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2015 Magistrates Court of Queensland Annual Conference

Criminal Law Update

Brisbane Magistrates Court

Thursday 12 March 2015

The Hon Tim Carmody

Chief Justice

Magistrates Court of Queensland Annual Conference *Counting Down the Top Hits of 2014*

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1. Crown not to make submissions on available sentencing range

Arguably the most contentious criminal decision of the past year is ***Barbaro v The Queen***,[1] decided by the High Court at the start of 2014. Although it is technically outside the one year mark of this presentation, its ramifications have been felt and canvassed in a number of other decisions handed down in the past year, and thus it is important to canvas it to provide context to those cases.

The issues addressed

Barbaro was an appeal against sentence where the sentencing judge refused to ask any party for a submission on the range of sentences available, and ultimately imposed a greater sentence than the one agreed between the parties. This went against a practice, peculiar to Victoria, of defendants entering guilty pleas in return for the Crown's recommendation for a discounted sentence. The practice was approved by the Victorian Court of Appeal in 2008 in ***R v MacNeil-Brown***,[2] in which the majority of the court considered that "the making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the

1 (2014) 88 ALJR 372; [2014] HCA 2.
2 [2008] VSCA 190; (2008) 20 VR 677.

court".[3] Such a submission could be expected either if the sentencing judge requested it be made or if the prosecutor considered that the court would fall into error were it not.[4]

The Victorian Court of Appeal held in ***Barbaro*** that the sentencing judge's refusal to accept submissions on sentencing range did not violate the principle in ***MacNeil-Brown***, nor did they consider that any questions of procedural fairness arose.[5] Barbaro and Zirilli appealed again to the High Court.

What a prosecutor may not do

The High Court went further than the decision below. It held that the Crown *may not make* a submission at plea as to the appropriate sentencing range. The majority considered that such submissions are statements of opinion, not submissions of law, and are thus irrelevant;[6] and,
further, that the practice may lead to a suggestion that the sentencing judge was influenced by the prosecution in exercising his or her discretion.[7] Likewise, it is not permissible for counsel in appealing or the appellate court in resentencing to indicate an appropriate range of sentences within which the particular sentence ought to have fallen.[8]

Bagaric criticises the former finding as being "flawed to the point of being unintelligible", arguing that "[a] statement regarding the appropriate sentencing range is a submission of law which relies on assumptions and conclusions regarding relevant facts."[9] He considers it of no import that a submission on range may make assumptions about what facts might be found by the sentencing judge because "the essence of the adversarial system is that parties advance their interpretation of the facts and law in a manner that they believe will best further their position."[10]

As to the latter proposition, Bagaric considered it to be "verging on the incredulous [as the] purpose of legal submissions is precisely to sway the court."[11]

What a prosecutor may do

What, then, is the task of the prosecutor in sentencing proceedings? The plurality indicated that it is "to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases."[12] Drawing a sentencing judge's attention to sentences in comparable cases is distinguishable from the setting of bounds on the exercise of the discretion.[13] They are yardsticks to assist in assessing what the appropriate sentence will

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3 [2008] VSCA 190; (2008) 20 VR 677 at 678 [2].
4 [2008] VSCA 190; (2008) 20 VR 677 at 678 [3].
5 [2008] VSCA 190; (2008) 20 VR 677 at 682 [15].
6 (2014) 88 ALJR 372; [2014] HCA 2 at [7].
7 (2014) 88 ALJR 372; [2014] HCA 2 at [33].
8 (2014) 88 ALJR 372; [2014] HCA 2 at [28].
9 Mirko Bagaric, "Editorial: The need for legislative action to negate the impact of Barbaro v The Queen" (2014) 38 Crim LJ 133 at 134.
10 Mirko Bagaric, "Editorial: The need for legislative action to negate the impact of Barbaro v The Queen" (2014) 38 Crim LJ 133 at 134.
11 Ibid.
12 Barbaro at [39].
13 Barbaro at [40].

be in any given case and "[w]hat is important is the unifying principles which those sentences reveal and reflect."[14]

Bagaric more recently argued that ***Barbaro*** would have the effect of reducing the fairness and effectiveness of the sentencing process.[15] His argument focussed on ***Matthews v The Queen***, recently handed down by the Victorian Court of Appeal.[16] The majority's decision avoids some of the restrictions arising from *Barbaro*:

1. The sentencing discretion will not be interfered with by a prosecutorial submission on range unless "it can be shown that the judge was in fact swayed by the prosecution submission";
2. The limitation does not apply to submissions on the disposition of the sentence (i.e. the prosecution may make submissions on whether, for example, probation would be more appropriate than imprisonment or vice versa);
3. The majority held that the prohibition on making submissions on sentencing ranges does not apply to defence submissions.

While no single decision in Queensland has squarely addressed the broad implications of ***Barbaro***, a review of the case law reveals that some similar propositions have been adopted, apparently as a matter of practicality, in this State. For example, Fraser JA (with Gotterson and Morrison JJA agreeing) in ***R v Ogden*** [2014] QCA 89 found that the *Barbaro* proscription was not violated in a case where a sentencing range was made by the prosecution because:

> ... the sentencing judge did not take those submissions into account in formulating the sentence. Instead, the sentencing judge took into account the comparable sentencing decisions which the prosecutor and defence counsel had helpfully provided to the sentencing judge and analysed in submissions. The prosecutor and defence counsel plainly did not contravene any practice now proscribed by *Barbaro* merely by supplying comparable sentencing decisions to the sentencing judge and making submissions about the similarities and differences between the circumstances and seriousness of those cases and those of the present matter.[17]

In ***R v Castle; Ex parte Attorney-General (Qld)*** [2014] QCA 276 Fraser JA at [20] considered that a Crown submission for a Serious Violent Offence (SVO) declaration is not prohibited by ***Barbaro*** (Muir JA and Mullins J agreed with his Honour).

In ***R v Engeln*** [2014] QCA 313 at [49] Henry J (with whose decision Fraser JA and Mullins J agreed) in obiter adopted the first of the three principles identified in ***Matthews*** in relation to an argument that a prosecutorial submission that "it would be outside the exercise of proper sentencing discretion if a sentence other than a period of immediate imprisonment were imposed" caused a failure by the sentencing judge to properly comply with s 17A of the *Crimes Act* in fixing sentence. (Section 17A relevantly requires, that in fixing a sentence a judge "is satisfied that no other sentence is appropriate" and that reasons are given.) His

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14 Barbaro at [41].

15 See Mirko Bagaric, 'Editorial: Bad law inevitably leading to confused jurisprudence – the inevitable, regrettable fallout from *Barbaro v The Queen*' (2015) 39 Crim LJ 3

16 [2014] VSCA 291.

17 [2014] QCA 89 at [7].

Honour noted that even if the submission was impermissible, it would not have led to a failure to properly comply with the section unless it could be shown the submission "influenced the judge's application of s 17A in fixing sentence."

I would make the following remark in relation to those two cases: in accepting that the Crown may make a submission for a SVO declaration, Fraser JA in ***Castle*** seemingly implies that submissions about the disposition of sentence are permissible, whereas Henry J in ***Engeln*** appears to assume that they are not.

On the other hand, and in line with the decision, the Queensland Court of Appeal has adopted a practice of disregarding references to sentencing range in pre-***Barbaro*** appeal cases: see e.g. ***R v AAR***.[18] In ***R v Goodwin; Ex parte Attorney-General (Qld)*** [2014] QCA 345 the prosecution contended that a wider "range" of sentences was within the discretion of the sentencing judge where there were no sentencing precedents for a particular offence. Fraser JA clarified at [5] that:

> Comparable sentences assist in understanding how those factors should be treated, but they are not determinative of the outcome and they do not set a "range" of permissible sentences. Whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a predetermined range of available sentences but by reference to all of the factors relevant to sentence. Because sentencing involves a case-by-case synthesis in which past sentences may be used only as guidelines and are not determinative, there can be no underlying range of available sentences for a particular case which may be narrowed or broadened over time by subsequent sentencing decisions.

Finally, a non-appellate determination by Judge Smith in ***R v Costin*** [2014] QDC 39 identifies that the prohibitions against submissions on range by prosecutors must also, as a matter of logic, apply to defence counsel. Bagaric makes the same point in a recent article. While the Victorian Court of Appeal took the opposite stance in ***Matthews***, this point is yet to be addressed at an appellate level in Queensland.

In spite of these practical determinations by intermediate appellate courts in both Queensland and Victoria, I am sure you have observed that prosecutors are now reluctant to offer clear submissions on sentence. Many will refer to precedents but avoid specifically identifying what point is to be taken from them. I hope that the decisions I have discussed just now – no matter whether they are undesirable as a matter of clarity of principle – may, as a matter of practicality, show prosecutors that they should not feel overly hamstrung. The greatest effect of the decision in ***Barbaro*** appears to be on the maligned Victorian practice of what was essentially plea bargaining. That practice clearly interferes with the discretion of the sentencing judge.

Bagaric suggests that legislative intervention is required to avoid the negative implications of ***Barbaro***. This has not yet eventuated, but in the meantime it seems that the impact of the proscription to sentencing proceedings in Queensland is not as significant as some may have thought.

[18] [2014] QCA 20 at [43]

2. Section 180(2) Penalties and Sentences Act will not be applicable where a section is repealed and replaced rather than amended

In ***R v Wruck*** [2014] QCA 39 the appellant pleaded guilty to two counts of indecent dealing dating back to 1982 and 1983. Other similar incidents not the subject of charges were raised for the purpose of showing that these were not isolated incidents.

The applicant cooperated with the investigation at all times once the complaint was made and investigation instigated, and pleaded guilty in a timely manner. The maximum penalty for indecent dealing at the time of the offending was seven years' imprisonment with hard labour. He was sentenced to 18 months imprisonment on both counts, suspended after four months with an operational period of 18 months.

Counsel submitted, and the primary judge accepted, "that in such matters as this, without an extraordinary circumstance, the sentence should include a period of actual custody",[19] in accordance with the line of cases beginning with ***R v Pham*** [1996] QCA 3. However, the authorities submitted to support this proposition post-dated the offending by some ten years and remains good law today.[20]

In fact, the law at the time did not require exceptional circumstances to be shown and "it could not be said that a gaol sentence should necessarily be regarded as the norm."[21]

After considering comparable cases determined prior to 1982, her Honour concluded that they clearly illustrated that, at the time of the offending, there was no practice that accorded with the approach taken in *Pham*.

Her Honour then moved on to consider whether current sentencing practices should be given retrospective effect. After reviewing relevant authorities from other States, her Honour concluded at [31] that the court should "regard the *Pham* approach as having no application in the applicant's case. The sentencing judge, having proceeded on the basis that it did, fell into error."

The applicable maximum penalty

Her Honour then considered the effect of s 180(2) of the *Penalties and Sentences Act*, which effectively states that where the maximum or minimum sentence applicable to a particular offence is reduced after the offence was committed, the sentence should be based on the reduced maximum or minimum. Section 210 was repealed and replaced in 1989 to include indecent treatment of boys and girls; aggravating factors; and a reduced maximum sentence of 5 years (for children over 12). Counsel for both parties submitted that s 180(2) did not apply because the offence was not only amended, it was an entirely new offence. As the

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19 [2014] QCA 039 per Holmes JA at [11].

20 see [2014] QCA 039 per Holmes JA at [8] – [10], [13] – [15].

21 see *R v Warren; ex parte Attorney General* [1979] Qd R 268.

applicant did not contest that the applicable maximum sentence was seven years, her Honour did not consider it necessary to delve further into the issue, simply remarking that a narrow reading of s 180(2) was consistent with interstate authority: at [33].

The appropriate sentence

At [36] her Honour considered the mitigating factors to the offending. Of significance were "his relative youth and sexual immaturity at the time of the offending [by virtue of his cloistered life from his late teens until his mid twenties], his blameless life thereafter over a period of decades, his evident remorse and co-operation in the prosecution."

However, the acts were a major breach of trust: he was "called on in a counselling role to provide the complainant with the male guidance he lacked because of his father's departure, the applicant abused his position utterly, in what were not isolated incidents" as well as "the serious and lasting harm done to the complainant who, in middle age, remained deeply affected by what had occurred."

In those circumstances, her Honour considered that the sentence of 18 months suspended after four months of actual custody was not manifestly excessive and refused the appeal.

3. Sentencing judge entitled to take into account offender's belief that they were acting lawfully

In ***R v Bonham; Ex parte Director of Public Prosecutions (Cth)*** [2014] QCA 140 the respondent had pleaded guilty to four counts of recklessly importing marketable quantities of border controlled drugs and one count of importing border controlled drugs. He was sentenced to 4 years imprisonment to be released on parole after serving six months.

The respondent was engaged in a lawful business in which he imported substances to assist him in making a lawful cannabis-like substance. When customers asked whether he could supply "party pills", he amateurishly researched the drug's legality, including by checking the *Drugs Misuse Act* 1986 (Qld) on Austlii, reached the belief that he could legally make and sell the pills, and so imported a precursor.

He later checked the *Drugs Misuse Act Regulations* and found that the drug had been added to the list of banned substances in a recent amendment. He then threw the drugs away.

The Commonwealth DPP appealed against the sentence on the basis that it was manifestly inadequate.

The court concluded that the sentence was appropriate. In reaching this conclusion, McMurdo P remarked that "[w]hilst ignorance of the law was no excuse as to liability, it lessened culpability in sentencing": at [18]. Further, her Honour noted that "[h]ow a

sentencing court deals with an allegation that the offender did not know he was acting unlawfully will turn on the circumstances of each case": at [29].

High Court dicta in ***Hili v The Queen; Jones v The Queen*** (2010) 242 CLR 520 affirms that a sentencing court has a discretion to set the non-parole period for a Commonwealth offence at less than one third. In the present case the personal circumstances of the offender, including his age, medical conditions and otherwise law-abiding life, meant that the sentencing discretion did not miscarry in sentencing him to a head sentence of four years with parole after six months: at [36]-[37].

4. Mitigating features including restitution of moneys plus interest did not mean sentencing discretion miscarried in setting 3 months of actual custody for sentence of solicitor who committed fraud

In ***R v Voll*** [2014] QCA 170 a practising solicitor pleaded guilty to the dishonest application to his own use of a sum of money amounting to more than $30,000.

He was sentenced to a term of two years and six months imprisonment suspended after three months with an operational period of 30 months.

He appealed on the basis that the sentence should have been wholly suspended.

The offence was committed in the course of his practice as a solicitor at a firm of which he was one of the two partners.

He misapplied money that should have been used to pay stamp duty for his own purposes. The total amount misapplied was $77,360.88. The offending occurred in 2006.

The offending was discovered in 2007 and he paid back the outstanding duty plus interest, which came to a total of $103,261.70. In 2009 he paid a fine of $77,445 to the Office of State Revenue, which was equivalent to the amount misappropriated.

He was not interviewed by the QLS about the offending until 2010. He made full admissions and surrendered his practising certificate. He has not practised since.

The Court considered that, notwithstanding the significant pecuniary losses the applicant suffered as a result of the offending which extended to loss of earnings from the time of the surrender of his practising certificate, the applicant failed to demonstrate that the sentence imposed was manifestly excessive. No particular error was shown in the exercise of the sentencing discretion, including when compared to the comparative sentences advanced. The application for leave to appeal against sentence was dismissed.

5. Incorrect statement of applicable penalty in comparable case by counsel does not necessarily mean that the sentencing discretion will miscarry

In ***R v Nikora*** [2014] QCA 192 the applicant was convicted of dangerous operation of a motor vehicle causing death of two persons while adversely affected by an intoxicating substance and speeding. He was sentenced to seven years' imprisonment with parole eligibility after two and a half years. A review of the authorities demonstrated that the sentence was not manifestly excessive.

A second ground of appeal was that the sentencing discretion miscarried because both counsel misstated, and the sentencing judge accepted, that the maximum penalty for the offence was 10 years in two of the cases cited when in fact it was 14 years. This argument was rejected by Morrison JA on two bases. First, it was not clear that the sentencing judge placed significant weight on the two authorities as they had distinguishing features, including, in the case of one, having occurred before the relevant provision was amended: see paras [72] and [73]. Secondly, Morrison JA stated that notwithstanding those considerations, it is well accepted that the exercise of sentencing is an "intuitive synthesis, drawing a number of factors together, only one of which is what has been said in previous decisions" and as such would be difficult to say how the sentencing discretion could miscarry: see para [74].

6. The need for general deterrence for serious assault outweighs considerations that would otherwise attach to youth and rehabilitation

R v Levy & Drobny; Ex parte Attorney-General (Qld) [2014] QCA 205 was an application to appeal against sentence by two offenders.

Levy was convicted on his own plea of guilty of one count of causing grievous bodily harm. He was sentenced to imprisonment for 30 months but it was ordered that he be released on parole immediately.

Drobny was convicted on his own plea of guilty of one count of assault occasioning bodily harm whilst in company and sentenced to perform unpaid community service of 150 hours to be performed within 12 months with no conviction recorded.

Their offending consisted of an assault on a taxi driver who, upon discovering that they were unable to pay for the taxi ride he was providing to them, said that he would drop them to a police station. The applicants had the driver stop the car. They exited the car, then Drobny tackled the complainant to the ground. Levy punched and kicked the complainant causing multiple facial fractures that required surgery and the permanent insertion of screws.

Both were 19 at the time of the assault; Drobny had good employment prospects and Levy was employed.

In the circumstances, Levy's sentence was manifestly inadequate but Drobny's was not. The more serious assault on a vulnerable member of society required a period of actual custody to reflect society's approbation regarding such assaults. Accordingly the application for leave was granted and an order made for Levy's parole release date to be set at four months. A bench warrant was issued for the apprehension of Levy, and the sentences were otherwise confirmed

7. Conviction will be overturned where it is an affront to the justice system

In ***R v Donahue*** [2014] QCA 198 the appellant pleaded guilty to 40 property offences. He was arraigned in bulk and asked all of the usual questions in relation to such an arraignment, but by some error one of the offences to which he pleaded was alleged to be committed when he was in fact in custody.

He appealed on a number of discrete grounds, none of the others of which warrant mention here. The appeal was allowed, but only insofar as it related to the count which he clearly did not commit. Donahue's conviction was overturned on that count. The Court remarked that a conviction will be overturned where it is an affront to the justice system. Conviction of an offence of which an accused is indisputably innocent is clearly one such circumstance.

8. Sentencing considerations for "serious assault" per s 340 Criminal Code (Qld)

In ***Queensland Police Service v Terare*** [2014] QCA 260 the respondent urinated on the complainant police officer while drunk. He was sentenced to three months imprisonment, wholly suspended with an operational period of 12 months. The QPS appealed against sentence.

While the court accepted that the legislature increased the maximum penalty under s 340 from 7 years to 14 years with the intention that heavier sentences would be imposed under it, that did not mean actual imprisonment was inevitable in every case (citing ***R v King*** (2008) 179 A Crim R 600 per Holmes JA at [16]).

Nor did the court "accept the applicant's contention that the sentence imposed for offences of this kind should be comparable to those imposed for the offence of grievous bodily harm. The extent of the injuries suffered by a complainant in offences of physical violence is relevant in determining the appropriate sentence.": at para [36] referring to s 9(2)(b), (d) and 9(3)(c), (d).

The main injury suffered was revulsion; case was not as serious as those where offenders claiming to suffer from contagious diseases threw bodily fluids such as blood or saliva at the complainant police officer; there was no reason for her to think she would contract a serious disease and no evidence of psychological injury or trauma resulting from the incident.

The court considered that this offending was at the lower end of the conduct captured by s 350. A sentence of 3 months imprisonment suspended immediately for an operational period of 12 months was not manifestly inadequate. The application was refused.

9. PTSD stemming from service in the Australian Army in Afghanistan does not of itself constitute a relevant sentencing consideration

In ***R v Rix*** [2014] QCA 278 the applicant received a head sentence of 11 years for six counts of rape (s 349 of the Criminal Code) and one count of breaking and entering a dwelling by night with intent to cause an indictable offence (against ss 419(1),(2) and (3)(a) of the Criminal Code).

The applicant had served in Afghanistan and it was undisputed that he suffered from post traumatic stress disorder (PTSD).

The applicant claimed that he could not remember committing the offence of rape against the complainant. The evidence was clear that the offence had occurred and he pleaded guilty at an early time. The sentencing judge considered that he was feigning memory loss, but nonetheless concluded that he was remorseful

In the 2009 case of ***Porter v McCollum*** 558 US 30 (2009) the Supreme Court of the United States of America considered that the fact that PTSD stems from military service is a relevant sentencing consideration. Porter was a veteran of the Korean War, both wounded and decorated as a result of that conflict.

The Court in ***Rix***, however, reached a different conclusion. Gotterson JA remarked at 55 that:

> "in instances in Queensland and comparable jurisdictions where an offender's PTSD, suffered as a result of active military service, has been recognised on sentencing, what has attracted recognition has not been the mere fact of the condition or its origin, but rather the relevance to the offender's culpability for the offending, the need for deterrence and the prospects of rehabilitation, that the condition itself or its symptoms or sequelae may have"

His Honour accepted that it is necessary in sentencing to account for the impact of the PTSD suffered by the applicant on his alcohol abuse and consequent drunkenness at the time of the incident.

The sentencing judge referred to the link between the undiagnosed PTSD and alcohol abuse, but failed to identify the drunkenness on the night of the offending as a consequence of the alcohol abuse. The court thus drew the inference that this was not taken into account.

The court resentenced him to a head sentence of 9 years, but also determined to make a serious violent offender declaration in view of the seriousness of the offences and their protracted nature over a period of one night.

10. Failure to identify rationale for parole period set is a ground for appeal in circumstances where significant mitigating features can be identified; where the submission below is uninformed but is adopted by the sentencing judge, the difficulty of arguing a sentence is manifestly excessive may be overcome

An accused pleaded guilty to two counts of obtaining a financial advantage by deception contrary to s 134.2 *Criminal Code Act* 1995 (Cth). The maximum penalty for each offence was 10 years' imprisonment or a fine not exceeding $66,000 or both.

The offending

The accused defrauded the Commonwealth by way of Centrelink fraud. She wrongly claimed the sole parent pension over a period of four years and 10 months to the value of $71,588.14. She also claimed Newstart Allowance to which she was not entitled and overpaid $54,900.14 for a somewhat shorter period. The total amount was $126,488.58.

Over the five year period in which she wrongly claimed the pension and allowance she earned $283,154.75 but only declared $160 of those earnings. To perpetrate the Newstart fraud she failed to declare she was already receiving the sole parent pension. Each payment was received under variations of her name as two separate customers.

The sentence below

She was sentenced to three years imprisonment to be released after serving nine months of the term, with a recognizance of $1,000 to be given prior to release and a requirement of good behaviour for three years.

Her counsel submitted that the same term of imprisonment and parole release date were appropriate, and did not quibble with the imposition of the recognizance.

She was also required to pay reparation to the Commonwealth of $126,488.58.

Mitigating circumstances:

It was submitted that the offending was the result of significant pressure from the applicant's ex-partner to provide him with money. This was not a fact in dispute and was corroborated by a letter tendered by her co-worker and to a lesser degree her son.

A psychiatrist considered that she did not have the skills to cope with the intimidation she suffered by virtue of a very tragic life, including pregnancies at a very young age, a rape, a ten year period of 'hell' with her partner at the time, and persistent mental health concerns and suicide attempts: see [34].

In ***R v Pham*** [2014] QCA 287 McMeekin J considered whether the sentence was manifestly inadequate. His Honour identified that although the sentencing judge identified the reasons for imposing the head sentence, he did not identify the rationale for the parole period. Although this would usually be acceptable, the submissions by the Crown demonstrated that the non parole period could vary widely from case to case, with some of the comparatives setting a period of less than 9 months in circumstances that were not necessarily any better.

McMeekin J then cited King CJ in *R v Trocko* (1988) 142 LSJS 412 at [4] where his Honour stated that threats that do not support a defence of duress may nonetheless be relevant to sentencing in (1) assessing moral culpability for the conduct and (2) rehabilitation.

The mitigating features in the applicant's case were more compelling than in the comparables: at [47].

In particular, the fear of reparation was distinguishable from two other fraud cases involving significant amounts of money, and for which a relatively short non-parole period was imposed. McMeekin J concluded that the sentence did not give sufficient recognition to the exceptional circumstances.

Gotterson and Morrison JJA agreed with his Honour McMeekin J. The court ordered that the period of actual imprisonment to be served before being released on parole be reduced from 9 months to six months, but the sentence was otherwise affirmed.

11. Effect of lack of comparative sentences on sentencing discretion

An accused pleaded guilty to 125 counts of recording in breach of privacy on various dates between December 2005 and February 2010; 13 counts of burglary by breaking in the night; six counts of sexual assault; three counts of burglary and stealing; one count of burglary; one count of making child exploitation material; two counts of indecent treatment of a child under 12; one count of observation in breach of privacy; one count of distributing child exploitation material (November 2011); and one count of possessing child exploitation material (September 2012).

The accused pleaded guilty on all counts and was, relevantly, sentenced to eight years' imprisonment, and lesser concurrent periods of imprisonment on all other counts. Parole eligibility would arise after serving one third of the head sentence.

The sentencing judge had a difficult task as there was a dearth of comparable sentences. On appeal in ***R v Goodwin; Ex parte Attorney-General (Qld)*** [2014] QCA 345, Fraser JA and Mullins J separately considered that this does not alter the task of either the sentencing court or the Court of Appeal in respectively setting and reviewing sentences. The sentencing discretion is wide irrespective of whether relevant comparative sentences exist.

After considering the comparable authorities, Mullins J concluded that the head sentence of eight years adequately recognised the plea of guilty to the 154 offences. However, her Honour considered that parole eligibility after serving one third of the sentence had the effect of mitigating the sentence to such an extent that it was "unreasonable and fail[ed] to reflect the overall criminality of the respondent's offending." The sentence was varied to the extent of removing the non-parole period of one third of the sentence and leaving the parole eligibility date as that determined by s 184 of the *Corrective Services Act* 2006 (Qld), namely after the respondent served one half of the head sentence.

12. Meaning of contravening a probation order under s 187 Animal Care and Protection Act 2001 (Qld)

On 12 December 2008 a prohibition order was made against two accused, Dart and Hajridin, pursuant to s 187 of the Act, the effect of which was that they were not permitted to acquire or take possession of any dogs or rats for trade or commerce.

They were both separately charged with contravening a prohibition order in December 2008 and Hajridin with contravening a probation order in April 2010.

The complainant/respondent, Mr Singer, conceded in cross examination at the Magistrates Court that he could not prove that the animals for which the charges were laid were not in the possession of the applicants on or before 12 December. Those convictions were quashed by the Court of Appeal in ***Dart v Singer; Hajridin v Singer*** [2014] QCA 263.

However, the Court did not accept that puppies bred from dogs in the appellants' possession were not possessed in a way contravening the Act and thus the 2010 contravention offence was not interfered with. "Possession" was defined in the schedule to the Act as including "control" and "custody". Even though the puppies were kept at the houses of other people (including Hajridin's mother), the evidence showed that Hajridin took responsibility for their care. It was reasonable for the Magistrate to conclude beyond reasonable doubt that Hadjridin possessed the puppies in the relevant sense.

Hajridin's appeal against sentence was dismissed as the 2010 offence was the most serious of the four convictions and showed serious issues of recidivism given that it occurred while she was on parole for stealing and fraud convictions.

13. Whether there is a failure to give way to traffic depends on the circumstances of the case

Johnson v Queensland Police Service [2014] QCA 195 was an appeal against conviction pursuant to s 118 of the *District Court of Queensland Act* 1967.

The appellant was convicted in the Magistrates' Court of an offence of failing to give way to a vehicle travelling in a lane or line of traffic pursuant to s 87(1) of the *Transport Operations (Road Use Management – Road Rules) Regulation* 2009 (Qld). A person will relevantly contravene the section if they fail to give way. "Give way" is defined in Sch 5 to the Regulation as meaning "(a) if the driver or pedestrian is stopped—remain stationary until it is safe to proceed; or (b) in any other case—slow down and, if necessary, stop to avoid a collision."

The magistrate summarised the evidence presented, which is not necessary to discuss here. It suffices to say that some of it was irrelevant or inadmissible. The appellant was convicted on the basis that they prima facie failed to give way by proceeding onto the highway at a speed of 80 kilometres per hour in circumstances where another vehicle would be obliged to brake to avoid collision.

The matter proceeded first on appeal to the District Court which was an appeal by way of rehearing. The District Court judge did not identify the errors in the first instance decision.

The matter then proceeded to the Court of Appeal. Muir JA identified that the question to be determined for the purposes of s 87(1) is whether it is safe for a vehicle to proceed. His Honour considered that finding a failure to give way in the circumstances described would cause great difficulty on roads, as in many situations a driver on a busy highway will be obliged to brake to avoid a collision with a merging vehicle. Similarly, rapid acceleration in order to reach the same speed as other vehicles in the traffic flow will not contravene s 87(1) as it is reasonable to do so to ensure safety of the vehicle travelling on the highway.

14. Admissibility of statement at police station where status as admission disputed

In a trial of entering a dwelling with intent to commit an indictable offence and wounding with intent to disfigure, the Crown tendered and primary judge admitted as an admission a statement made by the accused to police that “You should know me, I’m the granny slasher”. In ***R v Woods*** [2014] QCA 341 Fraser JA agreed with the primary judge that the question of admissibility was borderline but, contrary to the determination at trial, considered the context of the statement rendered it inadmissible as an admission of guilt because its meaning depended on the context in which it was made.

The accused was in a holding cell with other prisoners at the watch house and the police were attempting to ascertain the identities of the people in the holding cell. It was common ground that the accused had been identified in the media as “the granny slasher”, that being a description of one of the offences with which he was charged. The accused had also persistently denied the charges in the months leading up to the alleged admission. Fraser JA considered that because different views might be held about the meaning of the statement, the better view was that it was not capable of amounting to an admission. Because the jury might have attributed significant weight to it, the verdict was set aside and a retrial ordered.

15. Significant rehabilitative promise does not justify imposition of significantly lenient sentence for heroin trafficking

In ***R v Ryan; Ex parte Attorney-General (Qld)*** [2014] QCA 068 the accused pleaded guilty to heroin trafficking and was sentenced to five and a half years imprisonment in respect of

that count, two years imprisonment on the second count of possessing heroin and was convicted but not further punished for summary offences. The 99 days spent in presentence custody was declared as time served and the parole eligibility date was fixed after nine months.

The sentencing judge placed significant emphasis on the rehabilitative prospects of the respondent in allowing parole eligibility after serving nine months under a sentence for heroin trafficking.

The relevant sentencing considerations were identified at [23] by McMurdo P as:

- trafficking in heroin for a period of 5 weeks consisting of regular supply of relatively small quantities to known drug addicts;
- the accused was an addict and trafficked to support his addiction;
- he was a mature man with a serious criminal history;
- general and personal deterrence was highly relevant.

There were also significant mitigating factors (identified at [24] per McMurdo P):

- he pleaded guilty at an early time and cooperated with authorities;
- his dysfunctional background was a major cause of his imprisonment for lengthy periods since a young age, and helped to explain his criminal history;
- he had been rehabilitated in the past and only relapsed upon allowing a past acquaintance to live with his family;
- after his arrest for this offence he undertook a rehabilitative program and returned to his family.

Notwithstanding the need to impose a sentence that would account for rehabilitation, the sentence was too lenient in the context of its particulars. The Court of Appeal thus substituted parole eligibility date at 14 months rather than nine: at [26].

16. Application to adduce evidence of drug addiction refused where sentencing reasons showed scepticism regarding submission that the applicant was drug-addicted

In ***R v Johnson*** [2014] QCA 79 the accused/appellant wished to lead new evidence before the Court of Appeal that he was drug addicted at the time of offending and at sentence. He contended that he had instructed his solicitor on this basis and the solicitor had not heeded those instructions. The solicitor was called to give evidence and contended otherwise, although he did not have his file with him (it was not requested by the appellant) and thus could not show direct evidence of this.

Appraisal of the sentencing remarks showed that the sentencing judge was sceptical of this submission in light of the references tendered in support of the applicant, which indicated fears that he had a significant drug habit which required assistance to overcome

On balance, the Court of Appeal considered that the evidence accorded with the testimony of the solicitor, namely that the appellant had given instructions that he was a recreational drug user.

The scepticism of the sentencing judge about this submission, together with the applicant's inability to lead any cases showing that a sentence of less than ten years for comparable offending was appropriate, meant it was unlikely that the applicant would have received a lesser sentence had the evidence been led.

The application to adduce new evidence was refused, as was the application for leave to appeal against sentence.

17. Circumstances where appellate court ought to exercise its residual discretion not to interfere in sentence

In ***CMB v Attorney-General for New South Wales*** [2015] HCA 9, handed down this year, the High Court considered whether the New South Wales Court of Criminal Appeal had erred in failing to exercise its residual discretion not to interfere in sentence. It is necessary to briefly outline the facts in order to explain the court's reasoning and outcome.

The appeal concerned an accused charged with sexual assault of his daughter. He was referred by the Director of Public Prosecutions for assessment for a pre-trial diversion program. In the course of his assessment for entry to the program, which encouraged him to disclose other offences as evidence of his intent to reform, he disclosed further offences that he had committed against his daughter in the same period of time as the first set of offences and which she could not remember. A repeal of a regulation meant that the newly disclosed offences could not be dealt with under the program. He was charged with and plead guilty to them.

The District Court sentencing judge imposed a non-custodial sentence. The Director of Public Prosecutions supported this, given the exceptional circumstances of the case and particularly because a custodial sentence would be against the spirit of the program. The DPP publicly announced that he had determined not to appeal against the sentences. However the Attorney-General subsequently appealed to the Court of Criminal Appeal on the basis that the sentence imposed was manifestly inadequate. The Court of Criminal Appeal allowed the appeal and re-sentenced the accused to five years and six months' imprisonment with a non-parole period of three years. In doing so it concluded that the sentencing judge erroneously took into account what would have occurred had the regulation not been repealed. It also held that his Honour failed to give sufficient weight to the objective seriousness of the offences and imposed a sentence that was manifestly inadequate.[22]

[22] See reasons of French CJ and Gageler J at [24].

These findings were not included in the special leave appeal to the High Court. Instead the appeal proceeded in relation to two points:

1. That the Court of Criminal Appeal erred in finding that the respondent to a Crown appeal against sentence bears the onus of establishing that the residual discretion to intervene should be exercised.

2. That the Court of Criminal Appeal made an error of law in its considering the leniency in sentence that can be afforded to an accused who voluntarily confessed and plead guilty to offences that would not otherwise have come to light.

The High Court unanimously allowed the appeal on the first ground, and by a majority allowed it on the second ground.

The First Ground

With regards to the first ground, French CJ and Gageler J writing jointly and Kiefel, Bell and Keane JJ[23] writing jointly affirmed Heydon JA's succinct statement of principle in ***R v Hernando*** **(2002)** 136 A Crim R 451 at 458 [12]: that:

> if [the Court of Criminal Appeal] is to accede to the Crown's desire that the respondent be sentenced more heavily, it must surmount two hurdles. The first is to locate an appellable error in the sentencing judge's discretionary decision. The second is to negate any reason why the residual discretion of the Court of Criminal Appeal not to interfere should be exercised.

The whole court agreed that Crown appeals are generally limited to matters of principle that will help guide sentencing courts in exercising their discretion.[24] This was not such an appeal; the peculiar circumstances of the confession meant that the case had no value as a precedent, either at the sentencing or appellate level.

In the present case, French CJ and Gageler J considered that the peculiar circumstances of the case as identified by the sentencing judge meant that the case was of no value as a precedent.[25] Thus, their Honours concluded, the case, although involving a manifest inadequacy of sentence, was not one in which it could be said that "to decline to intervene would have been to perpetuate a manifest injustice" (citing ***Munda v Western Australia*** (2013) 249 CLR 600 at 625 [76]).[26]

Their Honours and the joint judgment of Kiefel, Bell and Keane JJ also noted that the accession of the prosecutor in the sentencing court was significant; the duty of a prosecutor to help a court avoid appealable error would be hollow if it did not remain a rare occurrence for appellate courts to increase a sentence where the Crown had not requested the appropriate sentence below.[27]

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23 See French CJ and Gageler J at [34]; Kiefel, Bell and Keane JJ at [56].
24 See Kiefel, Bell and Keane JJ at [55]; French CJ and Gageler J at [35] – [36].
25 See French CJ and Gageler at [37].
26 See reasons of French CJ and Gageler J at [37].
27 See French CJ and Gageler J at [38]; Kiefel Bell and Keane JJ at [64].

Because it was not possible to conclude that if the Court of Criminal Appeal had applied the correct test it would have arrived at the same decision, the appeal was allowed: per Kiefel, Bell and Keane JJ at [69].

The Second Ground

French CJ and Gageler J considered that the second ground was not made out. Their Honours considered that the rationale for leniency in sentencing, including in circumstances where the offences to which an accused confesses have not been discovered and may not be discovered (consistent with Street CJ's statements in ***R v Ellis*** (1986) 6 NSWLR 603 at 604), was appropriately canvassed on appeal.[28]

Their Honours also considered that it was appropriate for the Court to qualify this rationale for leniency by saying that it "must not lead to a sentence that is unreasonably disproportionate to the nature and circumstances of the offences".[29]

Kiefel, Bell and Keane JJ in the majority, however, found differently in relation to the second ground. The appeal related to the Court of Criminal Appeal's finding on s 23(3) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) which provides that a lesser penalty imposed under the section must not be "unreasonably disproportionate to the nature and circumstances of the offence".

Their Honours noted that the term "unreasonably" in such a context has been given a wide operation, and that reasonable minds may differ on the question of whether a sentence is unreasonable. Their Honours concluded that:

> the issue for the Court of Criminal Appeal was not whether it regarded non-custodial sentences as unreasonably disproportionate to the nature and circumstances of the offences but whether, in the exercise of the discretion that the law reposed in Ellis DCJ, it was open to his Honour upon his unchallenged findings to determine that they were not. (citations om.)

Queensland

Having discussed the High Court's reasoning on the exercise of the residual discretion it is worth noting the case of ***R v Hopper; Ex parte Attorney-General (Qld)*** [2014] QCA 108, where the Queensland Court of Appeal exercised its residual discretion not to intervene in the sentence. Some of you no doubt recall Ms Hopper from news bulletins last year – she was convicted of one count of dangerous driving causing death and one count of dangerous driving causing grievous bodily harm in circumstances where she very briefly looked at her mobile phone to check the maps application because she was unfamiliar with the area she was travelling in.

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[28] French CJ and Gageler J at [40] – [41].
[29] French CJ and Gageler J at [42] – [43].

Six months later, and in spite of the remorse that she had expressed, she was apprehended by police checking a maps application in slow-moving traffic. She was convicted of that offence and fined $330.

She was sentenced for the dangerous driving offences two years after they were committed. The sentencing judge considered that her youthfulness, remorse, and circumstances of the offence (namely that she only failed to keep a lookout for less than a second; it was not a built up area and thus one would not expect to see pedestrians) meant that a sentence that did not include any actual time of imprisonment.

The Court of Appeal, after reviewing the facts, considered that the sentence was manifestly inadequate but determined to exercise the residual discretion not to intervene in the sentence.

Fraser JA, Boddice J agreeing, considered that notwithstanding that the sentence was manifestly inadequate, her progress in the five or so months since she was sentenced together with the major psychological problems she suffered from as a result of the incident and the considered opinion of the psychologist that her rehabilitation would be better achieved in the community than in jail justified an exercise of the court's residual jurisdiction to decline to intervene in the sentence.

cf. Morrison JA, who agreed there was a residual jurisdiction to decline to intervene in a sentence and return an offender to jail where it would interrupt rehabilitation of an offender. However his Honour considered that this case was distinguishable on its facts from the sentences in the authorities cited, three of which involved an offender who had actually served a period of imprisonment and been released, and one of which was served under an intensive correction order: see in particular [76] – [77]. She had never served any time in jail at all.

Morrison JA considered that the authorities did not stand for the proposition that an appellate court should never intervene. His Honour thus considered that a period of actual custody was appropriate, notwithstanding "the youthfulness of the offender, good history and having been at large in the community": at [81].

<u>High Court cases...</u>

In *Lee v The Queen* (2014) 88 ALJR 656; [2014] HCA 20.

- transcripts of evidence obtained pursuant to the *New South Wales Crime Commission Act* 1985 (NSW) were provided to the DPP and police to assist in determining what defences the accused might assert.
- they should not have been – runs contrary to the immunity of witnesses called at the Crime Commission, given that they are compelled to give evidence in Crime Commission proceedings. Although not productive of practical unfairness, it gave rise to a risk that there might not be a fair trial. The Court also affirmed the

importance of the privilege against self-incrimination and the non-compellability of an accused person.

In *Honeysett v The Queen* (2014) 88 ALJR 786; [2014] HCA 29

- The High Court discussed the operation of the opinion rule in s 79 of the *Evidence Act 1995* (NSW) and in particular the "specialised knowledge" requirement
- An anatomist gave evidence as a purported expert witness that the robbers' physical traits were similar to those of the accused. He reached this by comparing CCTV footage of the incident with footage of the accused in custody. He stated that he had a thorough knowledge of the human body's proportions and shapes.
- The High Court said that these matters that the anatomist gave evidence on were not in his area of specialisation, as comparisons based on head shape, height, shoulder width and so on were subjective and could have been made by the jury.

The court clarified that, for the purposes of s 79(1),

> "Specialised knowledge" is to be distinguished from matters of "common knowledge". Specialised knowledge is knowledge which is outside that of persons who have not by training, study or experience acquired an understanding of the subject matter. It may be of matters that are not of a scientific or technical kind and a person without any formal qualifications may acquire specialised knowledge by experience. However, the person's training, study or experience must result in the acquisition of *knowledge* [which could be appropriately characterised as]... *facts, truths or principles*...[30]

Additionally, it is sufficient to satisfy the requirement that the opinion must be wholly or substantially based on that knowledge "that the opinion is substantially based on specialised knowledge based on training, study or experience. It must be presented in a way that makes it possible for a court to determine that it is so based."[31]

Mirko Bagaric observed that this demonstrates that it is essential to demarcate the subject area where expert evidence is tendered – an observation that I would concur with.[32]

Some interesting cases from other States...

- ***Catley v The Queen*** [2014] NSWCCA: an accused was found guilty of manslaughter rather than murder on the basis of substantial impairment. The sentencing judge considered that the downgrading of the conduct from murder to manslaughter

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30 at [23].
31 at [24].
32 See Bagaric, "The High Court on crime in 2014: Outcomes and jurisprudence" (2015) 39 Crim LJ 7 at 15.

automatically and sufficiently took into account the reduction of his culpability and consequent lesser emphasis on general deterrence required. The accused appealed against this finding, among other grounds.

- The Court of Criminal Appeal considered that the impairment was sufficient to persuade the jury that the defence was made out, but not sufficient to persuade the sentencing judge that the appellant was an inappropriate vehicle for general deterrence. The appeal was dismissed on that and the other grounds.

- In ***Abraham v Western Australia*** [2014] WASCA 151, in contrast to the position in Queensland, it was held that s 9AA of the *Sentencing Act 1995* (WA) the strength of the prosecution's case is directly relevant to the benefits received by the State when a guilty plea is made and therefore relevant to the court's determination of an appropriate discount for a guilty plea.
    - Section 9AA specifically relates to the discounts to be applied to pleas of guilty. Subsection (2) requires that "If a person pleads guilty to a charge for an offence, the court may reduce the head sentence for the offence in order to recognise the benefits to the State, and to any victim or witness to the offence." Per subs (3) the earlier the plea occurs, the greater the discount will be.
    - Cf. ***R v Mahoney; R v Shenfield*** [2012] QCA 366 where the Court of Appeal held that the strength of the prosecution case is not "wholly irrelevant" to the utilitarian value of a guilty plea: at [56].

- ***Milsom v The Queen*** [2014] NSWCCA 142 was a serious instance where apprehended bias was demonstrated on the part of the sentencing judge. Three primary irregularities can be identified from the case:
    - (1) The judge initiated an out of court conversation with counsel in which he indicated a view on sentence, not having received all submissions, in an attempt to circumvent a Crown appeal. This is an obvious example of apprehended bias: he had evidently reached a conclusion on what was an appropriate outcome before having received all submissions from the parties. He also refused to accede to an application that he recuse himself without giving reasons.
    - (2) Cross-examination on irrelevant matters by the trial judge and use of the accused's answers in sentencing was unfair procedural practice.
    - (3) Having indicated his understanding that counsel were arguing for a sentence of more or less than about two years, the trial judge without notice to the parties determined to impose a sentence of six years. This constituted procedural unfairness as the accused was denied the opportunity to make submissions on the issue.