to commit that offence, an offender must have foreseen the possibility of the infliction of *grievous* bodily harm, not merely *actual* bodily harm; it had no application to the mental elements of reckless wounding.

Is spitting on a bench "damaging property"?

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

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

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

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

On the appeal, McClellan CJ at CL decided that while the *Police Integrity Commission Act* envisages counsel assisting asking questions of witnesses in the course of proceedings, it was nonetheless made clear by s 40 that all questions were asked with the authority of the Commissioner. The fact that Mr Ryan could not have been authorised to make such

inquiries on his own did not make the proceedings a nullity. Furthermore, the relevant provisions for appointment of counsel assisting were concerned with facilitating the task of the PIC, not affecting the constitution of its investigations. Mr Vos's responses Mr Ryan's questions were capable of being evidence in his prosecution

Failure to comply with a dog control order is an offence of strict liability

Professor Hunter owned a Kelpie/Rottweiler cross. It was subject to a control order made in the Local Court under Part 5 Division 3 of the *Companion Animals Act*. The order required that, when outside, "the dog must be kept under effective control of some competent person by means of an adequate chain or leash that is being held by … the person and must be muzzled." Professor Hunter procured the services of a dog walker. She took every reasonable precaution to ensure the walker would comply with the order. Unfortunately, he did not, and a Council worker saw the dog one day without a leash or muzzle. Professor Hunter was prosecuted and found guilty (without conviction) of an offence under s 49 *Companion Animals Act.* She was acquitted on appeal to the District Court, where Blanch J held that the offence was not one of strict liability and Professor Hunter lacked the requisite mens rea to commit it. The Council requested Blanch J state a case to the Court of Criminal Appeal consisting of the following questions:

(a) Is the offence created by section 49 of the act an offence of full mens rea or an offence of strict liability?

(b) If an offence of full mens rea, what is the content of the mental element of the offence created by section 49?

(c) Was it open as a matter of law for the charge to be dismissed on the ground that the respondent had taken all reasonable steps to ensure the terms of the control order were complied with?

In ***Leichhardt Municipal Council v Hunter* [2013] NSWCCA 87**, the Court answered that the offence was, on its proper construction, one of strict liability, but that a person would be taken to "comply" with a control order if he or she ensured that the dog was under the control of a competent person and took all reasonable steps to direct such a person with respect to the terms of the order.

Traffic offences - evidence of reliability of speed cameras

***Roads and Maritime Services v Addario* [2012] NSWCA 412** concerned the proper construction of provisions of the *Road Transport (Safety and Traffic Management) Act 1999* dealing with speeding offences captured on traffic cameras. Section 47 presumes a photograph taken by a traffic camera is taken on the specified day and the specified location, and is prima facie evidence of the matters depicted, unless "evidence sufficient to raise doubt" is adduced. Section 73A applies to s 47, and states that only evidence given by a person possessing "specialised knowledge" is capable of "raising a doubt" that a speed camera is operating reliably and accurately.

Mr Addario was issued a court attendance notice for a speeding offence captured by a speed camera. Before the magistrate, he gave evidence that he was at a service station at the recorded time so could not have committed the offence. Mr Addario also produced

receipts to that effect. The magistrate dismissed the charge, holding that s 73A did not apply to the measurement of time by traffic cameras, rather than speed. On that construction, Mr Addario's lack of specialised knowledge did not prevent him raising an unrebutted doubt about whether the offence had been committed, based on the reliability of the traffic camera. The Roads and Maritime Services appealed to the Supreme Court (unsuccessfully), and then to the Court of Appeal, in order to clarify the operation of s 73A.

Beazley JA (as her Honour was then) held that s 73A did apply, and that Mr Addario had not, in the terms of s 47, raised a doubt about the reliability of the traffic camera. But her Honour went on to say that it was not necessarily determinative of the question of whether the offence had been committed. At [40]-[41] she held:

> The effect of this construction is that in a prosecution such as occurred here, as there was no assertion given in evidence by a person with specialised knowledge as to the accuracy, reliability and operation of the devices, the prosecution was not required to call other evidence in respect of those matters.
>
> However, the prosecution evidence does not thereby constitute conclusive evidence of the commission of the offence. It is evidence that is to be weighed with all the evidence in the case. In this case, the magistrate was required to determine whether the prosecution had proved its case beyond a reasonable doubt, having regard both to the evidence that the camera recording device was accurate, reliable and operating properly at the relevant time, and the respondent's evidence.

Aggravated sexual assault and "under authority"

Certain charges against an accused alleged he had sexually assaulted his niece while she was under his authority. The trial judge explained to the jury that this meant "the person [was] in the care or under the supervision or authority of that other person." The accused was convicted and appealed. One of his grounds was the asserted inadequacy of this definition of "under authority". In ***KSC v R* [2012] NSWCCA 179**, McClellan CJ at CL held that despite some circularity in the trial judge's direction in referring to "authority", the definition was supplemented by the words "care" and "supervision"; both correct and needing no further exposition. There was no error.

Elements of offence of people smuggling

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

Meaning and relevance of "consent" in medical assault cases

Dr Reeves performed surgery upon the genitalia of one of his patients. The surgery involved the removal of the patient's labia and clitoris. The procedure was grossly excessive, and expert evidence showed that small excision would have been sufficient. Dr Reeves was found guilty of maliciously inflicting grievous bodily harm with intent to cause grievous bodily harm. It was clear that the patient had not been aware of, and had not had explained to her, the full extent of the procedure. The trial judge had instructed the

jury that Dr Reeves would not be guilty if the Crown could not prove that the surgery was conducted without lawful cause or excuse. One of the elements of "lawful cause or excuse", the trial judge said, was that Dr Reeves had the patient's "informed consent". Dr Reeves appealed against the verdict, contending that, amongst other things, "informed consent" was relevant to negligence and was a misdirection in a criminal prosecution.

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

Meaning of "malicious intent" in context of surgical procedure

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

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

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

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

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

Manslaughter – whether supplier guilty where deceased voluntarily ingested fatal drug

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

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

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

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

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

Basten JA that a loan could constitute a financial advantage. They found that the District Court judge had been correct refuse to allow the appeal.

Section 61J – meaning of "in company" in aggravated sexual assault

A woman was convicted on a number of counts, including three counts of aggravated sexual assault in company (s 61J of the *Crimes Act* 1900). It was alleged at trial that she had assisted or encouraged the principal offender, Mr Golossian, to commit the assaults against the complainant. The assaults occurred in a motel room with an adjoining bathroom. It was suggested that she was in the bathroom while the assaults occurred. There were also drugs administered to the complainant that were relevant to the issue of consent.

It was submitted on appeal in ***FP v R* [2012] NSWCCA 182** that the judge had erred in her directions on the meaning of in company. R A Hulme J dismissed the appeal against these convictions. After considering the authorities, his Honour stated (at [126]) that the trial judge was required to direct the jury it had to be satisfied of the following components.

1. Mr Golossian had sexual intercourse with the complainant without consent, knowing that she was not consenting.
2. The accused shared the common purpose that the assault would occur.
3. The accused was physically present when it occurred, and sufficiently proximate to either encourage Mr Golossian or intimidate the complainant.

The appellant submitted, in part, that the judge's direction had ignored the rationale of the offence that the complainant should be coerced by the physical proximity of the victim. However, RA Hulme J held (at [150]) that the thrust of her direction was that the physical presence could satisfy the "in company" element through the encouragement of G to commit the assaults. On the facts, it was open to the jury to find that even if the appellant was in bathroom during the penetration, but present immediately before and after, her presence was sufficient for her to be "in company". Relevantly, the appellant also had been present during the critical acts of administering the drugs to the complainant prior to the assaults occurring.

Meaning of "inflicting" grievous bodily harm

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

POLICE POWERS

Seizure of property to prevent breach of the peace

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

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

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

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

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

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

Whether power to arrest where no intention to charge

In ***Dowse v New South Wales* [2012] NSWCA 337** Basten JA held that where a police officer has no intention of charging a person with an offence, there is no power to arrest the person without a warrant. At [25], his Honour found that the officer had not attempted to arrest D on the basis of the offence for which he was suspected of committing, namely using offensive language. A warrantless arrest requires an honest suspicion in the mind of the arresting officer that the person has committed an offence and information that provides reasonable grounds for that suspicion. But Basten JA held at [27] that this state of mind will not be sufficient to support a warrantless arrest where the officer has no intention of charging the person with the offence which he suspects has been committed.

Reasonable grounds to suspect or believe

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

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

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

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

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

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

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

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

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

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

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

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

Police “by chance discovery” of restricted substances during attendance at a home for a domestic violence incident

Mr Tamcelik lived with his grandfather. While Tamcelik was away from the house, the grandfather called police and invited them to enter the home to make a complaint of domestic violence against Tamcelik. After taking the statement on a rear balcony and while walking back through the house to leave the premises, police happened upon and seized what they believed to be illegal substances in Tamcelik’s bedroom. He was subsequently charged with possessing steroids, but the magistrate held that the police had illegally obtained the evidence and dismissed the charges.

Garling J in ***Director of Public Prosecutions v Tamcelik* [2012] NSWSC 1008** dismissed an appeal against the decision. Part 6 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPRA) governs the powers of police to enter premises in relation to incidents of domestic violence and his Honour referred specifically to s 82 (Entry by invitation) and s 85 (Powers that may be exercised on entry into premises). From the magistrate’s judgment it was evident that the sole purpose for police attending under the Act was to investigate whether a domestic violence offence had been committed. Garling J held (at [98]) that the key question was therefore whether that investigation had concluded once they left the balcony. The magistrate found it had and that finding was open to him.

That being so, the police were not entitled to remain on the premises after taking the grandfather’s statement. Nor were they entitled, after entering the house, to undertake any action not specified in s 85(1) of LEPRA (which provides only very limited powers in relation to an alleged domestic violence incident). Garling J held (at 100]) that LEPRA had abrogated the common law principle of chance discovery in the relevant circumstances and dismissed the appeal.

PRACTICE AND PROCEDURE

Duplicity

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

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

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

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

Revisiting evidence rulings where the successful objector takes unfair advantage

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

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

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

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

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

SENTENCING – GENERAL ISSUES

Form 1 offences and the primary sentence

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

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

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

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

More onerous imprisonment as consequence of assisting authorities

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

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

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

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

Hardship to third parties not to be considered unless "exceptional circumstances" present

Mr MacLeod received a suspended sentence in the District Court. The sentencing judge found that the "offender in my judgment deserves to go to gaol and I have no reservations about that" but decided that an order under s 12 of the *Crimes (Sentencing Procedure) Act* was appropriate because of the impact his incarceration would have on his family and employees. In ***R v MacLeod* [2013] NSWCCA 108**, Simpson J held that in the absence of exceptional subjective circumstances, hardship to third parties was not a relevant factor in sentencing. Indeed, hardship to third parties is one of the expected outcomes of the majority of sentences of imprisonment. Because there were no exceptional circumstances in Mr McLeod's case, the suspended sentence converted to one to be served by way of full-time imprisonment.

Erroneous assessment of objective gravity by reference to Local Court's jurisdictional limit

In ***Roads and Maritime Services v L & M Scott Haulage Pty Ltd* [2013] NSWCCA 107**, the respondent, a haulage company, had been fined $35,750 in the Local Court for an offence against s 56 of the *Road Transport (General) Act 2005* relating to the overloading of heavy vehicles. The relevant maximum penalty was $203,500. However, the Local Court could not impose a fine greater than $55,000. The Local Court sentence was reduced to $5000 on appeal to the District Court, where Toner DCJ held that the penalty imposed in the Local Court was grossly disproportionate to the offence, having regard to the lower jurisdictional limit. On a referred question of law, the Court of Criminal Appeal held that this was an incorrect approach. Latham J, by reference to the recent case of *Zreika v R*

[2012] NSWCCA 44, confirmed that objective gravity is to be assessed by reference to the maximum penalty, not the jurisdictional limit.

(Latham J also held that the matters to be considered in s 60(2) are not aggravating factors and there is no need for evidence of the relevant consequences to be adduced.)

Self-induced intoxication and violent offences

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

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

Illicit drug dependence and moral culpability

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

Correct calculation of discount for assistance to authorities

LB was involved in the large-scale manufacture of methamphetamine and ecstasy in Western Sydney. He was arrested and charged with two serious drug manufacture offences, to which he pleaded guilty. He provided the Crown with significant information in relation to the criminal enterprise that he was involved in. At his sentencing, Garling DCJ allowed LB a discount of 25% for his plea of guilty, and 25% for his assistance to the authorities. But his Honour applied a combined discount of only 30% to the final sentence, giving no particular reasons for doing so. LB appealed on the basis he had not been afforded a sufficient discount for assistance.

In ***LB v R* [2013] NSWCCA 70**, Button J rejected the suggestion that there had been mathematical miscalculation. Rather, he found that DCJ Garling had attempted to balance the competing imperatives of s 23(4) *Crimes (Sentencing Procedure) Act 1999*, which requires particularisation of the discount, with s 23(3), which requires that the total

penalty not be unreasonably disproportionate to the offence. The approach taken led to error. If LB withdrew his assistance in the future, it would not be possible to calculate the relevant discount for the purpose of a Crown appeal under s 5DA *Criminal Appeal Act 1912*. The correct approach was to formulate the discounts; explicitly reduce them, if necessary, by reference to s 24(3); and then apply them to the undiscounted sentence.

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

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

Basis for plea and assistance discounts in Commonwealth matters

The decision of ***R v Karan*** **[2013] NSWCCA 53** serves as a reminder that the legislation allowing discounts for pleas of guilty and assistance to authorities in Commonwealth cases differs from the NSW scheme. Regard is not to be had to the utilitarian value of the plea, rather to the offender's contrition and willingness to facilitate the course of justice by cooperation. The case concerned a Crown appeal against a discount of 25 per cent given to an offender who offered a late plea and "assisted the authorities" by presenting himself at the police station for arrest. The Court of Criminal Appeal found that the late plea had been spurred by the addition of further evidence to an already-strong Crown case: it was recognition of the inevitable. This substantially reduced the extent to which the offender could be said to be willingly facilitating the course of justice. An appropriate discount was 15 per cent.

Meaning of "duress" in offending behaviour

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

Expressing plea discounts in approximate terms

Mr Ayache pleaded guilty to a drug supply offence. The sentencing judge said, in his reasons, that he had reduced the sentence "by about 25 per cent". Mr Ayache appealed; arguing that the language used indicated a discount had been given of less that 25 per cent, and that this was in error as no reasons had been given for departing from the top of the available discount range. In ***Ayache v R*** **[2012] NSWCCA 41**, Rothman J dismissed the appellant's argument out of hand. Not only did the language not support the inference that the discount must have been less than 25 per cent, the "proposition that there must be mathematical precision of the kind for which the applicant contends cannot be supported" (at [15]). Sentencing is an exercise of instinctive synthesis, not calculus.

Taking into account non-custodial offences on a Form 1

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

No requirement that remarks on sentence be bland

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

Accumulation in aggregate sentencing

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

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

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

Criticising psychiatric opinions without cross-examination

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

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

Reminder against sentencing co-offenders in separate proceedings

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

Information on sentences passed upon co-offenders

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

Mental illness does not necessarily mean that general deterrence is inappropriate

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

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

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

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

Aggregate sentencing requires separate consideration of criminality of each offence

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

Special circumstances - first time in custody

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

Discount for assisting authorities applies to all counts

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

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

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

In ***Blackwell v R* [2012] NSWCCA 227**, the respondent had, while in a highly intoxicated state, struck another man with a glass in the early hours at Scruffy Murphy's Hotel. He was charged with maliciously inflicting grievous bodily harm. At trial, he denied being involved in the altercation. He was convicted, but the Court of Criminal Appeal returned the matter for retrial on account of a misdirection. At the commencement of the second trial, the respondent maintained his plea of not guilty, but did offer to plead guilty for the statutory alternative of recklessly inflicting grievous bodily harm. The Crown indicated that it would not accept that plea, and no plea was formally entered. The respondent was found guilty of the alternative offence, and the sentencing judge allowed him a discount of 13 per cent for the utilitarian value of the plea. Garling J held that there was no error in granting the discount, notwithstanding that the plea had not been entered, and that the circumstances of the retrial were not relevant to calculating the utilitarian value of the plea.

Future dangerousness

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

The scope of the discount for providing assistance to authorities

In ***RJT v R* [2012] NSWCCA 280**, the appellant argued for a discount to his sentence under s 23 of the *Crimes (Sentencing Procedure) Act 1999* because he had, independently of the offence for which he was convicted, reported another crime of which he was the victim. The appellant had committed two serious sex offences against his 7-year old daughter.

After she had reported the offences, but before he was interviewed in relation to them, he reported to police that his grandfather had, for a long period when he was younger, committed sexual offences against him. The appellant assisted police in recording incriminating conversations with his grandfather.

Basten JA (with whom Adams J agreed, R A Hulme J dissenting) identified the purpose of the discount in s 23 as, in a general sense, countering the disincentive of reporting criminal activities. While some disincentives are more established, such as fear of retribution by one's criminal associates, the discount could be applied where there was a public interest in overcoming any disincentive to reporting. Basten JA observed that it was well known that sexual abuse was underreported for a variety of reasons, and there was a public interest in applying the discount in this case. The appropriate discount was set at 10 per cent. His Honour declined to decide whether this interpretation would apply to independent witnesses, rather than victims, of crimes, or to assistance provided to authorities *before* the discovery of a crime for which the informant received a sentence. The full scope of the discount remains at large.

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

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

SENTENCING - SPECIFIC OFFENCES

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

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

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

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

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

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

Sexual assault - relationship between offender and complainant a relevant consideration

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

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