LOCAL COURT OF NSW ANNUAL CONFERENCE 2014

Criminal Law Update

The Honourable Justice R A Hulme

2 July 2014

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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

Context evidence was really tendency evidence

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)).

Covertly recorded conversation between victim of sexual offences and perpetrator not excluded by Surveillance Devices Act 2007 (NSW)

DW was found guilty of 15 sexual assault offences against his natural daughter. Among other things, the offences related to DW touching the complainant's breasts and demanding to see her naked body. The complainant recorded a conversation with her father in which he said "I want you to show me these regularly over the next week or so without me asking you OK", while pointing at her breasts. DW argued at trial that the recording breached s 7(1)(b) of the *Surveillance Devices Act 2007* (NSW). The evidence was admitted and DW appealed his conviction on the same basis. Ward JA dismissed the appeal in ***DW v R* [2014] NSWCCA 28**. The recording was "reasonably necessary for the protection of the lawful interests" of the complainant (s 7(3)(b)(i)), meaning that the prohibition in s 7(1) did not apply. The appellant was 14 years old at the time the recording was made and could not be expected to have understood the legal avenues open to her. The assaults were ongoing and the recording was made prior to any police investigation. It was accepted that the complainant was afraid of the appellant, and this was acknowledged to be the reason for the complainant denying knowledge of the offences to DOCS. In these circumstances it was not practicable for the complainant to contact police in order to seek to arrange a warrant to record the conversations with her father. (*Sepulveda v R* [2006] NSWCCA 379 distinguished).

Tendency evidence wrongly admitted

Mr Sokolowskyj was found guilty by a jury of indecent assault upon a person under the age of 10. He and his girlfriend took an 8 year old girl, who was the daughter of a friend of the girlfriend, to a local shopping mall. When the girlfriend went to the ladies bathroom it was alleged he took the girl into the parents room and locked the door, and then removed her lower clothing and touched her vagina. He threatened her and told her not to tell anyone. Tendency evidence was allowed at trial, comprising three separate events that occurred 5-8 years before the alleged conduct. Previously he had: exposed himself to a 15 year old female who was walking her dog along a street; exposed himself masturbating within view of a number of people at a gym; masturbated in a parked car within sight on an adult female pedestrian. The Crown alleged that this demonstrated that "the accused had a tendency at the relevant time to have sexual urges and to act on them in public in circumstances where there was a reasonable likelihood of detection". Hoeben CJ at CL in ***Sokolowskyj v R* [2014] NSWCCA 55** quashed the conviction and ordered a new trial. The evidence did not have significant probative value due to its generality and also its dissimilarity to the alleged conduct. It focused on generalised sexual activity, involving neither an assault nor a child. Furthermore, the probative value did not substantially outweigh the danger of unfair prejudice. There were various impermissible ways the jury

could have used the evidence, for example, to show that the appellant was a sexual deviant. The trial judge did give a direction relating to unfair prejudice but did so without actually assessing the danger himself.

Temporal nature of tendency evidence

RH pleaded guilty to five counts of aggravated indecent assault involving his foster daughter, L, committed between December 2005 and November 2006, when she was 11 years' old. This was led as tendency evidence in relation to offences committed against two other foster daughters, J and K, alleged to have occurred in 1989-93 and 2003 respectively. The appellant argued that since the acts in question did not occur within a confined time period and were subsequent to those that had been charged, the probative value was significantly reduced and the evidence should not have been admitted. There may have been an explanation for the later acts that did not apply to the earlier ones, such as RH's depression that developed in 2002-3. The principle argument was that the jury was invited to find a tendency at an earlier time based on the same facts that the tendency was led to prove. Ward JA in ***RH v R*** **[2014] NSWCCA 71** held that the evidence was admissible as tendency evidence. If the jury was satisfied beyond reasonable doubt of the appellant's tendency in 2005-6, there was nothing wrong with the conclusion that he had the same tendency 2 or 3 years earlier. In relation to K, the jury was also entitled to take into account the conduct against J, provided they were satisfied of it beyond reasonable doubt. The same applied to the conduct alleged against K in respect of J.

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.

OFFENCES

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

In ***Gedeon v R*** **[2013] NSWCCA 257** 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.

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.

An unassembled crossbow is not a prohibited weapon

Mr Jacobs was found guilty of selling a prohibited weapon, a crossbow, on numerous occasions. What he actually sold were unassembled crossbows, packaged in boxes that contained all the parts required for construction. He appealed his conviction on the basis that the definition of "crossbow" in the *Weapons Prohibition Act 1998* did not encompass unassembled crossbows. Ward JA and RS Hulme AJ (Johnson J contra) in ***Jacobs v R*** **[2014] NSWCCA 65** allowed the appeal and quashed the conviction. The definition of crossbow in the Act is: "A crossbow (or any similar device) consisting of a bow fitted transversely on a stock that has a groove or barrel design to direct an arrow or bolt". The language focuses on whether there is actually a bow fitted (transversely) on a stock, not that there is a bow capable of being fitted transversely on a stock.

Reckless damage or destruction of property

The applicant CB, who was 14 at the time of the offence, was found guilty by a magistrate of recklessly destroying or damaging property belonging to another under s 195(1)(b) of the *Crimes Act*. He broke into an unoccupied house with a companion and whilst inside played with a lighter in an attempt to singe the edge of a couch. The couch caught alight

and the house ended up burning down. CB contended that to prove recklessness, the prosecution had to establish that he foresaw the possibility of the house being destroyed. This was rejected by the magistrate at first instance, Adamson J in the Supreme Court and finally by Barrett JA in ***CB v Director of Public Prosecutions (NSW)*** **[2014] NSWCA 134**. Recklessness is established by proof that the accused realised that the particular type of harm constituting the offence may possibly be inflicted, yet went ahead and acted. In this case the harm is either destruction or damage. Recklessness as to either will mean the offence is made out. It does not matter what the extent of the damage is, so long as damage is done. Furthermore, foresight of destruction or damage to specified property is not necessary. Rather, it is in relation to property more generally.

PRACTICE AND PROCEDURE

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.

Magistrates cannot determine matters in chambers in absence of parties

Mr Gatu was charged with an offence of driving a motor vehicle whilst his licence was cancelled. He appeared in court unrepresented and informed the magistrate that he did not believe his licence was cancelled due to a letter that he had received from the Roads and Maritime Services. The magistrate adjourned the proceedings for two weeks but later that day, after the respondent had provided the letter to the registry, determined the matter in chambers and purported to dismiss the charge. Button J in ***DPP (NSW) v Gatu*** **[2014] NSWSC 192** allowed an appeal against the determination. It is a fundamental principle that legal disputes joined between parties must be the subject of adjudication in the courtroom, not in chambers. The prosecution was denied the right to be heard and the magistrate failed to provide reasons for the decision. It was also wrong to determine the matter prior to the date set down for hearing and to fail to conduct a summary hearing in accordance with the *Criminal Procedure Act*.

Correcting sentencing errors pursuant to s 43 of the Crimes (Sentencing Procedure) Act 1999

The High Court of Australia in ***Achurch v The Queen*** **[2014] HCA 10** held that a strict construction of s 43 should be adopted; with emphasis on the words "contrary to law". A penalty is not "contrary to law" only because it is reached by a process of erroneous reasoning or factual error (at [36]). Correction of legal or factual errors is available by way of appeal, it being said (at [35]) that obvious matters could be dealt with by way of consent orders. But there is also available inherent powers or the slip rule or statutory extensions thereof (e.g. r 50C Criminal Appeal Rules).

Magistrate not entitled to determine matter as if accused not present where solicitor is

Ms McKellar was served with a Court Attendance Notice in respect of an offence of larceny. She was unable to attend on the day of the hearing. Her solicitor sought an adjournment, which was refused. The matter was stood down and upon resumption the solicitor informed the magistrate he had obtained instructions to conduct the matter in his client's absence. The magistrate held s 196 of the *Criminal Procedure Act* applied. The magistrate then made a finding of guilt based only upon the CAN. He refused to consider any written material lodged by the prosecutor or accused. Adamson J in ***McKellar v DPP*** **[2014] NSWSC 459** found that s 196 should not have been applied. Sections 3 and 36 of the *Criminal Procedure Act* meant that the solicitor's appearance before the magistrate meant that the appellant was before the court. Consequently, pursuant to s 202 of the Act, the magistrate was obliged to hear the evidence in the matter, whether by way of the prosecutor tendering the police brief or the prosecution witnesses giving their evidence orally. In addition, the magistrate's view that s 38 of the Act required the appellant's physical attendance at the hearing was incorrect. That section does not apply all criminal trial procedures applicable in the Supreme Court to the Local Court.

"Practical unfairness" not determinative where evidence before Crime Commission made available to prosecution

Jason Lee and Seong Won Lee were summoned to give evidence before the Crime Commission. At the time of Jason Lee's examination, the Commission gave a direction, in accordance with s 13(9) of the *New South Wales Crime Commission Act*, that the evidence was not to be published except as directed by the Commission. The same direction failed to be given at Seong Lee's examination but it was accepted that it should have been. Notwithstanding this, the evidence was made available to the DPP after the appellants had been charged, prior to their trial. The Court of Criminal Appeal found that no miscarriage of justice was occasioned because there had been no practical unfairness to the accused. A five-member bench of the High Court ***Lee & Lee v The Queen*** **[2014] HCA 20** overturned this decision. The companion rule to the principle that it is for the Crown to prove the guilt of an accused person is that an accused cannot be required to testify. The question of whether practical unfairness has occurred is not determinative given that the case

concerns "the very nature of a criminal trial and its requirements in our system of criminal justice" (at [43]).

Jurisdiction of District Court to deal with breach of bond imposed in Local Court

The applicant Mr Yates sought a writ of habeas corpus in the Supreme Court. He had been convicted of an offence in the Local Court and sentenced to a three year good behaviour bond under s 9 Crimes (Sentencing Procedure) Act. The bond was "confirmed" on appeal to the District Court. Community Corrections later alleged that Mr Yates breached the bond and the matter came before the District Court on a number of occasions. On the last of those, the judge stood the matter over and remanded Mr Yates in custody. Rothman J in ***Yates v The Commissioner of Corrective Services NSW*** **[2014] NSWSC 653** granted the application of habeas corpus. The bond continued to have been imposed by the Local Court, and s 98 of the Crimes (Appeal and Review) Act required that the Local Court, not the District Court, deal with an alleged breach of that bond.

SENTENCING – GENERAL ISSUES

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.

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 in approaching the sentencing task: ***Finnigan v R* [2013] NSWCCA 177**. The relevant remarks of the sentencing judge included:

> Ultimately I have come to a conclusion that I should impose on him a sentence that may be seen to be one of the toughest sentences ever imposed and that is a sentence of ten years imprisonment with a six-year non-parole period. …
>
> The individual sentences that I impose are as follows. Count 1, I have decided I should impose a maximum sentence for the offence committed against Mrs Matt of five years, but reduce it by ten per cent to four years and six months because of his plea of guilty. … 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.

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.

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 pleaded 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.)

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, arguing that the sentence 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 recognizance release order.

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).

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.

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]).

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 bearing upon 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.

Special circumstances must be "special"

Mr Tuuta was found guilty of an offence of causing grievous bodily harm with intent. The maximum penalty for the offence is imprisonment for 25 years, and the standard non-parole period is 7 years. The offender received a sentence of 6 years with a non-parole period of 3 years 7 months and 6 days. The Crown appealed. Among other things, Bellew J in ***R v Tuuta*** **[2014] NSWCCA 40** concluded that "special circumstances" should not have been found and so the ratio between the non-parole period and the balance of the term should not have been altered. The non-parole period constituted 60% of the total sentence. The basis of the finding was that the offender needed a longer period of supervision in order to address issues of anger management, and that he had positively adapted to prison discipline. However, there must be "significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful, and that this is not merely a possibility" for special circumstances to be made out: at [57] (citing *R v Carter* [2003] NSWCCA 243 at [20]). The evidence fell substantially short of satisfying that requirement.

Mental condition should be considered in sentencing notwithstanding guilty plea

Mr Elturk pleaded guilty to stealing a knife and wounding with intent to cause grievous bodily harm. The Crown applied to have his pleas set aside on the basis that a special verdict of not guilty by reason of mental illness would be more appropriate. That application was rejected. At sentence the sentencing judge did not take into account the appellant's mental condition when assessing the objective seriousness of the offence, because the appellant had not availed himself of the defence of mental illness. Beazley P in ***Elturk v R*** **[2014] NSWCCA 61** held that this was an erroneous determination. Beazley P quoted from the decision in *McLaren v R* [2012] NSWCCA 284 where McCallum J held that "the decision in *Muldrock* does not … derogate from the requirement on a sentencing judge to form an assessment as to the moral culpability of the offending in question … I do not understand the High Court to have suggested in *Muldrock* that a sentence judge cannot have regard to an offender's mental state when undertaking that task" (at [29]). Accordingly the sentencing judge erred in determining that the applicant had waived his right to have his mental illness considered as a causal factor in the commission of the crime: [35].

Whether providing a witness statement in relation to an unrelated matter amounts to assistance to authorities

On 20 November 2013 Mr Peiris was found guilty by a jury of two counts of indecent assault upon a child. On 10 April 2012 he made a witness statement to the effect that the victim's older brother had been sexually assaulted by the father of one of the victim's friends. The trial judge altered the ratio of parole to non-parole to 50% in recognition of

the statement and the appellant's preparedness to give evidence in those proceedings. His Honour did not award a discount in sentence, however, and the appellant appealed this decision. In ***Peiris v R*** **[2014] NSWCCA 58** Leeming JA held that there was no error disclosed in the approach adopted by the sentencing judge. It is doubtful that s 23(1) *Crimes (Sentencing Procedure) Act* should be read literally, as this could lead to a scenario whereby, for example, a discount is awarded to a victim of a home burglary for reporting the crime to police years before offending him or herself (see *RJT v R* [2012] NSWCCA 280). There was no evidence as to the value of the statement, as this largely depended upon the testimonial and forensic evidence otherwise available to the Crown.

Seriousness of Commonwealth money laundering offences

The respondent Ms Ly was found guilty by a jury of dealing with the proceeds of crime, believing it to be the proceeds of crime and exceeding a value of $100,000. The respondent committed a series of frauds on the Australian Taxation Office, accruing $357,568. She was sentenced to 3 years 6 months with a non-parole period of 2 years 4 months. The maximum penalty is 20 years imprisonment and/or 1200 penalty units. The Crown appealed the sentence. The Court in ***R v Ly*** **[2014] NSWCCA 78** allowed the appeal and increased the sentence to 8 years. A number of matters relevant to the assessment of money laundering offences were provided. The seriousness of the offences set out in the statutory scheme depends on the value of the proceeds and the state of mind of the offender. The number of transactions and the period over which they occur is also significant. For instance, a number of transactions of small amount will generally be more serious than a single transaction of a large amount. The use to which the money is put is also relevant, as well as knowledge of illegality of conduct.

Relevance of bail conditions to sentence ultimately imposed

Mr Bland was on bail pending sentence, one of the conditions of which was that he not leave home unless in the company of one of several nominated family members. He argued on appeal that this condition should have resulted in a lower sentence, given that it was a form of custody. Johnson J in ***Bland v R*** **[2014] NSWCCA 82** dismissed the appeal. There was no curfew condition, nor was he required to reside in a treatment facility. The sentencing judge was not required to take the condition into account in favour of sentence.

Denial of procedural fairness at a sentence hearing

Mr Tran was sentenced for, among other offences, supplying a commercial quantity of methylamphetamine. The sentencing judge held that the objective seriousness of this offence was "well above the middle of the range of seriousness for such offences". However, in the course of the sentencing hearing, the judge indicated that the offence was in the middle range of objective seriousness. Hall J in ***Tran v R*** **[2014] NSWCCA 85** held that Mr Tran had been denied procedural fairness. Senior Counsel for the applicant should have been given the opportunity to make submissions against the finding of above mid-range objective seriousness.

Alleged denial of procedural fairness where judge says "gun crimes are on the rise"

Mr Wootton was sentenced in the District Court for an offence of specially aggravated breaking and entering a dwelling and committing a serious indictable offence. In her remarks on sentence the judge said, among other things, that "gun crimes are on the increase". On appeal Mr Wootton argued there was no evidence for this and that he was denied procedural fairness. Campbell J in ***Wootton v R*** **[2014] NSWCCA 86** dismissed the appeal. The judge referred to the increase in gun crimes in the context of general deterrence and was not singling it out as a determinative factor in fixing the sentence. However, it was wrong to refer to "police expectations". Just as prosecutorial opinions are irrelevant as to the available range of sentences, so to are those of the police.

General deterrence must be reflected in non-parole period as well as head sentence

Mr Wasson was found guilty by a jury of armed robbery. The sentencing judge found that special circumstances applied and that "the need for general deterrence in respect of the matter … will be dealt with in the head sentence". The Crown appealed, arguing that general deterrence should have been reflected in the non-parole period as well as the head sentence. R A Hulme J in ***R v Wasson*** **[2014] NSWCCA 95** allowed the appeal. The decision was contrary to *R v Simpson* [2001] NSWCCA 534 where Spigelman CJ said that the non-parole period must reflect all of the circumstances of the offence and the offender, including the need for general deterrence.