DISTRICT COURT
OF
NEW SOUTH WALES

ANNUAL CONFERENCE 2014

Criminal Appeals Review

The Honourable Justice R A Hulme

23 April 2014

CONTENTS

SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the past 12 months. 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 Alexander Edwards BA LLB (Hons) and Mr Nicholas Mabbitt BA (Hons) JD.

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.)

Relevance of risk of contamination to tendency evidence

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

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

BJS was a former Catholic priest charged with numerous counts of indecent assault against various complainants. He gave evidence at his trial. As part of his cross-examination by the Crown, he was asked whether a number of witnesses were wrong in having given evidence that he stayed in the home of one of the victims on three occasions. After he was convicted, BJS appealed, one of the grounds being that the jury should have been discharged after this exchange: ***BJS v R* [2013] NSWCCA 123**. He relied upon the principle in *Palmer v R* [2009] HCA 2; 193 CLR 1 that asking an accused if a complainant had a motive to lie invites the jury to accept that complainant's evidence unless positively disproved.

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

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.

Expert evidence on shared anatomical features between persons

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

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

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

Evidence of sexual interest in child sex offence cases requires tendency directions

The appellant in ***Colquhoun v R (No 1)*** **[2013] NSWCCA 190** had been convicted of three offences of indecent assault on an eleven-year-old boy. He had befriended the child and the two, with the knowledge of the child's mother, spent time together doing various recreational activities. The appellant gave the mother two CDs of photographs and film of their activities, some of which featured the child. Those pictures and footage were admitted as evidence in the appellant's trial. The Crown suggested to the jury that one part of the footage focused "momentarily on the crotch area" and that "one might wonder whether they are the sorts of photographs that would appear in a family album". One ground of appeal was that the CDs were only relevant as tendency evidence of sexual interest and s 97 of the *Evidence Act* should have been applied. The Crown contended on the appeal, somewhat contrary to the inferences drawn out at trial, that the pictures and footage did no suggest any such thing and were admissible as "context" evidence to support the victim's evidence of various recreational activities.

Macfarlan JA remarked that many of the photographs were admissible as context evidence. But others, particularly those showing the victim partially dressed, were capable of carrying the implication that the appellant's interest in the victim was sexual. The Crown Prosecutor had drawn out those implications at trial. Evidence of an accused's sexual interest in a child is tendency evidence subject to ss 97 and 101, and was wrongly admitted in the appellant's trial.

Admissibility of prior inconsistent statement as evidence in its own right

Ms Scott lived with her de facto partner, Mr Col. She suffered serious burns one evening as a result of an incident involving ignited methylated spirits. She gave a statement to police in which she said that Mr Col had deliberately doused her in the spirit and set it alight. Mr Col was charged with causing grievous bodily harm with intent. He maintained that he had found Ms Scott in bed, saw a smouldering fire, and had accidentally splashed her with spirits, thinking it was water.

Before trial, Ms Scott told police she had no recollection of the events and, that fact notwithstanding, asserted that the version recorded in the statement was "not the truth". The prosecutor cross-examined Ms Scott as an unfavourable witness and, over objection, tendered her statement in evidence. Mr Col was found guilty and, on appeal, argued, inter alia, that the trial judge made an error of law in admitting the statement: ***Col v R*** **[2013] NSWCCA 302**. Latham J dismissed the appeal. The contents of the statement were admissible pursuant to ss 103 (cross-examination as to credibility) and 106 (prior inconsistent evidence) of the *Evidence Act 1995* and there was no miscarriage arising from the tender.

Admissions made during telephone conversation instigated by police improperly excluded

The respondent in ***R v Burton*** **[2013] NSWCCA 335** was charged with having sexual intercourse with the complainant without consent. During the investigation and before he was charged, the complainant called the respondent at the instigation of the police. The conversation was recorded pursuant to a listening device. The Crown contended that admissions were made. The respondent sought to have the evidence excluded under, among other provisions, s 90 *Evidence Act*. The trial judge found that it should have been excluded under this section, primarily because the complainant elicited responses from the respondent whilst acting as an "agent of the state". In deciding whether a person is acting as an "agent of the state" in this context, the question is whether the conversation would have taken place in the form and manner it did, but for the intervention of the police. The trial judge also found that: the conversation amounted to an unfair derogation of the respondent's right to silence; the police were exploiting a special relationship; and the police conveyed the key questions they wanted the complainant to ask. Simpson J found that the evidence should not have been excluded and rejected all of these findings. It was wrong for the trial judge to have characterised the complainant as an "agent of the state". Given the nature of the relationship between the complainant and the respondent, it was not the case that the conversation would not have taken place but for the involvement of the police. Nor did the complainant elicit responses from the respondent.

Evidence of sexual interest has no bearing on consent to later sexual activity with another party

Another aspect of ***R v Burton*** **[2013] NSWCCA 335** concerned the admissibility of evidence of the complainant's alleged sexual interest in a person other than the respondent. The alleged sexual assault occurred after Mr Burton, the complainant and a third man had been out drinking. The trial judge made a pre-trial ruling allowing cross-examination of the complainant about the interest she was said to have displayed in another man she met that night. Section 293 *Criminal Procedure Act* renders inadmissible evidence relating to sexual experience, but it was found that this evidence fell within the exception provided by s 293(4)(a). Simpson J found that the evidence was not relevant and in any event should have been excluded by s 293. The fact in issue that the evidence was said to be rationally capable of affecting was that the complainant did not consent to the sexual activity. It is proper to inquire whether the respondent believed that the complainant was consenting or not. But whether the complainant had exhibited sexual interest in another man "is irrelevant to any question concerning her consent to sexual engagement with the

respondent" (at [68]). Furthermore, s 293(3) was not properly considered. The evidence did not disclose or imply sexual experience or activity, or lack thereof. Even if it did, it did not fall within the exception in s 293(4)(a) – the alleged encounter with the man at the bar did not take place "at or about the time" of the events giving rise to the charge (s 293(4)(a)(i)); and there was no relevant connection between the two events (s 293(4)(a)(ii)).

MENTAL HEALTH

Reasons for dismissal under s 32 Mental Health (Forensic Provisions) Act 1990

Director of Public Prosecutions v Lopez-Aguilar **[2013] NSWSC 1019** was an appeal by the Director against a decision by a magistrate to dismiss charges against an accused in accordance with the discretion offered by s 32 of the *Mental Health (Forensic Provisions) Act 1990*. Ms Lopez-Aguilar committed a series of very serious traffic offences. She drove at 120km/h in a 60km/hr zone, and failed to pull over when signalled by police. There was evidence before the Local Court that she suffered from a Major Depressive Disorder. She sought dismissal of the charge under s 32.

The Director argued, inter alia, that the magistrate had failed to make a finding of whether "it would be more appropriate to deal with the defendant" under s 32 and failed to have regard to the seriousness of the offences. Harrison J agreed. He referred to the comments of Button J in *DPP v Soliman* [2013] NSWSC 346 at [61] that only terse reasons are required, but found that in this matter no reasons were discernable. The magistrate was required to have regard to the charges, the surrounding circumstances, the mental illness and the public interest. Harrison J also commented that the connection between the mental illness, the subject offence and Ms Lopez-Aguilar's multiple criminal antecedents required consideration.

Power of Mental Health Review Tribunal to make directions contrary to conditions of release imposed by judge on a person found not guilty by reason of mental illness

In 2010, a young man, "X", attempted to hold-up a convenience store with a pair of scissors. He was charged with attempted armed robbery, but found not guilty by reason of mental illness in accordance with s 38 of the *Mental Health (Forensic Provisions) Act 1990*. After the special verdict was entered in 2011, the judge made orders, pursuant to s 39, that X be subject to supervised treatment for two years and then unconditionally released. X did not respond particularly well to treatment, and in 2013 the Mental Health Review Tribunal made directions that he reside in Macquarie Hospital beyond the two-year limit specified in the orders made in 2011. X challenged the validity of those conditions, and the Attorney General applied to the Supreme Court for declaratory relief.

Attorney General of New South Wales v X **[2013] NSWSC 1392** was heard by Johnson J. Section 39(1) is in the following terms:

> If, on the trial of a person charged with an offence, the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the Court may order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of

> law or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.

Johnson J doubted that these provisions empowered a judge to make any order with respect to time. But the Attorney General did not argue that point, and he expressed no concluded view. Regardless, proper construction of the statutory scheme made clear that a court was not able under s 39 to fix a legally binding period upon the Tribunal in the exercise of its functions under the Act. Johnson J granted declaratory relief in respect of the conditions imposed by the Tribunal.

OFFENCES

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".

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.

One "demand" may satisfy multiple offences of demand money with menaces

Mr Delaney visited the owner of a new tattoo parlour at Raymond Terrace with persons identified as members of the Rebels Motorcycle Club. He said, "Do you know who we are? … We can close you down and blow your shop up. You can pay $200 a week. If you don't,

we'll run you out of town". Money was not collected at that time, but was collected the following day and on another occasion. Mr Delaney was present on the first occasion money was collected, but did not make a demand accompanied by a menace, and was not present at all on the second occasion. He was convicted of three offences of demanding with intent to steal contrary to s 99 *Crimes Act*.

Mr Delaney appealed his conviction, arguing that the verdict could not be supported: ***Delaney v R* [2013] NSWCCA 150**. In particular, he argued that once the first demand had been made, the first offence was complete, and further demands were required in relation to the two other convictions. Hoeben CJ at CL rejected the second part of that proposition. A specific threat does no have to be articulated if it is clear that the threat exists. Hoeben CJ at CL specifically refuted (at [28]) the suggestion that a continuing threat is somehow terminated by the completion of a particular offence related to it.

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

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

Knowledge of destination as element of offence of aggravated people smuggling

***Taru Ali v R* [2013] NSWCCA 211** concerned an Indonesian national who was steering a vessel when it was intercepted by the Royal Australian Navy off Ashmore Reef. Fifty-two illegal immigrants were aboard. He was charged and convicted for an offence of aggravated people smuggling contrary to s 233C of the *Migration Act 1958* (Cth). His case at trial had been that he thought the passengers were going on a holiday to Bali, and that after it became clear that the boat was not going to Bali, he had no idea of the destination. He said he had not heard of Australia or Ashmore Reef. In addressing the mental element of the offence, the trial judge directed the jury that "the accused meant to do what he did if he knew that by steering the boat and taking the group to the place that he did he was helping to take the group to Australia". Mr Taru Ali appealed his conviction, arguing that the trial judge should have also directed the jury that the Crown had to prove he knew Ashmore Reef was part of Australia. On appeal, reliance for this proposition was placed upon decisions such as *Alomalu v R* [2012] NSWCCA 255 **and** *Sunanda v R; Jaru v R* [2012] NSWCCA 187.

R A Hulme J undertook an analysis of the evidence in the trial. Some passengers gave evidence that Mr Taru Ali indicated that their destination was Ashmore Reef; that they were entering Australian waters; and that the "Australian Navy will come and collect you guys" and that "when the Australian Navy [come] they will put us in jail and you guys will be free". *Alomalu* and *Sunanda* were cases where the evidence was only capable of establishing that the accused knew the immediate destination of the passengers. This was not so with respect to Mr Taru Ali. As he knew the ultimate destination of the passengers was Australia, and that bringing them to Ashmore Reef facilitated their arrival at their ultimate destination, it was not necessary to prove any intent with respect to whether he knew Ashmore Reef was part of Australia. R A Hulme J held that there had been no misdirection.

Part 9.1 of the Criminal Code Act 1995 (Cth) *does not cover the field in regards to supply*

This appeal in ***Buckman v R* [2013] NSWCCA 258** was heard simultaneously with ***Ratcliff v R* [2013] NSWCCA 259**, which raised identical issues. The appellant contended that the provision under which he was charged, s 25 of the *Drug Misuse and Trafficking Act 1985* (NSW), is inconsistent with Pt 9.1 of the *Criminal Code Act 1995* (Cth). Thus it was argued that the NSW provision infringes s 109 of the *Australian Constitution*. The appellant relied on the High Court decision of *Dickson v The Queen* [2010] HCA 30; (2010) 241 CLR 491, submitting that, just as there, the two Acts in issue are directed at controlling the same activities, drug possession and supply (at [36]). Since the *Drug Act* renders unlawful many acts not covered by the *Criminal Code*, it was argued that it acts to alter, impair or detract from the operation of the *Criminal Code*.

Bathurst CJ dismissed the appeal. He noted (at [78]) that s 300.4 of the *Criminal Code* "explicity seeks to preserve concurrent operation even when the same act or omission is an offence under the *Criminal Code* and a State law and the penalty and fault element in the State law is different". This indicates that the Commonwealth did not intend to cover the field. All that the *Drug Act* does is treat possession with an intention to supply gratuitously to a third person as a more serious offence. Section 300.4 does not operate to eliminate direct inconsistency but allows for federal law to be read and construed as not disclosing a subject matter or purpose with which it deals exhaustively and exclusively (citing *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 at [272]).

Section 25(2) of the Drug Misuse and Trafficking Act can operate concurrently with s 233B of the Customs Act

The appellant was charged with two counts of supplying cocaine in contravention of s 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW). On appeal he claimed that this section is directly inconsistent with s 233B of the *Customs Act 1901* (Cth), thereby violating s 109 of the *Australian Constitution*, which invalidates State legislation insofar as it is inconsistent with Commonwealth legislation. The appellant argued that both Acts criminalise possession of narcotics. The inconsistency arises since the *Drug Act* does not provide for the defence of reasonable excuse, whereas the *Customs Act* does, the State act thereby denying a right or privilege conferred by a Commonwealth law.

Bathurst CJ dismissed the appeal. The test is whether the State Act alters, impairs or detracts from the operation of the federal Act: *State of Victoria v The Commonwealth (The Kakariki)* (1937) 58 CLR 618 at 630 (Dixon J). Section 233B of the *Customs Act* relates to imported goods. To establish an offence under that section the prosecution must prove beyond reasonable doubt that the accused knew that he or she possessed the goods: *He Kaw Teh v The Queen* (1984) 157 CLR 523 at 545, 584, 589 and 603. The *Drug Act* deals with the supply of drugs. The necessary element is intention to supply. Once possession for supply is established it is hard to see how a defence of reasonable excuse for possession could be made out. In addition, the reasonable excuse defence is co-extensive with defences at common law, the only difference being that under the *Customs Act* the onus is clearly on the defendant.
***Gedeon v R* [2013] NSWCCA 257**

Mens rea for reckless wounding in company by joint criminal enterprise

The appellant in ***Prince v R* [2013] NSWCCA 274** was found guilty by a jury of offences of affray and wounding with intent to cause grievous bodily harm. The primary charge was brought under s 33(1)(a) *Crimes Act 1900*, and a statutory alternative was provided under s 35(3). Both charges were put on alternative bases, direct liability and joint criminal enterprise. It was conceded that the trial judged erred in his directions for the s 35(3) offence when put on the joint criminal enterprise basis. The jury was directed that the person inflicting the wound must have been reckless, and also that the appellant intended that the person would inflict the wound recklessly. Instead, what the Crown had to prove was that the wound was inflicted recklessly by one of the appellant's co-offenders; that the appellant had agreed to attack the victim; that he was acting in company with his co-offenders who he knew were armed; that he realised the victim might be harmed; and that he continued to act in furtherance of the enterprise. However, the trial judge directed the jury to consider the statutory alternative only in the event that the jury acquitted the appellant of the primary offence, which they did not. Furthermore, the misdirection favoured the appellant by overstating the mens rea requirement, and so no miscarriage of justice could have flowed.

There was no reference in the judgment (presumably because neither counsel raised it) to *Blackwell v R* [2011] NSWCCA 93 where an error in directing as to the elements of an alternative offence resulted in a successful appeal, notwithstanding the appellant was found guilty of the primary offence.

Where multiple traffic offences charged, withdrawal of one does not void licence suspension

Upon being charged with refusing to undergo a breath test, failing to undergo a breath analysis and driving whilst under the influence of alcohol, Mr Firth was issued with a notice of suspension of authority to drive in NSW. The suspension came into effect immediately. The charge of failing to undergo a breath analysis was later withdrawn but before that occurred, Mr Firth was charged with driving whilst suspended to which he pleaded guilty. He sought judicial review of the suspension on the basis that the suspension had been void ab initio upon the withdrawal of the charge. Leeming JA in ***Firth v Direction of Public***

***Prosecutions* [2013] NSWCA 403** held that it was the charge of refusing to undergo a breath test that gave rise to the suspension and the suspension remained valid as long as the charge remained on foot. A pre-condition to the issuing of a suspension notice under s 205 of the *Road Transport (General) Act 2005* is that the person has been charged with an offence listed in s 205(1)(a) or (b), which Mr Firth had. (NB: the relevant provisions have since been transferred to *Road Transport Act 2013*).

Consent to surgery in a medical assault case

Former doctor Reeves was convicted of malicious infliction of grievous bodily harm with intent. He was sentenced on the basis that he did not have the complainant's consent to surgically remove her entire genitalia. The issue on appeal to the Court of Criminal Appeal was whether the trial judge provided erroneous directions to the jury on the issue of consent. The High Court in ***Reeves v R* [2013] HCA 57** found that the Court of Criminal Appeal formulated the correct test. The CCA was correct to find that the trial judge was wrong to direct that the practitioner had to explain the "possible major consequences of the operation" together with "options" and "alternative treatments" in order for there to be "informed consent". All that is needed in order to negative the offence of battery is consent to the nature of the procedure, in broad terms. (This is not necessarily enough to protect against liability in negligence, however). The appellant argued that Bathurst CJ formulated a more demanding test, by requiring consent to the "nature and extent of the procedure". The High Court ruled that this was irrelevant since neither formulation could be said to have been agreed to on the facts.

Varying a sentence for a driving offence operates prospectively

The respondent in ***RMS v Porret* [2014] NSWCA 30** was convicted of a low range PCA offence and was disqualified from driving for three months. Two months later she was charged with driving whilst disqualified and subsequently failed to appear before court. She was fined and disqualified for 12 months in her absence. Ms Porret then appealed the severity of her sentence for the original PCA offence. The appeal was allowed and the charge was dismissed under s 10 *Crimes (Sentencing Procedure) Act*. Ms Porret then appealed her conviction of the later disqualified driving offence, which was also allowed, on the basis that the original PCA conviction was set aside ab initio and that she was never disqualified from driving. Bathurst CJ found that this conclusion was not open to be made. The power to set aside or vary a sentence under s 20 *Crimes (Appeal and Review) Act* operates prospectively.

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.)

Application for judge-alone trial on basis of "revolting" facts

Mr Stanley was accused of intentionally or recklessly inflicting actual bodily harm with intent to have sexual intercourse. It appeared from the facts, which were not contested, that he had violently assaulted a nurse at a hospital and, while naked, jabbed his erect penis in her face. He was affected by drugs and alcohol at the time, and the sole issue was intent. Mr Stanley's counsel made an application for a judge alone trial on the basis that the nature of the evidence was likely to engender prejudice in the jury. The trial judge granted the application, which was appealed by the Crown.

In ***R v Stanley*** **[2013] NSWCCA 124**, Barr AJ quashed the order of the trial judge. While it was true that the evidence was of a kind that could make a jury experience disgust, the same was true of evidence in many criminal trials in NSW. Jurors are warned in advance about such evidence and have an opportunity to recuse themselves, and in any event are directed to not allow emotion to interfere with their reasoning. His Honour rejected two alternate grounds of which argued the expert evidence was complex and that the trial did not call for the application of community standards as incorrect characterisations of the issues in the trial.

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

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

In ***Iqbal v R*** **[2012] NSWCCA 72**, McClellan CJ at CL confirmed the refusal to grant a stay. First, his Honour held that the DPP had the necessary power. The applicant disavowed any

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

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

Failure to answer outstanding question from jury before delivery of verdict

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

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

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

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

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

Appearance of pregnant prosecution witness by AVL not "unfair" to accused

***JD v R* [2013] NSWCCA 198** concerned a stay application on account of the pregnancy of the complainant. JD was charged with child sex offences. The complainant was, by the time of the trial, an adult. She was pregnant, residing in another state, and had been advised by a doctor not to fly. An application that she give evidence by video link was foreshadowed. JD sought a stay, arguing that the jury might react with a "heightened level of sympathy" to strenuous cross-examination of the witness, and that this would cause prejudice to the appellant because a reasonably informed member of the public might perceive unfairness. The trial judge refused the stay, and JD appealed to the CCA.

The Court refused leave to appeal. The first point was that the touchstone for apprehended bias ("fair minded lay observer") is not the relevant test for refusing an application under s 7(2)(c) *Evidence (Audio and Audio Visual Links) Act 1998*, which is simply that the Court is satisfied that "the direction would be unfair". The second was that arrangements could very easily be made for the complainant to give evidence in such a way that her pregnancy was not visible to the court in NSW. Appropriate arrangements could also be made for the officers of the court from which she was giving evidence to have any documents that might be required for cross-examination.

(The Court remarked that the AVL arrangements could be such that the jury would never know that the witness was pregnant. So the case is not authority for the proposition that *physical* attendance of a heavily pregnant witness is not an arguable ground for a stay.)

Inadequately particularised charges of aggravated sexual assault

Mr Tonari was convicted of offences of sexual intercourse without consent in circumstances of aggravation (s 61J *Crimes Act*). The aggravating feature cited in the indictment was the threatened infliction of actual bodily harm to the victim. The indictment was defective in that it did not disclose that the prescribed aggravating feature required the threats to be conveyed "by means of an offensive weapon or instrument". The defect was not noticed at trial. Mr Tonari appealed his conviction before he was sentenced for the subject offences: ***Tonari v R* [2013] NSWCCA 232**. He relied, inter alia, on two grounds: that the indictment disclosed no offence known to law and the trial was a nullity; and that the defect led the trial judge to misdirect the jury.

Johnson J rejected the first ground. The indictment disclosed "an imperfect formulation of a known offence" (at [95]). It was a case of incorrect particularisation. But a real consequence was the jury was given incomplete directions of law on the circumstance of aggravation relied upon. There was some very slight evidence of an implement having been used, but the jury was not directed to make a finding on that issue because of the way the indictment was framed. The appropriate course was for the court to substitute verdicts for the non-aggravated form of the offence (s 61I) by means of s7(2) *Criminal Appeal Act 1912*.

Legislative change did not affect conviction

The appeal against conviction in ***MJ v R*** **[2013] NSWCCA 250** arose because three counts of aggravated indecent assault brought against the appellant used the language of s 61E(1A) of the *Crimes Act 1900* (NSW). This provision was repealed on 17 March 1991 and replaced with ss 61L and 61M. The evidence was incapable of establishing whether the offence was committed before or after this date. The appellant accepted that the counts could be established under the new s 61M. However, he claimed that the counts failed to allege an offence known to the law (because neither provision covered the entire period referred to in the count) or alternatively were bad for duplicity (because two different offences were alleged). Macfarlan JA dismissed the appeal. He accepted the Crown's submission that the conduct charged in the counts was unlawful at all times in the period referred to "and the fact that the source of the unlawfulness changed did not invalidate the appellant's convictions" (at [29]). It was also recognised, as in *R v MAJW* [2007] NSWCCA 145; 171 A Crim R 407, that if the factual matters alleged would constitute offences under more than one legislative provision, the offender should be sentenced on the basis of the lower maximum penalty. Furthermore, there was no unfairness to the appellant arising out of the fact that the statutory provision which rendered the appellant's conduct unlawful was not identified; the essential factual ingredients of the charges were clear in the indictment.

Neither express nor implied power for District Court to order costs upon the setting aside of a subpoena

While the applicant was an accused in criminal proceedings for sexual assault offences pending in the District Court, his solicitors issued a subpoena calling for various documents to be produced by the complainant. The trial judge set aside the subpoena at the request of the complainant's solicitors, and also ordered the applicant to pay costs. The ordering of costs was found by R A Hulme J in ***Stanizzo v Complainant*** **[2013] NSWCCA 295** to be beyond the power of the District Court. There is no express conferral of power to do so, and nor does the District Court possess inherent jurisdiction in this respect. The question was whether there was an implied power, "by a strict test of necessity" (at [12]). R A Hulme J referred to *R v Mosley* (1992) 28 NSWLR 735 in which it was confirmed that there is neither express nor implied power for a District Court to order costs in its criminal jurisdiction. Reference was also made to *DPP v Deeks* (1994) 34 NSWLR 523 where Kirby P observed (at 534) that the power to award costs in criminal proceedings must be "very clearly conferred". These two authorities take precedence over *Darcy v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497 upon which the respondent had relied.

Undesirable for prosecutor to frame address as questions to be answered by defence

The appellant in ***Lane v R*** **[2013] NSWCCA 317** appealed, inter alia, against certain aspects of the Crown Prosecutor's closing address in her trial for murder. The objectionable portion involved the Crown posing a series of questions to the jury, and asking that they be borne in mind during the defence address. The appellant argued that this had the effect of reversing the onus of proof, and that as a result the trial had been unfair.

The Court (Bathurst CJ, Simpson and Adamson JJ), referring to *Wood v R* [2012] NSWCCA 21, agreed that asking questions with a view to inviting the jury to consider if satisfactory questions were provided was highly undesirable. But a miscarriage of justice did not automatically flow. In this case, the issues raised as "questions" were factually relevant to the Crown onus of excluding a defence case. Had the questions been framed as issues, they would have been unobjectionable. (And no objection was taken at trial.) The Court felt bound to accept that the jury applied the directions of the trial judge assiduously.

Self-defence should not be left where it does not arise on the evidence

The appellant in ***Flanagan v R*** **[2013] NSWCCA 320** was convicted of wounding with intent to cause grievous bodily harm. It was her case at trial she did not cause the relevant injury. No direction was sought on self-defence, but she appealed on the basis that it should have been left to the jury. The Court of Criminal Appeal held that even if a direction had been sought on self-defence, the trial judge would and should have refused to give it, given that the elements of self-defence could not be made out on the evidence. The appellant denied the conduct that was the subject of the charge and so there was no evidence to which the judge could have directed the jury.

Unlawful physical coercion by one juror upon another falls outside the exclusionary rule

A jury found Mr Smith guilty of two sexual offences. He appealed to the Western Australian Court of Appeal, arguing that the trial miscarried. A note had been found in the jury room after they had been discharged, alleging that the author had been coerced by a fellow juror to return a verdict of guilty. The appeal was dismissed because of the exclusionary rule that says that a juror's evidence of what takes place in a jury room is inadmissible. The High Court in ***Smith v State of Western Australia*** **[2014] HCA 3** found that the evidence fell outside of the exclusionary rule and therefore should have been admitted. The rationale for the rule "lies in the preservation of the secrecy of a jury's deliberations to ensure that those deliberations are free and frank so that its verdict is a true one and to ensure the finality of that verdict" (at [31]). Unlawful physical coercion by one juror upon another cannot be regarded as part of the course of "free and frank" deliberation and to apply the rule in such a case would defeat the purpose of the rule. Furthermore, "the need to protect and preserve the finality of trial by jury as a justification for the exclusionary rule loses its force where the evidence in question does not go to the substance of the jury's deliberations, but, rather, to demonstrate the disruption of the deliberative process" (at [43]).

SENTENCING – GENERAL ISSUES

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.)

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.

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.

"One punch" assaults and drunken violence

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

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

Reflecting Form 1 offences in aggregate sentencing

***R v Grover* [2013] NSWCCA 149** concerned a Crown appeal against an aggregate sentence. The respondent had pleaded guilty to a number of offences and received an aggregate sentence of imprisonment. Sequences one, two and three were aggravated break enter and steals. But the sentencing judge specified the same individual sentence for each count, regardless of the fact that *nineteen* Form 1 offences were attached to the first sequence. On the appeal, the Crown argued that the failure to show the impact of the Form 1 offences was indicative of error. Hoeben CJ at CL agreed. The point of taking into account Form 1 offences is to increase the penalty that would otherwise be appropriate for the particular offence through the consideration of personal deterrence and the community's expectation of condign retribution.

Failure to observe that offence could have been dealt with in the Local Court

The appellant in ***Hendra v R* [2013] NSWCCA 151** was convicted of an offence of common assault, as an alternative to a more serious charge of assault occasioning actual bodily harm. He appealed his sentence, arguing, inter alia, that the trial judge had entered error by failing to observe, in his remarks on sentence, that the assault could have been dealt

with summarily. The trial judge had not been asked to do so by counsel. McCallum J, observing *Zreika v R* [2012] NSWCCA 44 at [111]-[112], remarked that the failure to raise the matter was indicative of it not being realistically available. Once it had been concluded that the offence was in the worst category (a finding that was open) and that the sentence would be higher than that which the Local Court could impose, the significance of the lower jurisdictional limit fell away.

Meaning of offence being committed in the "presence" of a child

Mr McLaughlin pleaded guilty to and was convicted of three domestic violence related offences. All were committed in the home he shared with his partner and her young son. The agreed facts mentioned that the last offence occurred in the child's bedroom while he was asleep. The sentencing judge acknowledged that there was no evidence that the child had seen the offending conduct. But she remarked that the presence of the child was a "potentially aggravating circumstance", applying s 21A(2)(ea) of the *Crimes (Sentencing Procedure) Act*. Mr McLaughlin appealed, arguing that the sentencing judge erred in taking into account as an aggravating factor the "generalised presence" of the child.

On the appeal, ***McLaughlin v R* [2013] NSWCCA 152**, Button J agreed that the circumstance should not have been taken into account as an aggravating feature. There was no direct evidence that the child was present at the first two offences. The sentencing judge could have made a finding that the child must have realised what was occurring during the third offence, but she did not do so. In those circumstances, her Honour's view did not accord with the strict approach to s 21A(2)(ea) put down by *Gore v R; Hunter v R* [2012] NSWCCA 330; (2012) 208 A Crim R 353 at [103]-[104]. The Crown must prove the specific feature of aggravation beyond reasonable doubt.

(The appeal was dismissed as no lesser sentence was warranted.)

The maximum penalty for a statutory offence serves only as a reference point for the equivalent common law crime

***Blackstock v R* [2013] NSWCCA 172** concerned a plea of guilty to the common law offence of misconduct in a public office. Mr Blackstock had, between 2003 and 2007, improperly used his position at RailCorp to surreptitiously create a company to take up a maintenance contract. Part 4A of the *Crimes Act* creates a number of statutory offences proscribing similar conduct to the common law offence. Those offences have prescribed maximum penalties, while the sanction for the common law offence is, of course, at large. Mr Blackstock argued that his sentence of six years was equivalent to a finding of the worst degree of criminality in respect of the statutory offence, and that it was thus manifestly excessive. Campbell J rejected his argument. His Honour held that the statutory analogue provided a reference, but no more than that, and that there was no limit to the term of imprisonment that could be imposed on a person convicted of a common law misdemeanour.

Aggregate sentences: whether fixed terms indicate head sentence or non-parole period

The appellant in ***Tuvunivono v R*** **[2013] NSWCCA 176** had received an aggregate sentence in respect of ten offences of armed robbery or attempted armed robbery. The total sentence was 12 years with a minimum custodial component of 8 years. One sentence reflected a number of Form 1 offences, but for the other nine offences the sentencing judge delivered similar fixed terms of four to five years in accordance with the guideline judgment of *R v Henry* [1999] NSWCCA 111; (1999) 46 NSWLR 346. On appeal, it was argued that the fixed terms were, effectively, non-parole periods, not head sentences, and that as a result the sentences were manifestly excessive (purportedly reflecting notional head sentences higher than the guideline). The argument was rejected by Price J (Campbell J agreeing). The sentencing judge's reliance upon *R v Henry* showed that he intended to set fixed terms as "head sentences" that reflected the guideline.

Following the rule in Pearce

Mr Finnigan unscrupulously promoted a Ponzi scheme. He was charged and pleaded guilty to nine offences relating to eight victims and a sum of almost two million dollars. He received a total sentence of ten years, with a non-parole period of six years. He appealed his sentence, arguing, inter alia, that the sentencing judge failed to fix proportionate sentences for each individual offence by approaching the sentencing task: ***Finnigan v R*** **[2013] NSWCCA 177**. The relevant remarks of the sentencing judge included:

> For the other sentences in the main they will be three years and seven months or thereabouts. For Counts 7, 8 and 9 they will be a straight four years. As will be seen that is done to ensure that in an overall sense a greater sentence is not imposed than it should be imposed.

Campbell J agreed that the decision below displayed error. By fixing an appropriate total term and then (seemingly) arbitrarily setting individual sentences to correspond with that, the sentencing judge failed to follow the mandatory sequence required by *Pearce v The Queen* (1998) 194 CLR 610 at 624[24]. The sentencing judge must fix an appropriate sentence for each offence and then go on to consider the other questions, including totality.

Victim impact statement expressing harm far in excess of what might be expected from offence

The appellant in ***RP v R*** **[2013] NSWCCA 192** pleaded guilty to an offence of indecent assault upon a female under the age of 16 (proscribed by s 76 *Crimes Act*, now repealed) committed between 1978 and 1980. The conduct involved two occasions of rubbing cream into the face and upper chest of an 11-year-old girl (the second occasion appearing as a Form 1). The sentencing judge found that the seriousness of the offence was "near the bottom" of the range, but imposed a fairly stiff fixed-term of one year, including a utilitarian discount. He had considerable regard to a victim impact statement that spoke of profound and devastating lifelong suffering by the victim. It included statements to the effect that, "her thoughts were consumed with the horror of the abuse, she was not able to function as a parent or a person". The appellant complained, on appeal, that the judge

was in error in giving weight to its contents in light of it expressing a level of harm incommensurate with the scale of the offending.

The appeal was upheld. Price J found that the sentencing judge was obliged, in the context of the charged offences, to approach the victim impact statement with caution. The harm asserted to be suffered by the victim was not supported by other evidence. It did not accord with what would generally be expected from the circumstances of the offence. The appellant was re-sentenced to two months imprisonment.

Principles applicable to suspended sentences

R v Egan **[2013] NSWCCA 196** is another reminder of the importance of assiduously following the proper steps when considering whether to impose a suspended sentence. The three primary things to be determined, elucidated in the judgment of R A Hulme J at [79], are:

1. Whether no other penalty than imprisonment is appropriate.
2. If so, what the length of the term of imprisonment should be.
3. Whether the sentence *can* and *should* be suspended.

Mr Egan pleaded guilty to a number of serious offences. In written submissions on sentence, his counsel conceded that a full-time custodial sentence should be imposed. While hearing submissions, various things fell from the bench that indicated the sentencing judge was giving serious consideration to imposing some kind of alternative to custody. At the conclusion of his remarks on sentence, he imposed sentences that gave the appearance of being calculated to give effect to that intention. It was evident that he had missed the second step in the principles above: he had not determined the length of the sentences of imprisonment before he decided to suspend them. As a result, the sentencing exercise miscarried and resulted in a manifestly inadequate sentence. R A Hulme J expressed his regret for:

> the unfortunate consequences that flow from a judge being unduly merciful in imposing a sentence that is substantially less than that which the law demands and that the judge's duty requires be imposed.

Offending the De Simoni *principle*

Mr Nguyen was conducting a minor criminal enterprise from the garage of his unit complex. Two masked men attempted, unsuccessfully, to rob him. Mr Nguyen was able to scare them off unarmed, but later obtained a pistol to prevent further robberies. Two weeks later, eight police officers executed a search of Mr Nguyen's unit and garage. When they entered the basement, Mr Nguyen confronted them. A brief exchange of fire ensued, in the course of which Mr Nguyen shot Constable Crews in the arm, and another police officer, in returning fire moments later, accidentally shot Const. Crews dead. Mr Nguyen claimed that he had mistaken the police officers for disguised robbers. He pled guilty to manslaughter on the basis of excessive self-defence (and also pleaded to wounding with intent). The Crown accepted his plea.

The sentencing judge expanding on the consequences of the plea:

> The plea of guilty to manslaughter also entails the Crown accepting the reasonable possibility that the offender genuinely believed that it was necessary to shoot at the person who proved to be Constable Crews in order to defend himself (based as it was on his mistaken belief that the officer was someone who was intent on robbing him and someone who might have posed a serious risk to his safety). It also entails acceptance by the offender that a reasonable person in his position would not have considered that it was necessary to shoot that person in defence of himself or his property.

Her Honour made a finding that the offence was not in the worst category of manslaughter, reasoning by comparison to a hypothetical scenario where the offender knew the victim was a police officer. The Crown appealed the sentence, arguing, inter alia, that if Mr Nguyen had *known* that Constable Crews was a police officer, he would have been guilty of murder: ***R v Nguyen*** **[2013] NSWCCA 195**.

The Court of Criminal Appeal agreed. The sentencing judge had erred by having regard to the absence of a factor that, if present, would have rendered Mr Nguyen criminally liable to the more serious offence of murder (see *The Queen v De Simoni* (1981) 147 CLR 383 at 389). As a result, the sentencing discretion miscarried by taking into account an extraneous consideration.

Whether an aggravating feature that offence was committed in premises offender entitled to be present in

The facts in ***Melbom v R*** **[2013] NSWCCA 210** involved an offender stabbing one of his housemates and threatening another. The sentencing judge referred to as an aggravating feature that the offence "was committed in the home of the offender". Section 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* provides that it is an aggravating feature if, "the offence was committed in the home of the victim or any other person". It has been held to not apply where offences are committed in a home where the offender has a lawful right to reside, in accordance with pre- s 21A common law. Mr Melbom appealed his sentence, arguing, inter alia, that this interpretation had been transgressed.

On appeal, R A Hulme J found that the sentencing judge was not in error because she relied on other circumstances (domestic violence and the special vulnerability of housemates) in making her findings in relation to the offence occurring in the home. But he was, in passing, sceptical of the current state of the law on the scope of s 21A(2)(eb). Simpson J took the point further, and remarked (Price J agreeing with her additional comments) at [1]-[2]:

> I have read in draft the judgment of R A Hulme J. I agree with his Honour's analysis and the orders he proposes. In relation to Ground 1, I note that the Crown initially sought to challenge the correctness of previous decisions of this Court that hold that the aggravating feature specified in s 21A(2)(eb) of the Crimes (Sentencing Procedure) Act 1999 (that the offence was committed in the home of the victim or any other person) does not extend to offences committed in the home of the victim if the offender lives in the same home. The Crown expressly abandoned that challenge. Why that course was taken is not apparent.
>
> I understand R A Hulme J to have expressed some reservations about the principle stated. I share those reservations. It is, perhaps, time for re-examination by this Court of those previous decisions.

A similar conclusion was reached in ***Montero v R*** **[2013] NSWCCA 214**, handed down days after *Melbom*. *Montero* involved a sexual assault in premises the offender was entitled to be in after a New Year's Party. Mr Montero climbed into a bed occupied by a guest after he had a fight with his girlfriend, and, in the morning, raped her. The sentencing judge referred to s 21A(2)(eb) as an aggravating factor. Mr Montero appealed, arguing that this finding was erroneous. Judgment on the appeal was again given by R A Hulme J, who found the ground was not made out. It was clear that the sentencing judge was occupied with the entitlement of the young victim to safety and security while a guest at a friend's home. (In the event that it was an erroneous finding, R A Hulme J found it was not material.)

Seriousness or aggravation: a distinction without difference

The appellant in ***Richardson v R*** **[2013] NSWCCA 218** killed his partner and dismembered her body with a power saw. The cadaver was placed in garbage bags and buried in the bush. The appellant was tried and convicted of murder. At the sentence hearing, his counsel conceded that his treatment of the body could be taken into account "in assessing the seriousness of the offence" (by reference to cases such as *Knight v R* [2006] NSWCCA 292; (2006) 164 A Crim R 126). The sentencing judge made findings of fact that the dismemberment was not done only to facilitate disposal of the body, but also to remove evidence of injuries and express the appellant's anger and hatred of the victim. He considered that the sentence should be increased on account of this feature. On appeal, the appellant sought to make a distinction between his concession that the dismemberment went to the seriousness of the offence and the finding that it was a matter of aggravation. Hoeben CJ at CL remarked that this was a distinction without difference, and that it was not open for the appellant to resile from the concession below. The relevant findings of fact were open and uncontradicted.

The relevance of entrenched disadvantage

Bugmy v The Queen **[2013] HCA 37** was an appeal against a decision of the Court of Criminal Appeal affirming a sentence below. The offender had assaulted a corrective services officer, blinding him in one eye. He came from a profoundly disadvantaged background in a variety of respects. The Court of Criminal Appeal found that the importance of these features must diminish over time where a person goes on to accumulate a significant criminal record. The High Court remitted the appeal on a technical matter, but also gave its considered view on this point. It held, at [43]-[44] below:

> ...The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
>
> Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory)

> relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

The reasoning was based on the principle outlined by Brennan J in *Neal v The Queen* [1982] HCA 55; (1982) 149 CLR 305 at 326, reflected in particular in NSW in *Fernando* (1992) 76 A Crim R 58 at 63.

The appellant in ***Munda v Western Australia*** **[2013] HCA 38** argued a similar point, that "systemic deprivation and disadvantage, including an environment in which the abuse of alcohol is endemic in indigenous communities" should have been taken into account. The appellant had killed his spouse in an intoxicated assault. The High Court reached a similar conclusion as it had in *Bugmy*, but also mounted a strong argument in support of features of the criminal law that look beyond the offender, including the "obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence" (at [54]).

Hardship to third parties when sentencing for Commonwealth offences

R v Zerafa **[2013] NSWCCA 222** concerned an offender who was convicted of a number of tax offences. The proceedings had been attended by significant delay. Section 16A(2)(p) of the *Crimes Act 1914* (Cth) requires a sentencing court to have regard to "the probable effect that any sentence or order under consideration would have on any of the person's family or dependants". Despite the obvious and uncontested hardships on Mr Zerafa's young family, the sentencing judge felt constrained by authority not to take this into account because it was not "exceptional". In response to a Crown appeal against leniency, Mr Zerafa raised a contention that the cases relied upon, primarily *R v Togias* [2001] NSWCCA 522 and *R v Hinton* [2002] NSWCCA 405; 143 A Crim R 286, were wrongly decided. Hoeben CJ at CL (Latham J agreeing, Beech-Jones J dissenting on this point) ruled that whatever the argument against the present interpretation of the legislation, the remarks of Spigelman CJ in *Togias* at [17] held true, "If there is to be any change in this position…only the High Court can effect it".

Form 1 offences not relevant to accumulation

Mr Sparos was sentenced for import and supply offences relating to a large quantity of cocaine. The sentencing judge was asked to take into account a Form 1 offence relating to Mr Sparos' dealings with the profits of his criminal enterprise. In his remarks, the sentencing judge said "the Form 1 matter requires an increase in the sentence for the principle offence *and* militates against complete concurrence for that offence with that to be imposed for the Commonwealth matter" (emphasis supplied). Mr Sparos appealed his sentence, arguing that the sentencing judge was not entitled to, in effect, take into account a Form 1 offence twice: ***Sparos v R*** **[2013] NSWCCA 223**.

Johnson J (Beazley P agreeing, Beech-Jones J in disagreement on this point) considered whether such an approach was contrary to the principles laid down in *Abbas, Bodiotis, Taleb and Amoun v R* [2013] NSWCCA 115. In *Abbas*, Bathurst CJ held that s 33 *Crimes (Sentencing Procedure) Act 1999* was framed so as to allow a sentencing judge to take Form 1 offending into account when "dealing with the primary offence" ([22]-[23]). Applying this, Johnson J held that having determined the appropriate sentence for the primary offence, it was not open to the judge in sentencing Mr Sparos to take the Form 1 offence into account for the subsequent consideration of the extent to which sentences should be accumulated. Authorities emphasising the role of totality in the sentencing process must be read as being applicable only to offending the subject of a criminal conviction.

General deterrence for vigilante offences

Four offenders assaulted, drugged and robbed Michael Venn at his home. The attack was carried out because the group believed Mr Venn, who was 42, was maintaining a sexual relationship with one of their number who was then aged 16: a fact they viewed as abhorrent and illegal. The group was arrested and charged shortly after the crime. ***Bonnet v R* [2013] NSWCCA 234** concerned an appeal brought by one of the group, Ms Bonnet, against her sentence for an offence of robbery with deprivation of liberty. She argued, inter alia, that the sentencing judge had erred by not giving ameliorating weight to her motivation for committing the offence. Ms Bonnet relied on the case of *R v Swan* [2006] NSWCCA 47, which concerned an assault by an intellectually disabled victim of a sexual offence against his attacker.

Adamson J dismissed the appeal. Unlike *R v Swan*, the offender in this case was not affected by any mental disorder or delusion. Vigilante offences are to be discouraged by general deterrence, and even more so where, as in this case, the perceived crime may be unsavoury to the attackers, but is no crime in law at all.

Principles of totality in sentencing an offender already serving another sentence

***R v DKL* [2013] NSWCCA 233** was a Crown appeal against sentences for offences of sexual intercourse with a child under 10 and using a weapon to intimidate. The sentence imposed for those offences amounted to, in total, a five-year non-parole period and an eight-year head sentence. The Crown did not cavil with that aspect. But the offender was already serving a substantial sentence of imprisonment for other sexual offences committed against a different complainant. The sentencing judge accumulated the new sentences on the existing sentences to such an extent that the effective additional non-parole period was reduced from five years to two years and three months. Adamson J, on the appeal, found that the degree of accumulation rendered the sentences so inadequate that it must have involved error. The new offences were different in time, character and victim to the other offences. The structural approach meant the new sentences did not sufficiently reflect the offender's criminality.

(The Court exercised its residual discretion to dismiss the Crown appeal because of the deterioration of the offender's health in custody.)

Suspended sentences do not reflect general deterrence

Mr Donald was sentenced for one offence of dishonestly using his position as an employee of a corporation with the intention of gaining an advantage. The offence covered a considerable number of activities and an illicit advantage of more than $1,700,000. Mr Donald was sentenced to two and a half years imprisonment, but released on a good behaviour bond. The Crown appealed the adequacy of the sentence, arguing that it failed to reflect the gravity of the crime: ***R v Donald*** **[2013] NSWCCA 238**.

Latham J, allowing the appeal, referred to the inherent leniency of a suspended sentence as an effective general deterrent to white-collar professionals. She remarked, at [86], that "the real bite of general deterrence takes hold only when a custodial sentence is imposed". A sentence of two years from judgment on the appeal was imposed, with only the last year to be served by way of bond.

Threatening harm not always less serious than causing harm

In ***Linney v R*** **[2013] NSWCCA 251** the applicant had pleaded guilty to threatening to cause injury to a judicial officer on account of something lawfully done contrary to s 326(1) of the *Crimes Act 1900* (NSW). There was an issue about the sentencing judge having assessed the seriousness of the offence by referring solely to threatening behaviour without acknowledging that an offence will be more serious if it involves the actual doing or causing of injury or detriment, all of which is contemplated by the offence-making provision. R A Hulme J held that the sentencing judge did not err in his assessment of the seriousness of the offence. The sentencing judge did not merely compare various sorts of behaviour encompassed by the section, in which case the applicant's argument would have had force, but referred to a wide range of *threatening* behaviour. It was open to him to conclude that the offence fell above the mid-range, given that the threats encompassed the worst types of threatening behaviour (i.e. to kill the judge).

Sentencing for historical offences and whether to take into account the former availability of remissions

In ***Versi v R*** **[2013] NSWCCA 206**, the applicant had been found guilty of offences committed in 1985-1986 and a question arose whether there was a need to replicate sentencing practices that would have prevailed at that time, that is, prior to the "truth-in-sentencing" reforms. Basten JA (Latham J agreeing, Adams J contra) held that, since the offender would not have been sentenced until after the commencement of the *Sentencing Act 1989* (NSW), there was no need to take account of principles that may have operated prior to this. Accordingly, the Court should have regard to statutory guidelines, the range of conduct covered by the offence in each count and other sentencing principles that were applicable at the time.

The relevance of a victim's benevolent view towards offender

***Efthimiadias v R* [2013] NSWCCA 276** illustrates a victim's potential influence on sentencing that was firmly rejected. In this case, the offender had attempted to solicit (from an undercover officer) the murder of his young partner. After the offender's arrest and imprisonment, the victim expressed a desire to at least maintain contact with him. This was said, on the sentence appeal, to be a relevant mitigatory circumstance. Johnson J strongly disagreed. He stated, at [67]:

> The attitude of a victim cannot be allowed to interfere with a proper exercise of sentencing discretion. A serious crime such as this is a wrong committed against the community at large and the community itself is entitled to retribution. Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim: *R v Palu* [2002] NSWCCA 381; 134 A Crim R 174 at 183-184 [37]; *R v Burton* [2008] NSWCCA 128 at [102]ff. To adopt the words used in another solicit to murder case (*R v Qutami* [2001] NSWCCA 353; 127 A Crim R 369 at 374 [37]-[38]), the fact that the victim adopted a generous attitude to the Applicant was not something on which the Applicant can trade.

Discount for assistance incorrectly applied to single sentence

In **CM v R [2013] NSWCCA 341**, the applicant was allowed a discount on sentencing as a result of providing assistance to authorities. His appeal centred on the fact that the sentencing judge only applied the discount to one of five sentences. R A Hulme J held that, since the assistance did not relate to any of the offences for which the appellant was charged, there was no reason not to apply the discount to each of the sentences. Further, such discounts should not be eroded by a process of accumulation of sentences.

Onus of proof on a question of financial gain or lack thereof in fraud offences

In ***Hinchcliffe v R* [2013] NSWCCA 327**, the applicant had pleaded guilty to offences of defrauding a body corporate, as a director, contrary to (then) s 176A *Crimes Act 1900*. He asked that a further seven Form 1 offences be taken into account on sentence. He was sentenced to two years imprisonment to be served by way of an ICO. The Crown appealed against the leniency of the sentence, raising among other matters a finding by the sentencing judge that the Crown had not proved beyond reasonable doubt that the respondent had gained personally from a substantial number of the offences. Johnson J held that the sentencing judge misconstrued the facts and also the law relating to the onus of proof. Given the pleas of guilty and the agreed statement of facts, which quantified the sums obtained by the respondent, the onus was on the respondent to establish, on the balance of probabilities, that he had not gained personally from the offences. If the respondent had established this, it may have operated to reduce sentence, and in line with *The Queen v Olbrich* [1999] HCA 54, this meant it was an issue upon which the respondent bore the onus of proof to the civil standard.

Application of Munda – limited weight given to the deprived background of the offender

In ***R v Robinson*** **[2014] NSWCCA 12** the Crown appealed against the inadequacy of a sentence imposed for an offence contrary to s 112(3) of the *Crimes Act 1900*. Although it was acknowledged that the offender had a seriously disadvantaged background, Basten JA found that the sentence imposed was manifestly inadequate. Basten JA referred to *Munda v Western Australia* [2013] HCA 38 where the High Court emphasised that the importance of personal deterrence may in fact be elevated where an offender's deprived background has had a formative effect on his or her criminal tendencies. Furthermore, courts must be wary of treating offenders as victims since this can lead to a belief that they are not wholly responsible for their actions, thereby reducing community protection.

Utilitarian value of guilty plea depends on length of delay in entering it

The applicant in ***Morton v R*** **[2014] NSWCCA 8** pleaded guilty to an offence of knowingly taking part in the supply of cocaine, and asked that further Form 1 offences be taken into account on sentence. He was arrested in August 2010 and did not plead guilty until 4 June 2012. The trial judge allowed a discount of 15 per cent for the plea. Hoeben CJ at CL rejected the submission that this was an inadequate discount. The plea of guilty was entered after lengthy charge negotiations. The applicant argued that the offer that was eventually accepted was in the same terms as an earlier offer (made on 22 June 2011) and so he should have been awarded a 25 per cent discount. The Court referred to *R v Stambolis* [2006] NSWCCA 56 and *R v Borkowski* [2009] NSWCCA 102, both of which are authority for the proposition that delayed negotiated pleas reduce their utilitarian value. Furthermore, even if the earlier offer had been accepted, there was still a disputed factual matter to be resolved, thereby reducing the utilitarian value of the plea.

Necessary to have regard to effect of separation of mother from young baby

The applicant in ***HJ v R*** **[2014] NSWCCA 21** pleaded guilty to two offences of breaking and entering and committing a serious indictable offence. She was sentenced to a term of imprisonment of 2 years and 1 month, with a non-parole period of 12 months. She was a juvenile at the time of the offence, and at the time of sentence was mother to a four-week-old baby. Garling J found that the sentencing judge gave no attention to the effect of separation from the baby. There are facilities for mothers and babies to live together in the adult correctional environment but not in any juvenile detention facility. It was necessary for the judge to consider the effect the separation would have had on the applicant and the degree to which it would have impacted upon the hardship of her time in custody. No attention was given to these matters and accordingly the appeal was allowed, with HJ being released on parole forthwith.

Prosecution prohibited from making submissions as to sentencing range

Two offenders pleaded guilty to serious Commonwealth offences and each was sentenced to a very lengthy term of imprisonment. At the sentencing hearing, the judge did not seek and refused to receive submissions from the prosecution about the bounds of the

available range of sentences. On appeal to the High Court, they submitted that the trial judge was wrong to do so for two reasons: first, plea agreements had been made and the prosecution had expressed its views about the available range of sentences; second, the applicants could have used the submissions to their advantage. The appeal was dismissed: ***Barbaro and Zirilli v The Queen*** **[2014] HCA 2**. The prosecution's view as to the bounds of available sentences is a statement of opinion. It advances no proposition of law or fact that a sentencing judge may properly take into account in finding the relevant facts, deciding the applicant principles of law or applying those principles to the facts to yield the sentence to be imposed. "That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge" (per French CJ, Hayne, Kiefel and Bell JJ at [7]).

SENTENCING - MULDROCK ISSUES

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

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

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

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

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

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

Question: If *Muldrock* affirms *Markarian* in requiring all facts, matters and circumstances to be considered in the assessment of sentence, what is the a point of distinguishing between "objective seriousness of the offence" and "moral culpability" by assigning consideration of the offender's mental state to the latter and not the former?

Reference to the mid-range of objective seriousness does not establish "Muldrock" error

Mr Kerrtai was sentenced for an offence of having sexual intercourse with a child under 10. He appealed his sentence, arguing that the sentencing judge had fallen into *Muldrock* error in expressing a finding that the objective seriousness of the offence was "slightly below mid-range": ***Kerrtai v R* [2013] NSWCCA 252**. Mr Kerrtai submitted that the degree of specificity in that finding was contrary to an instinctive synthesis approach. Hoeben CJ at CL disagreed. It is no error to express a finding of objective seriousness on a scale. And the judge did not engage in a two-step process. He had identified all factors relevant to sentence, evaluated their significance, and determined the appropriate sentence according. The application for an extension of time in which to appeal was refused.

Standard non-parole period and maximum penalty both relevant even where significant disparity is prescribed

The appellant in ***Duncombe v R* [2013] NSWCCA 271** was sentenced, pre-*Muldrock*, to an offence of inflicting grievous bodily harm. That offence carries a non-parole period of seven years, and a significantly higher maximum penalty of 25 years. The appellant argued that the sentencing judge had applied a two-stage process, and had also assigned determinative significance to the standard non-parole period.

In his remarks, the sentencing judge said:

> Taking all of these matters into consideration I would fix the objective criminality of this offence as being slightly below the mid range for offences of this nature. The prisoner's counsel Mr Priestley submitted that as against the standard non-parole period of seven years such an analysis as that which I have disclosed might be quantified at six years. I agree that represents a fair appraisal of the culpability of this offender. I stress however that this is to be viewed not simply against the standard non-parole period but against the overall maximum penalty of twenty five years. I have not been distracted from consideration of that penalty by over concentration on the standard non-parole period.

Johnson J agreed that the remarks revealed a two-stage approach. But he did not see that the sentencing judge assigned determinative significance to the standard non-parole period. Rather, the remarks showed appropriate regard to the statutory guideposts of

both the standard non-parole period and the maximum penalty. His Honour remarked, at [53], that both standards are relevant even where there is such a significant gap in their prescribed lengths.

Finding that standard non-parole period "highly relevant" not erroneous in light of judgment as a whole

***Black v R* [2013] NSWCCA 265** concerned a finding by a sentencing judge that, for offences in the mid-range with no guilty pleas, the prescribed standard non-parole periods were "highly relevant". The offender argued that this demonstrated *Muldrock* error. Bellew J held that this ground did not succeed in the light of the judgment as a whole. The sentencing judge only made that remark after considering objective seriousness and the subjective case. It was also not possible to conclude that anything expressed as "relevant", to whatever degree, could be equated with a finding of determinative significance. The application for an extension of time in which to appeal was refused.

Muldrock does not prohibit consideration of objective criminality of offence

Mr Ramea appealed a sentence out of time which he claimed had been calculated on a two-stage basis contrary to *Muldrock* and *Markarian*. He claimed that the sentencing judge had given determinative weight to the standard non-parole period, in particular by referring to *R v Knight*; *R v Biuvanua* [2007] NSWCCA 283. In ***Ramea v R* [2013] NSWCCA 310** Latham J held (at [17]) that there is "nothing inherently objectionable, even post *Muldrock*, in the statement that there must be an appropriate relationship between the standard non-parole period and the objective criminality of the offence. In my view, that is saying no more than that the standard non-parole period operates as a benchmark." The appellant's claim that the sentencing judge had offended the approved approach to sentencing set out in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 was also rejected. *Markarian* was not a standard non-parole period case, and indeed the plurality recognised that careful attention ought be paid to legislative yardsticks. Instead, the prohibited approach involves "determining a sentence referable to an offence, and then engaging in 'arithmetical deduction' from that sentence for mitigating and/or subjective factors" (Latham J at [21]).

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".

Setting condign sentences for tax fraud offences

***R v Hawkins* [2013] NSWCCA 208** was a Crown appeal against a sentence imposed on a tax fraud, Mr Hawkins. The offending conduct occurred over a number of years and deprived the Commonwealth of something in the area of $600,000 in tax revenue. Mr Hawkins received a total head sentence of 3 years 4 months including a non-parole period of 1 year 8 months. RS Hulme AJ agreed, in strong terms, that the sentences were inadequate. He referred to the decision in *Hili v The Queen; Jones v The Queen* [2010] HCA 45; (2010) 242 CLR 520 and its summation of the many features that make revenue fraud serious, such as the cost to the community and difficultly of detection. But RS Hulme AJ went on to say, at [30] that even without the guidance of *Hili v The Queen; Jones v The Queen*, the sentences were "utterly disproportionate to a fraud yielding a benefit of over $600,000". Mr Hawkins was resentenced to a total head sentence of 6 years, with a non-parole period of 3 years 6 months.

Sexual assault – relevance of prior relationship

***R v Cortese* [2013] NSWCCA 148** concerned an application by a sentencing judge of the decision in *NM v R* [2012] NSWCCA 215. Mr Cortese committed two serious sexual assaults on his girlfriend, in circumstances where she was trying to end the relationship; her lack of consent was made abundantly clear; and she was forcibly detained overnight. The judge, imposing a suspended sentence and a s 9 bond, considered *NM v R* and concluded that the "prior sexual relationship [between the respondent and the victim] is an important mitigating factor". The Crown initiated an appeal. Beech-Jones J, imposing full-time imprisonment, held that the finding in *NM v R* was predicated on the particular

circumstances of that case, and that the existence of a prior sexual relationship would usually only be relevant where it suggested some prevarication or initial consent.

Home invasions by current or estranged partners

Mr Eckermann pleaded guilty to a charge of aggravated breaking and entering and assault. The offence was committed against his ex-partner in the early hours of the morning. It was violent and terrifying. The sentencing judge found that "this would have been less frightening than a home invasion by some stranger where the occupants, including Ms Haines, would have no idea initially why the stranger was there or what he or she was about." Mr Eckermann received a suspended sentence. The Crown appealed, arguing, inter alia, that this finding was erroneous: ***R v Eckermann*** **[2013] NSWCCA 188**. It submitted that the comments were not reconcilable with the vulnerability of women to violent attack by current or estranged partners. Price J agreed. An offence does not become less serious because of a prior relationship, and the finding made by the trial judge was not open in the face of the terrifying circumstances of the home invasion.

Firearms offences not a category of offence for which prior good character is of less weight

Mr Athos plead guilty firearms offences relating to a cache of guns, gun parts and ammunition he was transporting for his associates. It was his first criminal offence. The sentencing judge remarked that because the possession of illegal firearms by a person of prior good character was less likely to come to the attention of police, he would give the mitigating feature of good character less weight than he would otherwise. Mr Athos appealed his sentence: ***Athos v R*** **[2013] NSWCCA 205**. On the appeal, Price J held that firearms offences were not regarded as within the category of offences where less weight is afforded to prior good character (e.g. white-collar crime, child sex offences, drug couriering). It was erroneous, in the absence of evidence about how such crimes are typically committed, to extend the same reasoning as applies to drug couriers to firearms offences of this kind. His Honour also found that the facts of the individual case did not support a finding that the "good character" of the offender facilitated the crime. It would have been permissible to find that good character was not, in general, a factor of great weight, but it was an error to base that finding in the category of offence.

Sentencing for firearms crimes where multiple offences arise from possession of single firearm

Bejanov v R **[2013] NSWCCA 207** concerned a Mr Bejanov, who was sentenced for a number of firearms offences. Two offences related to a .22 calibre rifle with a box magazine and telescopic sight that was found at his house. The first offence arose from that weapon being unregistered and prohibited (s 36 *Firearms Act 1996*); the second from it being unauthorised and prohibited (s 7 *Firearms Act 1996*). On the sentence appeal, Button J held that the sentencing judge had erred in not affording a substantial degree of concurrency.

Proper approach to sentencing for historical child sex offences

***MPB v R* [2013] NSWCCA 213** was an appeal in respect of sentences imposed for a number of child sex offences committed by the appellant in the 1970s and late 1990s. Garling J (Basten JA agreeing with additional reasons, R A Hulme J agreeing) discussed the approach to be taken when sentencing for historical child sexual offences. He noted the difficulties in objectively ascertaining historical sentencing patterns, and the caution with which statistical tables should be approached. This is a pronounced difficulty when sentencing for child sex offences that historically encompassed a wider range of criminal conduct than their present analogues. Garling J warned that judicial recollection, which cannot be tested, should be applied with even greater care. His Honour stated, at [87], that the most reliable benchmarks were the maximum penalty and range of proscribed conduct:

> The guide which is entirely objective and is easily ascertainable, and therefore which is likely to be of most use to a sentencing court, when attempting to impose sentences which accord with an earlier practice or pattern, is the maximum penalty fixed by the law for the offence charged, together with the range of criminality encompassed by the offence charged. By having regard to these features, a sentencing judge will be able to readily assess where the particular offence charged falls along the spectrum of conduct encapsulated in the offence, and accordingly how the particular offence ought be viewed against the maximum penalty fixed by the legislation.

The relevance of quantity in sentencing for drug supply

The appellant in ***Pham v R* [2013] NSWCCA 217** was convicted of supply offences relating to 30 kilograms of cocaine. In finding that the offence fell in the middle of the range of objective seriousness, the sentencing judge remarked that "no other finding is really open given the amount involved was thirty times the large commercial quantity for the offence". The appellant argued that this reasoning gave erroneous weight to the quantity.

McCallum J agreed that quantity was not the primary determinant of seriousness. Her Honour pointed to the ruling of the High Court in *Wong v R* [2001] HCA 64; (2001) CLR 584, and in particular to the observation of Gleeson CJ at [31] that, in certain cases, an offender's own state of mind about the amount of drug is far more important than the bare fact of quantity. The appellant's role was that of a middleman and he did not expect to benefit directly from the proceeds of sale of the drug. He did not appear to have an awareness of the exact amount he would be entrusted with. But the amount was not irrelevant. And the sentencing judge took into account the appellant's apparent contemplation, as disclosed by the evidence, that whatever amount he would be receiving would not be insubstantial. Read in context, the sentencing remarks revealed no error.

Drugs manufactured to satisfy own addiction

Mr Dang was addicted to methamphetamine. He manufactured a quantity for his own use, and for his partner and friends. He was charged and sentenced for two offences of drug manufacture (and other offences). In ***Dang v R* [2013] NSWCCA 246**, he appealed his sentence, arguing under the umbrella of manifest excess that the sentencing judge had insufficient regard to the motive for the manufacture offences. Basten JA (Adams J agreeing, Latham J disagreeing) agreed. First, the manufacture of drugs for personal

satisfaction is a less serious offence than the same manufacture conducted for profit (at [27]). And second, the circumstance of addiction is relevant to moral culpability (at [30]). Mr Deng was accordingly resentenced.

Sentencing for insider trading offences in the nature of "tipping"

The applicant in ***Khoo v R*** **[2013] NSWCCA 323** pleaded guilty to four charges of insider trading and received an effective sentence of imprisonment for 1 year and 11 months. An appeal against the severity of the sentence failed. The offences were referred to as "tipping" (in effect, divulging inside information to a party who would be likely to acquire relevant financial products in the company in question). Leeming JA referred to *R v Glynatsis* [2013] NSWCCA 131 in which McCallum J said (at [79]) that the fact that people of otherwise good character and personal circumstances "are tempted to engage in [insider trading] emphasises the need for the clear deterrent that insider traders should expect to go to gaol". This was not obiter nor distinguishable from the "tipping" offences at hand. The primary contravention is the misuse of "inside information". "Tipping" may in fact be more serious than actual insider trading, given the potential for widespread disemmination of the information. Furthemore, the fact that the activities do not lead to variations in the price of securities does not detract from their seriousness. The injury derives from loss of public confidence in public securities. Bellew J set out the factors relevant to an assessment of objective seriousness of "tipping" offences, including the type of information disclosed; the extent of the disclosure; whether the offender knew that the information would be used for trading; the nature and extent of any breach of trust; the level of sophisticatoin or subterfuge; whether it involved a course of conduct; and the extent of any profit made.

Sexual assault - form of intercourse is relevant to, but not determinative of, seriousness

The applicant in ***Simpson v R*** **[2014] NSWCCA 23** had been in an on/off domestic relationship with the victim. The offences involved him accusing her of sleeping with another man, physically assaulting her, threatening to kill and harm her, and forcing his fingers into her vagina and wiping his fingers on her face, claiming that he could smell the other man's semen. The abuse lasted into the morning. Hoeben CJ at CL rejected the proposition that since the form of intercourse was digital and not penile, as well as short in duration, the judge had overestimated the seriousness of the offences. The Court found that the objective seriousness of sexual offences "is not confined to the nature of the act committed by the offender". The form of intercourse is important, but not the sole consideration. "Also important in assessing the objective seriousness are the degree of violence, the physical hurt inflicted, the form of the forced intercourse, any circumstances of humiliation and the duration of the offence" (at [30]). The surrounding circumstances of the case made the duration of the acts of intercourse largely irrelevant. Furthermore, the offender sought to degrade and humiliate the victim, and, looked at in context, the offences involved substantial violence.

SUMMING UP

Unhelpful "gloss" in directions to jury

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

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

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

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

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

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

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

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

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

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

Adverse Browne v Dunn *direction to be given with caution*

Mr Giourtalis was charged with fifty-seven tax offences. He gave evidence in his trial. Parts of his version of events, as it came out in cross-examination, had not been put to witnesses that preceded him. The trial judge gave a direction to the effect that the jury could assume that Mr Giourtalis had not told his representation of these matters, and that they could consider that a relevant factor in assessing his credibility. Mr Giourtalis appealed, arguing, inter alia, that the direction should not have been given and the witnesses should have been recalled: ***Giourtalis v R* [2013] NSWCCA 216**. Bathurst CJ agreed that the direction was incorrect. True it was that *Browne v Dunn* applies in criminal trials. But it should be applied with circumspection. It was not correct to invite the inference in the context of this trial. There were many reasons why Mr Giourtalis might not have informed counsel of discrete matters, not least the sheer volume of charges in which he had to give instructions on. However, the appeal was dismissed on the proviso.

Note: Counsel at trial agreed to the judge giving a *Browne v Dunn* direction in general, and did not object to the form it ultimately took. While the obvious issue was miscarriage of justice, and the dismissal of the appeal on the proviso showed consideration of that question, r 4 of the *Criminal Appeal Rules* seems to have been overlooked.

The giving of a Liberato *direction where relevant evidence is led to defend provocation case*

The appellant in ***Iskander v R*** **[2013] NSWCCA 256** was charged with murder. He pleaded guilty to manslaughter, raising provocation. The Crown did not accept his plea. He was convicted of murder after a trial. On appeal he argued that the trial judge should have given a direction based on *Liberato v The Queen* (1985) 159 CLR 507. The conventional form of that direction reminds the jury that evidence given for the defence may cast sufficient doubt on the Crown case even if not positively accepted in its own right. In this case, the appellant argued that the direction should have been given in relation to evidence led for the defence about what the deceased said that sought to resist the Crown's attempt to negative provocation.

Macfarlan JA considered the appellant's argument that the jury might have been led to erroneously believe that if they rejected the defence evidence in this regard provocation failed, rather than having to consider whether the Crown had in fact negatived it. His Honour noted that the trial judge had told the jury that the defence evidence need only be "possibly true". And the only evidence of provocation was from this defence evidence. So if the jury considered that the evidence was not "possibly true", the defence of provocation was bound to fail. A *Liberato* direction was not called for in the circumstances.

The two elements of an attempt

Mr Inegbedion and an associate attempted to intercept a parcel of heroin being delivered to a residential address. Unbeknown to them, the courier was an undercover officer of the Australia Federal Police. Mr Inegbedion was arrested and charged with an offence of attempting to possess a marketable quantity of heroin. He was convicted at trial. On his appeal, ***Inegbedion v R*** **[2013] NSWCCA 291**, he argued that the directions on attempt were erroneous.

Rothman J restated the two elements of an attempt: there must be an intention to commit the crime alleged; and the accused must have performed some act towards the commission of the offence that was more than merely preparatory and could not be regarded as being for any other purpose than the commission of the crime. In Mr Inegbedion's trial, the judge on no occasion expressly referred to these separate elements in adequate terms, instead using "intention" and "conduct". However, the trial judge directed the jury that intention was to be inferred from "conduct that was more than preparatory towards the commission of the offence". That is, while the directions were incorrect, they were favourable to the offender in restricting what could be considered in establishing intention. No miscarriage of justice was occassioned.

When manslaughter in the alternative should not be left to the jury

The notorious facts in ***Lane v R*** **[2013] NSWCCA 317** involved the disappearance of a newborn child while in the custody of her mother, Ms Lane. No body was ever found. After

a substantial police investigation, Ms Lane was charged with, and ultimately convicted of, murder. On the conviction appeal, it was argued, despite the lack of any suggestion to the effect at trial, that the judge had been in error in not leaving a manslaughter verdict open to the jury.

The Court (Bathurst CJ, Simpson and Adamson JJ) considered that the success of this ground hinged on whether there was sufficient evidence to support a verdict of manslaughter on either of the two bases put forward on appeal: by unlawful and dangerous act, or by criminal negligence. In relation to the first, the Court observed that since no body was found, there was no evidence of a cause of death. The jury could not perform a reasonable person test in relation to a purely hypothesised unlawful or dangerous act. A similar defect affected the proposed criminal negligence basis. Without an identified breach of duty, to leave the verdict open would invite the jury to engage in pure speculation. Manslaughter may only be left to the jury where it rests (on whatever basis) on an evidentiary foundation.

Trial judges are not obliged to leave alternative verdicts in all cases

The appellant in ***James v The Queen*** **[2014] HCA 6** was charged with intentionally causing serious injury, alternatively recklessly causing serious injury. While the jury was deliberating, the prosecutor raised for the first time whether the jury should be instructed on the availability of another alternative, intentionally causing injury. The trial judge reasoned that to do so would be to deprive the accused the possibility of acquittal. Counsel for the accused remained silent on this point, which was taken as agreement. The Victorian Court of Appeal dismissed an appeal brought by Mr James, who argued that the trial judge occasioned a miscarriage of justice. Priest JA in dissent held that statements in *Gilbert v The Queen* [2000] HCA 15 and *Gillard v The Queen* [2003] HCA 64 with respect to the failure to leave manslaughter on an indictment of murder applied by parity of reasoning. The High Court (Gageler J dissenting) agreed with the majority of the Court of Appeal. *Gilbert* and *Gillard* are concerned with the wrongful neglect to leave manslaughter to the jury where it is open to do so, which is informed by history and the gravity of conviction for murder. They do not state any wider principle regarding the obligation to leave alternative verdicts. Whether a miscarriage of justice was occasioned involves an assessment of what justice to the accused required in the circumstances of the case, taking into account the issues in the trial and the forensic choices of counsel. Forensic choices of counsel are not determinative, however, and the ultimate assessment rests with the trial judge, which was correct in this case.