SUPREME COURT ANNUAL CONFERENCE

2010

CRIMINAL LAW UPDATE [1]

The purpose of this paper is to provide something of a digest of appellate decisions concerning criminal law issues and to note the more significant legislative activity affecting criminal law in the past 12 months. It is beyond the scope of the paper to enter into detailed analysis of particular judgments. Rather it is hoped that it will provide a convenient reference tool in identifying the more significant decisions and changes in criminal law in the past year.

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

APPEAL

Double jeopardy in Crown sentence appeals

Section 68A of the *Crimes (Appeal and Review) Act* 2001 took effect on 24 September 2009. It provides that "an appeal court" must not take "double jeopardy involved in the respondent being sentenced again" when either dismissing a prosecution appeal against sentence or when imposing a less severe sentence than the court would otherwise consider appropriate.

A five judge bench was convened to consider the effect of this provision in ***R v JW*** [2010] NSWCCA 49. It was held, per Spigelman CJ:

> [141] The following propositions emerge from the above analysis:
>
> (i) The words "double jeopardy" in s 68A refer to the circumstance that an offender is, subject to the identification of error on the part of the sentencing judge, liable to be sentenced twice.
>
> (ii) Section 68A removes from consideration on the part of the Court of Criminal Appeal the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject.
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> (iii) Section 68A prevents the appellate court exercising its discretion not to intervene on the basis of such distress and anxiety.
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> (iv) Section 68A also prevents the appellate court from reducing the sentence which it

[1] Presented at the Supreme Court Annual Conference on 21 August 2010 by Justice R A Hulme

otherwise believes to be appropriate on the basis of such distress and anxiety.

(v) Section 68A prevents the Court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case by taking either step referred to in (iii) or (iv), or otherwise.

It was further held (at [146]) that the Court retained a discretion as to whether to intervene, a submission by the Crown that once error has been identified the Court was obliged to embark on a re-sentencing exercise being rejected.

Specification of grounds of appeal in Crown sentence appeals

Spigelman CJ also noted in ***R v JW*** [2010] NSWCCA 49 that there was nothing in the *Criminal Appeal Rules* that required grounds to be identified in a notice of appeal under s 5D of the *Criminal Appeal Act* 1912 but there were a number of reasons why "a rule of practice" to this effect was desirable. They included that it would serve to identify the grounds for the respondent and the court and that it would ensure clarity as to the issues that were before the court if the matter was to be later considered in another forum.

Crown appeals against directed verdicts of acquittal: s 107 of the Crimes (Appeal and Review) Act 2001

R v PL [2009] NSWCCA 256 raised two issues of significance in relation to the provisions of s 107 *Crimes (Appeal and Review) Act* 2001. One was the meaning of "on any ground that involves a question of law alone" in s 107(2) and the other was the extent of the discretion to order a new trial in the event such an appeal is upheld.

PL was tried for murder. The Crown relied upon circumstantial evidence that was incapable of identifying the precise means by which the death was caused. At the conclusion of the Crown case the trial judge directed the jury to return verdicts of not guilty regarding both murder and manslaughter because he considered it was necessary for the Crown to identify a particular act of the accused which caused the injuries that led to death. The Crown appealed.

Section 107, relevantly, provides for a prosecution appeal against the acquittal of a person by a jury at the direction of the trial judge *on any ground that involves a question of law alone*. The Court of Criminal Appeal may affirm or quash the acquittal. If it is quashed, the Court *may order a new trial in such manner as the Court thinks fit*.

Three grounds of appeal were relied upon but the first was not pressed. Ground two was whether the judge erred in finding that it was necessary for the Crown, in order to establish

that there was a case to answer, to identify a particular act on the part of the accused bringing about the injury which caused the death of the deceased. This was held (Spigelman CJ at [26]) to involve a mixed question of law and fact in that it involved the trial judge applying a legal principle to the facts.

Ground three was whether the judge erred in applying principles applicable to a direction of a verdict of acquittal, being that a circumstance cannot be rejected because it alone cannot lead to an inference of guilt and that the prosecution does not have to exclude a hypothesis consistent with innocence. It was held (Spigelman CJ at [27]) that this ground involved a question of law alone. It involved a legal proposition that is logically anterior to its application to the facts of the particular case.

Ultimately it was concluded that the trial judge had erred in directing the verdicts of acquittal. That then gave rise to a consideration of the extent of the Court's discretion to order a new trial pursuant to s 107(6). It was concluded that the Crown case on mens rea for murder was weak and that any conviction for murder that might result from a retrial would be unreasonable. The Court ordered that there be a new trial limited to a charge of manslaughter.

Unhelpful actions of senior counsel deprecated

Unhelpful actions of counsel in the conduct of an appeal were the subject of criticism in ***Rasic v R; Johnny Lee Vella v R; Damien Charles Vella v R*** [2009] NSWCCA 202. The three appellants were represented by the one senior counsel who prepared separate written submissions for each. Six grounds of appeal had been notified but counsel informed the court at the hearing of the appeal that only one ground was being pressed. That ground asserted that the verdicts were unreasonable and could not be supported having regard to the evidence at the trial. Johnson J (at [7] – [12]) deprecated the voluminous and repetitive nature of the submissions, the late notice of the abandonment of five of the grounds of appeal and the need for leave to appeal to be sought when the ground being pressed did not involve 'a question of law alone".

Suitors Fund Act certificate unavailable when an appeal withdrawn

It was held in ***Director of Public Prosecutions (DPP) v Moradian, Saliba and Sparos*** [2010] NSWCCA 27 that a certificate under the *Suitors Fund Act* 1951 is unavailable where an appeal is withdrawn. On the day of hearing, the prosecutor withdrew an appeal under s 5F(2) against the refusal of a magistrate to grant an application for witnesses in committal proceedings to give evidence by audio visual link, saying that the issue would be revisited in the Local Court on the basis of further evidence. The respondents sought a certificate under the *Suitors Fund Act*. The Court (Basten JA, Howie and Johnson JJ), however, noted that s 6(1)(a) only applied to an appeal to

the Supreme Court that "succeeds". This appeal was withdrawn and dismissed and so did not "succeed".

A ruling on the admissibility of evidence that involves a constitutional question is amenable to appeal pursuant to s 5F

It has long been held that there is no jurisdiction for the Court to consider an appeal pursuant to s 5F of the *Criminal Appeal Act* 1912 where the challenged ruling concerns the admissibility of evidence: see, for example, *R v Steffan* (1993) 30 NSWLR 633. In ***Cheikho v R*** [2008] NSWCCA 191 (only recently available for publication after a lengthy trial concluded) there was a challenge to the admissibility of evidence which also involved a constitutional question (the validity of s 18(2) of the *Telecommunications (Interception and Access) Act* 1979 (Cth)). It was held that the determination of the constitutional validity of this provision was an identifiable and separate part of the proceedings and so was a "judgment or order" within the terms of s 5F.

Leave to appeal was refused. It was held that s 18(2) was not constitutionally invalid. The fact that it provided for a document which was conclusive evidence of the facts referred to did not mean that any trial in which such a document was tendered by the prosecution was not a trial by jury within s 80 of the *Constitution*.

Non-publication orders amenable to s 5F appeal

Basten JA held in ***Nagi v DPP (NSW)*** [2009] NSWCCA 197 at [27] that s 5F of the *Criminal Appeal Act* 1912 should be given a construction which permits a challenge to an order involving non-publication of evidence, or of material revealing the identity of parties or witnesses, in the course of a criminal trial. The rationale was that where an order is made, it has consequences for third parties and can result in proceedings for contempt if breached. Where such an order is refused, there may be consequences for a third party, who may be a witness, or an informer, or, where non-publication is sought to preserve the fairness of a future trial, refusal may adversely affect an accused. In this case a sentencing judge set aside an earlier order prohibiting publication of information as to the appellant's HIV status. Leave to appeal was granted but the appeal dismissed.

Refusal of extension of time to appeal

In ***Edwards v R*** [2009] NSWCCA 199 there was an application for an extension of time to apply for leave to appeal against sentence when more than two years had elapsed since the applicant received a suspended sentence of imprisonment. She had breached the good behaviour bond by the commission of further offences and the order of suspension was revoked and the sentence activated. The Court refused the application for extension of time. Johnson J (at [9] – [18]) set out

a variety of matters that were relevant to consideration of such an application aside from the merits of the appeal itself.

BAIL

Presumption of bail in s 8A of the Bail Act 1978

In respect of the Commonwealth drug offences listed in s 8A(b1) of the *Bail Act* the relevant consideration is the pure weight of the drug rather than the gross weight: per Latham J in ***R v Hay*** [2010] NSWSC 14.

DEFENCES

Duress and the relevance of failure of accused to report threat to police

In ***Taiapa v R*** [2009] HCA 53; (2009) 261 ALR 488 the appellant was charged with drug offences in Queensland. He sought to rely upon the defence of compulsion within the meaning of s 31(1)(d) of the *Criminal Code* (Qld). The trial judge withdrew the issue from the jury and conviction ensued. The Queensland Court of Appeal dismissed an appeal. Special leave to appeal was granted but an appeal to the High Court was dismissed.

Determinative of the appellant's claim of compulsion was his assertion that he did not report to police threats that he said had been made to him in order to compel his involvement in drug supply activity. He conceded that he had ample opportunity to go to the police but claimed that he did not do so because (a) he did not have sufficient information to enable the police to identify the two men who had threatened him; (b) he did not believe that police protection was 100 per cent safe; and (c) the two men were "not your everyday drug dealers" and were unlikely to fall into a booby trap.

Reference was made to *R v Brown* (1986) 43 SASR 33; 87 FLR 400 where King CJ held that the failure to report intimidators and seek the protection of the police was fatal to the appellant's claim in that case, although allowing for the possibility that there may be circumstances in which a failure to seek police protection would not deprive an accused of the defence. Reference was also made to *Morris v R* [2006] WASCA 142; (2006) 201 FLR 325 in which it had been observed that prima facie the appropriate means of rendering a threat made by another ineffective is to report the matter to, and obtain the protection of, law enforcement authorities. The judgment in that case drew upon what was said by Gleeson CJ in *Rogers*

(1996) 86 A Crim R 542 in considering a claim of necessity by a prison escapee who had declined to avoid threats by another inmate by going into protection.

The unanimous judgment in the High Court was in agreement with the Court of Appeal that there were no reasonable grounds for Taiapa's belief within s 31(1)(d)(ii) that he was "unable otherwise to escape the carrying out of the threat". In effect, there was no merit in any of the three reasons he had advanced for not going to police. It was concluded that no reasonable jury could fail to be satisfied beyond reasonable doubt that there were no reasonable grounds for the appellant's belief.

EVIDENCE

Admissibility of admissions made during siege negotiations:

In ***R v Naa*** [2009] NSWSC 851, Howie J ruled in a murder trial that evidence of unrecorded conversations between the accused and police officers negotiating with him in the course of a siege were admissible. Police had been called to an incident. They had been told that a male had smashed a door and were later told that a woman had been stabbed. Upon arrival they saw the accused armed with two knives and he called upon police to shoot him, saying, *"I've already stabbed her"*. Negotiations between police and the accused ensued for almost 3 hours with some of the conversation recorded but most of it not.

Howie J rejected a contention that the conversations amounted to "official questioning" under s 281 of the *Criminal Procedure Act* 1986 and so there should have been an electronic recording made ([76] – [80]). He further held that even if s 281 did apply, there was a "reasonable excuse" for the police not making a recording ([81] – [89]). He rejected a contention that the accused should have been cautioned on the basis that the conversation did not amount to "questioning" for the purpose of s 139 of the *Evidence Act* 1995 ([97] – [101]). Even if the conversation did constitute questioning, the weight of considerations in s 138 of that Act (discretion to admit illegally or improperly obtained evidence) fell very substantially in favour of admitting the evidence ([102] – [106]).

Inadmissibility of evidence of the charge for which a co-offender witness has been dealt with

Santa v R [2009] NSWCCA 269 concerned a trial for robbery in company. The accused's cousin had been present at the incident and for his involvement had pleaded guilty to assault occasioning actual bodily harm and had been placed on a bond. He was called as a witness for the defence. The trial judge had earlier indicated that there could be evidence that he was an alleged co-offender and that he had been dealt with but that the jury should not be told what the charge against him

was or the outcome of his case. During the course of his cross-examination, however, he mentioned unresponsively that he had pleaded guilty and had been sentenced. Defence counsel sought in re-examination to explain that answer but the trial judge declined to permit her to do so. Hidden J held (at [38] – [46]) that the nature and outcome of the proceedings against the accused's cousin were not relevant and that the trial was not attended by any exceptional feature that made them relevant.

When evidence is "disclosed … in the case of the prosecution" for the purpose of s 293(6) of the Criminal Procedure Act 1986

Section 293 of the *Criminal Procedure Act* 1986 is concerned with the admissibility of evidence in prescribed sexual offence proceedings of prior sexual activity or experience of the complainant. Subsection (6) is concerned with whether it has been disclosed or implied in the case for the prosecution that the complainant has or may have had sexual experience, or a lack of sexual experience, or had taken part in, or not taken part in, sexual activity. Cross examination of the complainant may then be permitted in relation to the disclosure or implication if the accused might be otherwise be unfairly prejudiced.

Spratt v DPP [2010] NSWSC 355 was a case in which an accused sought relief in the Supreme Court in respect of the refusal of a magistrate to direct the attendance of the complainant for cross-examination in committal proceedings. In statements of the complainant served upon the accused it was said that she was a virgin before having been sexually assaulted. Such references were edited out of the material tendered by the DPP to the magistrate. Nevertheless, the accused contended that the complainant's virginity had been "disclosed" in the case for the prosecution. Hidden J held that the material in question did not become part of the prosecution case simply because it was served.

Cross-examination of a complainant about other sexual activity or experience

Defence counsel was found to have acted incompetently in making an application to cross-examine the complainant in a sexual assault trial about the continuation of her sexual relationship with the accused subsequent to the incident in question in ***Taylor v R*** [2009] NSWCCA 180. The relationship was said to have continued up until the trial held some 15 months later. Counsel recognised that evidence concerning the sexual component of the relationship was inadmissible unless it could be brought within one of the exceptions in s 293(4) of the *Criminal Procedure Act* 1986 but he failed to identify an appropriate exception. Campbell JA held that the evidence was within the exception in s 293(4)(b), being evidence relating to the relationship between the accused and the complainant at the time of the alleged offence ([29] – [43]; [65] – [74]). The miscarriage of justice that resulted from counsel's incompetence could have been avoided if the correct procedure for making the application to cross-examine had been followed. This was

described in *R v McGarvey* (1987) 10 NSWLR 632 as involving the provision to the trial judge of a written statement of the evidence proposed to be elicited ([44] – [48]).

Decision as to whether police acted improperly is discretionary

In ***Fleming v R*** [2009] NSWCCA 233, the accused was charged with a murder committed in 1984. Semen had been recovered from the deceased's body but it could not be identified with the science then available. The investigation was re-opened in 2004. Fleming had been a suspect and the police wanted to obtain a DNA sample from him. He lived in Victoria. A local officer attended his home on the pretext of discussing a minor complaint Fleming had made. He asked Fleming to draw a sketch. Fleming obliged but in the course of doing so some spittle fell onto the paper. The sketch was sent to NSW police and a DNA profile was obtained which matched that of the semen. Fleming was arrested and extradited. A buccal swab was taken and the resulting DNA profile confirmed the match with greater certainty. Fleming contended on appeal that the trial judge was wrong to have found there was no impropriety involved in the police conduct and so was wrong to have admitted the DNA evidence.

McClellan CJ at CL (at [10] – [22]) reviewed authorities concerned with the onus being upon an accused to establish that evidence had been improperly obtained and what constitutes an impropriety. It was held that the trial judge's decision was discretionary and that it was open to him to have found there was no impropriety.

Admissibility of tendency and coincidence evidence

A trial judge rejected the admissibility of tendency and coincidence evidence in ***R v Ceissman*** [2010] NSWCCA 50. The trial concerned an allegation that the accused was one of two men who committed offences arising out of five separate criminal enterprises. There was no dispute that the offences were committed, only as to whether the accused was a participant. The Crown called the other man to give evidence and relied upon it as tendency and coincidence evidence. The trial judge was concerned that the related events could be otherwise explained by the fact that they represented the co-offender's "modus operandi". An appeal by the Crown pursuant to s 5F(3A) of the *Criminal Appeal Act* 1912 was allowed. Latham J (at [13] – [18]) described the correct approach that should have been taken in assessing the question of admissibility of such evidence and demonstrated the erroneous approach taken by the trial judge.

Inadmissibility of an admission recorded on police in car video

It was held in ***Carlton v R*** [2010] NSWCCA 81 per Howie J at [14] – [19] that a recording of admissions that were made by a person who had been arrested and cautioned in respect of a drug offence was made in breach of s 108E of the *Law Enforcement (Powers and Responsibilities) Act*

2002. The point was not taken at trial. Section 108E(a) provides that "a conversation between a police officer and a person must not be recorded under this Part after the person has been arrested". Howie J described the provision as "very curious indeed", particularly given that a recording of the conversation made by a separate tape recorder would not only have been lawful but would have been required for the conversation to be admitted into evidence. In the result, the proviso was applied and the appeal dismissed.

Admissibility of uncharged indecent act occurring hours before alleged offences

The appellant in ***LJW v R*** [2010] NSWCCA 114 was charged with having committed acts of anal intercourse and fellatio upon a 12 year old boy one night in Muswellbrook. There was also evidence that during the car trip to Muswellbrook that day he had masturbated whilst driving and the complainant had seen this from the back seat. Hodgson JA held (at [45] – [53]) that the evidence as admissible as it could rationally support an inference that on the day of the trip to Muswellbrook the appellant was in a state of mind such that he had an interest in and lack of inhibition from engaging in sexual activity in the presence of the complainant and that there was a probability that this state of mind continued. The evidence was also admissibility as tendency evidence in relation to alleged offences occurring on other occasions.

INVESTIGATION

Conduct of interview with complainant in child sexual assault matter

Criticisms were made in ***GSH v R*** [2009] NSWCCA 214 of the manner in which a 9 year old complainant had been interviewed by a Department of Community Services officer and a police officer. There were three interviews which were later tendered as the child's evidence in chief. In total the recordings spanned 5 hours and contained what the appellant's counsel on the appeal described as "re-hashing, re cross-examining, inducing confusion, adding more dates and getting the person back to run through the story again". Latham J (at [36] – [42]) agreed with this description but, despite the forensic problem created by the manner in which the complainant's evidence was presented, the challenge to the verdict as being unreasonable was dismissed.

OFFENCES

The need to consider surrounding circumstances in determining whether an act of indecency has been proved and the meaning of "towards" in an offence of inciting a person under 16 to an act of indecency towards the accused

Director of Public Prosecutions (DPP) v Eades [2009] NSWSC 1352 concerned an appeal to the Supreme Court following dismissal of a charge in the Local Court. Eades and the 13 year old complainant had exchanged text messages in the course of which he incited her to send him a nude photograph of herself. She complied. When the magistrate considered whether the act of sending a nude photograph of herself constituted an act of indecency, he concluded that he should not have regard to the context in which the act of sending the photograph took place, including the motivation and desires of Eades, the respective ages of the two and the sexual inferences contained in the text messages. James J held (at [20] – [30]) that the decision was contrary to authority (*R v McIntosh*, unreported, Court of Criminal Appeal, 26 September 1994) that had not been drawn to the magistrate's attention.

In a notice of contention it was asserted that the magistrate should have found that the prosecution had not established that the act of indecency relied upon was "towards" the respondent. After referring to *R v Chonka* [2000] NSWCCA 466 and *R Barrass* [2005] NSWCCA 131, James J concluded that an act of indecency *towards* another person does not need to be committed in the physical presence of that person.

Attempt to achieve the impossible under the Criminal Code Act 1995 (Cth)

The accused in ***Onuorah v R*** [2009] NSWCCA 238; 234 FLR 377; 260 ALR 126, had leased a mail delivery box at a newsagency in a false name. He was in contact with a person in Venezuela. A parcel was lodged with DHL for delivery to his mail delivery box but not in his name. Authorities in Venezuela intercepted the parcel and found cocaine. They removed it and replaced it with an innocuous substance. Australian Federal Police were informed. When the parcel arrived in Australia Onuorah attempted to distance himself from personal collection. In the end he attended a location where he expected delivery to occur and was arrested and charged with attempting to possess a marketable quantity of a border-controlled drug that had been unlawfully imported.

On appeal it was contended before a five judge bench that the trial judge had erred in not directing an acquittal on the basis that there could be no conviction on the charge of attempt because no actual drug had been imported.

Hodgson JA held that an accused must intend each element of the relevant crime, and in pursuance of that intention, do acts that are not merely preparatory but are sufficiently proximate to the intended commission of the crime. Where an element of the relevant offence is that there be a border-controlled drug that has been imported into Australia, then for there to be an attempt there must be an intention that there be such a drug that has been imported; but it is not

necessary that this actually be the case. The effect of s 11.1(2), (3) and (4)(a) of the *Criminal Code* is no different from that of the general law. The decisions in *Britten v Alpogut* [1987] VR 929 and *R v Mai* (1992) 26 NSWLR 371 in this context were approved.

Murder/Manslaughter - no requirement that the Crown establish the precise act causing death

R v PL [2009] NSWCCA 256 has been noted earlier under the heading "Appeal". It involved a question as to whether it was necessary for the Crown to establish a precise act causing death in order to establish either murder or manslaughter. Spigelman CJ held (at [46] – [52]) that it was not.

Section 61HA of the Crimes Act does not apply to an offence against s 61P.

Section 61HA makes provisions for the proof of knowledge about consent in respect of certain sexual assault offences. Subsection (1) specifically provides that "this section applies for the purposes of the offences under sections 61I, 61J and 61JA". In ***WO v Director of Public Prosecutions (NSW)*** [2009] NSWCCA 275, the accused was charged with an offence under s 61P of attempting to commit an offence under s 61I (attempt to have sexual intercourse without consent). Basten JA held (at [73] – [80]) on a s 5F appeal that s 61HA does not apply to an offence charged under s 61P, notwithstanding that such offence is against one of the sections specifically nominated in s 61HA(1).

Using poison et cetera to endanger life or inflict grievous bodily harm - meaning of "cause to be taken"

In ***R v Wilhelm*** [2010] NSWSC 334, the accused was due to be further tried on a charge of manslaughter after the jury at his first trial failed to agree upon a verdict. The Crown, however, presented an indictment including an alternative charge under s 39 of the *Crimes Act* 1900 that he, "recklessly as to injuring Ms Dianne Brimble, did cause to be taken by Ms Brimble a noxious substance which is known as GHB and the thing caused to be taken inflicted upon Dianne Brimble grievous bodily harm". Wilhelm pleaded not guilty to manslaughter but guilty to this alternative. The Crown accepted this plea.

The evidence was to the effect that Ms Brimble observed Wilhelm preparing to take the drug known as "fantasy". She inquired what it was and he explained. She expressed interest in taking some herself. He provided some for her which she consumed. She subsequently died. Howie J raised a question as to whether the facts made out the offence. Wilhelm then applied to withdraw his plea and the application was granted.

Holding that the facts did not make out the offence, Howie J said that the use of the words "causes another person to take" is to cover a situation where a person in authority over another commands or directs that person to take the substance. In this case, Wilhelm may have offered Ms Brimble the drug and what he did and said may have influenced her to take it, but it was her act in taking the drug. Wilhelm did not cause her to take it.

No constitutional invalidity of an offence of supplying a large commercial quantity of pseudoephedrine

In ***R v El Helou*** [2010] NSWCCA 111, Allsop P rejected a contention that s 25(2) of the *Drugs Misuse and Trafficking Act* 1985 was constitutionally invalid. The appellant had contended that the provision was inconsistent with a law of the Commonwealth (s 306.2 of the *Criminal Code (Cth)* which creates an offence of pre-trafficking commercial quantities of controlled precursors) and also that prosecution of him for the offence against s 25(2) was incompatible with the District Court's capability to exercise the judicial power of the Commonwealth.

Conspiracy to commit an offence that has recklessness as its fault element under the Criminal Code (Cth)

It was contended in the High Court of Australia in ***Ansari v R; Ansari v*** R [2010] HCA 18; 266 ALR 466, on appeal from the NSW Court of Criminal Appeal, that an offence of conspiring to commit a money laundering offence, that being dealing with money and being reckless as to the risk that the money would be used as an instrument of crime, was bad in law. The basis of this contention was that there was an inconsistency inherent in proving that an accused conspirator *intends* that a circumstance will exist (intention being the fault element of conspiracy) and simultaneously intends that he or she would be *reckless* as to the existence of that circumstance. The contention was unanimously rejected with no such inconsistency being found by French CJ (at [26]) and, in a separate joint judgment, by Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ (at [55] – [63]).

In ***R v LK; R v RK*** [2010] HCA 17; 266 ALR 399 the issue was whether the offence of conspiracy is committed when there is an agreement to commit the offence of dealing with money that is the proceeds of crime where recklessness as to that fact is an element of the substantive offence. It was held that conspiracy under the *Criminal Code (Cth)* requires the prosecution to prove intention in relation to each physical element of the substantive office even if the fault element for that offence is a lesser one, such as recklessness: French CJ at [1] and [75] – [79], Gummow, Hayne, Crennan, Kiefel and Bell JJ at [141], and Heydon J agreeing with the plurality at [145].

PAROLE

No uncertainty in a condition of parole that parolee "must not associate with any member of any outlaw motorcycle gang"

In ***Moefili v State Parole Authority*** [2009] NSWSC 1146, Hall J rejected a contention that there was uncertainty in conditions of parole that an offender **"**must not associate with any member of any outlaw motorcycle gang" and "must not frequent or visit any club, house or place where members of outlaw motorcycle gangs gather". He noted (at [92]) that the expression "outlaw motorcycle gangs" was one in use in the community and (at [93]) that case law references to the term confirmed such current usage of the expression and, to some extent, what is meant by it.

Purported vacation of decision to grant parole:

Lim v State Parole Authority [2010] NSWSC 93 concerned a man convicted in 1992 of the murder of Dr Victor Chang. When his non-parole period was soon to expire the Parole Authority considered his case and determined that it would grant parole. Notice of this decision was given to the Department of Corrective Services. Then, having been notified by a representative of the Department of Corrective Services that the State would not be making any submission, the Parole Authority made final its decision to grant parole.

However, before Lim was released, the Executive Director of Statewide Administration of Sentences and Orders wrote to the Parole Authority requesting that the decision be vacated. The Parole Authority acceded to the request and stood the matter over for a review hearing. At that hearing it rejected a submission on behalf of Lim that it had no jurisdiction to "vacate" its earlier decision. It then determined that parole should be refused.

McClellan CJ at CL quashed the Parole Authority's decision to vacate its earlier decision, holding that the *Crimes (Administration of Sentences) Act* provided no power for the Parole Authority to unilaterally vacate a final decision to release an offender on parole.

PRACTICE AND PROCEDURE

"Why would the complainant lie"? and other prosecutorial excesses

Cusack v R [2009] NSWCCA 155 involved an appeal against conviction for a number of counts of child sexual assault. One of the grounds concerned a question as to whether a submission made in the prosecutor's closing address invited the jury to consider whether it had been shown that the complainant had a motive to lie, thereby having the effect of reversing the onus of proof. Beazley JA (at [100]) referred to the trial judge's summary of the prosecutor's submission thus:

> [The Crown] asked you, rhetorically, to consider the way in which [the complainant] had given her evidence about the Hungry Jacks incident and [the Crown] asked you to consider *why, if she was making up a story, she would add the quite unnecessary complications of this being an act of sexual intercourse without protection in circumstances which were physically uncomfortable and so on if it did not happen at all*. She is simply telling a story. She would have kept it simple in order to not confuse herself, rather than introducing these other complications including her belief that she was at risk of pregnancy necessitating her conversation with [the appellant's partner] and so on. Well that is the Crown argument.

Her Honour concluded (at [112]) that the jury were not being asked to accept the complainant's evidence unless the accused provided a positive answer to the rhetorical question posed. Rather, it was being suggested to the jury that in considering the 14 year old complainant's evidence they could consider that it would be unlikely that she would give evidence about being concerned about becoming pregnant unless it was the truth. The appeal was dismissed.

In ***MAJW v R*** [2009] NSWCCA 255, a prosecutor had submitted to the jury in a child sexual assault trial that they should scrutinise the evidence of both the complainant and the accused and consider whether "there is any reason why either of these people would want to tell lies". It was held, per Macfarlan JA at [28] – [44]), that this submission did not give rise to a miscarriage of justice, although his Honour commented that it would have been better if the submission had not been made.

In ***GDD v R; NJC v R*** [2010] NSWCCA 62, the majority (Grove and Simpson JJ) concluded that it would be unsafe for convictions to stand in the light of the prosecutor's closing address. She had expressed her personal opinions as to some aspects of the evidence. She had also invited the female members of the jury to use their own life experience in appreciating how much stronger men are than women (the case concerned an allegation that the complainant had been physically overborne and sexually assaulted by GDD). Grove J dealt with the latter aspect at [37] and Simpson J at [106] – [107]; [119] – [122]. In part, Simpson J said:

> [121] Counsel inviting juries to examine evidence from a particular point of view will need to exercise caution in expression. That is, in my opinion, a dangerously wrong approach. The question the jury has to decide is whether the participants behaved as they, or other witnesses, said they did. It is wrong to invite juries to determine contested factual issues on the basis of their assessment of how they would feel, how they would react, or what they would do. …

Failure to aver essential element of an offence in an indictment:

In ***Doja v R*** [2009] NSWCCA 303 the accused was charged with a number of offences including eight against s 178BB of the *Crimes Act* 1900. Two of these charges were expressed in such a way that there was no reference to the accused's knowledge or reckless disregard of the truth of the statements referred to. These omissions were an oversight that was not appreciated by the judge or counsel at the trial. On appeal it was argued that the verdicts in relation to those counts were invalid.

The appeal was dismissed. Spigelman CJ held that the averment of the mental element could be said to be necessarily implied and that the defect could be said to be formal for the purposes of sections 16 and 17 of the *Criminal Procedure Act* 1986. McClellan CJ at CL, with whom Grove J agreed, was of the view that the appellant was properly convicted whether by common law doctrine or the application of the proviso.

Publication of the name of a deceased child

Two accused were charged with the manslaughter of their infant child: ***R v Thomas Sam; R v Manju Sam (No 1)*** [2009] NSWSC 542. The trial judge, Johnson J, was called upon to consider the provisions of s 11 of the *Children (Criminal Proceedings) Act* 1987 which prohibits the publication or broadcasting of the names of children involved in criminal proceedings as victims, witnesses or defendants, siblings of such children, or children who are mentioned in the course of the proceedings. Various exceptions are specified.

Johnson J noted that the deceased child was obviously not in a position to be affected by any broadcast or publication. He held that the general public interest in open justice should prevail.

By way of contrast, in ***R v BW & SW (No. 2)*** [2009] NSWSC 595 and ***R v PC; R v NLH*** [2010] NSWSC 533 I had occasion to consider the same issue in cases of parents charged over the death of their child. However, in those cases it was contended, persuasively I thought, that there was potential for publication of the name of the deceased child to have an adverse impact upon his/her sibling(s). In *BW & SW* I permitted the deceased to be identified only by her middle name, Ebony. In *PC & NLH* I declined to permit the child to be identified at all.

Note that s 11 of the *Children (Criminal Proceedings) Act* 1987 was repealed and replaced by sections 15A to 15G by the *Children (Criminal Proceedings) Amendment (Naming of Children) Act* 2009 as of 11 December 2009 but in their practical effect the new provisions are not dramatically different.

Miscarriage caused by unexpected in court identification:

Aslett v R [2009] NSWCCA 188 concerned a trial for offences relating to a robbery and kidnapping. A security guard who had failed to identify the accused from photographs unexpectedly identified him in the dock. The trial judge refused an application to discharge the jury. An appeal against conviction was allowed. Kirby J held (see [44] – [58]) that the jury should have been discharged. The evidence was inadmissible as it had little probative value and was highly prejudicial. It converted a circumstantial evidence case to one in which there was direct evidence of the accused's involvement. The trial had only just begun. The security guard gave evidence on the first day so there was little inconvenience in recommencing.

Jurors play word games in court

In ***Li, Wing Cheong Li v R*** [2010] NSWCCA 40; 265 ALR 445, there was evidence on appeal that a juror at some unspecified occasion, or occasions, to some extent played the word game "Target" whilst in court. This came to light some months after the trial when an article appeared in a newspaper reporting that one or more jurors had played the game in court at stages during the trial. An inquiry was conducted by the Sheriff. Howie and Hall JJ, in a joint judgment held that the evidence did not establish that any one or more of the jurors were so distracted from due attention to the evidence that a miscarriage of justice occurred. It is notable that the trial was lengthy and the evidence, at times, tedious. It included a day of playing tapes of people speaking in a foreign language despite transcripts of an English translation being provided to the jury. Howie and Hall JJ noted (at [157]) that the game in question did not of its nature indicate that a juror playing it would necessarily be distracted from the evidence to an extent that a miscarriage resulted and that it was of no more concern than a juror who doodles or does some other activity that keeps the mind active and alert. It was also thought (at [159]) to be significant that no-one in the courtroom noticed any jurors being distracted.

When do "proceedings commence" for the purposes of the transitional provisions to the Criminal Procedure Amendment (Sexual and Other Offences) Act 2006

Although it will quickly become of historical significance, ***TJ v R*** [2009] NSWCCA 257 is concerned with a question about the *Criminal Procedure Amendment (Sexual and Other Offences) Act* 2006. A variety of amendments were made to the principal Act in relation to proceedings in respect of sexual and other offences. They variously applied to committal proceedings, trials and re-trials. One such amendment was to s 294 which made provisions for directions a judge must give a jury in prescribed sexual assault proceedings when there has been an absence of complaint or a delay in making complaint. The effect of the amendment was, in part, to limit the occasion for a judge to give a warning of the type that originated in *Longman v R* (1989) 168 CLR 79.

The question was whether the old or the amended provision in s 294 applied to the trial. A transitional provision inserted in Part 12 of the Schedule to the principal Act specified that the amendments did not apply to proceedings commenced before the amendments. TJ was arrested, charged and committed for trial before the amendments took effect but his trials commenced after.

McClellan CJ at CL held (at [12] – [23]) that as the provisions of the amending Act affect all "proceedings" from committal through to sentencing the only available approach to the meaning of "proceedings" in the transitional provisions is that it does not operate with respect to a trial which follows the arrest and charging of the offender before 1 January 2007, the date of commencement of the amendments.

Election to be tried without jury cannot be withdrawn after commencement of trial:

Grove J, as the trial judge, noted in ***R v Hevesi-Nagy*** [2009] NSWSC 755 that there appears to be an absence of a capacity for an accused to withdraw an election to be tried without a jury after the commencement of the trial.

Permanent stay of proceedings because of adverse publicity

In ***Dupas v R*** [2010] HCA 20; 267 ALR 1, the High Court of Australia dismissed an appeal against the refusal of a permanent stay of proceedings which had been sought in relation to the appellants retrial for murder. He had earlier been convicted of two other murders. It was held (in the unanimous joint judgment at [38]) that the unfair consequences of prejudice or prejudgment was capable of being relieved against by the trial judge by appropriate directions to the jury.

SENTENCE

Section 21A(2) *Crimes (Sentencing Procedure) Act* 1999

Previous convictions (s 21A(2)(d))

A record of previous convictions that comprises mostly driving offences and no previous imprisonment does not preclude a finding that the offender has demonstrated a continuing attitude of disobedience to the law as described in *Veen v R (No 2)*: ***Tsakonas v R*** [2009] NSWCCA 258 per R A Hulme J at [38] – [44]. In this case the offender was sentenced for dishonesty offences and dealing with the proceeds of crime. He had previous convictions that included four offences of driving whilst disqualified and one of driving whilst suspended. He had received suspended

sentences of imprisonment for two of the disqualified driving offences. There were other minor traffic and criminal convictions.

Offence committed in the home of the victim or any other person (s 21A(2)(eb))

There was no error in taking into account as an aggravating feature that an offence of break and entering and committing a serious indictable offence, namely intimidation, in circumstances of aggravation, namely that corporal violence was used, was committed in the home of the victim: ***Palijan v R*** [2010] NSWCCA 142 per Barr AJ at [19] – [22]. The element of breaking and entering in s 112(2) of the *Crimes Act* does not require that the premises be the home of the victim. Law-abiding members of the community are entitled to feel safe in their homes.

Substantial injury, emotional harm, loss or damage caused by the offence (s 21A(2)(g))

There is no general principle that injuries to a victim should be ignored or discounted because they are no more than would be expected as the result of the crime committed upon that type of victim: ***Josefski v R*** [2010] NSWCCA 41 per Howie J at [44] – [47]. It was contended in a case of aggravated break, enter and steal that the sentencing judge was in error in taking into account that the harm suffered by a female occupant was substantial because the harm was no more than would be expected of a person in her situation. Although the submission was ultimately withdrawn, Howie J took the opportunity to say something on the subject because he perceived a common misunderstanding of the decisions in *R v Youkhana* [2004] NSWCCA 412 and *R v Solomon* [2005] NSWCCA 158. Those cases were concerned with armed robbery. Caution was expressed about double counting if a sentencing judge applied the *R v Henry* guideline, which took into account the usual effects upon a victim of armed robbery, as well as the effects upon the victim if such effects were no more serious than would generally be expected. Howie J continued:

> [46] But there is no general principle that injuries to a victim should be ignored or discounted because they are no more than would be expected as the result of the crime committed upon that type of victim. In a sentencing decision considered by this Court on a Crown appeal, although the Crown did not raise the point, a Judge refused to take into account the injuries suffered by an 80 year old rape victim because they were what would be expected of such a victim who suffered such an attack. The absurdity of such an approach must be apparent. The Court has no knowledge of how a victim of rape of that age might react to the offence. It can be predicted that it is likely to be severe, but why for that reason should the effect on the victim be disregarded?
>
> [47] In this case the Judge was entitled to take into account the emotional injuries suffered by Ms Wickham, even though it could be predicted that any female in her situation, particularly having a young child under her protection, would be traumatised by the events of that evening. The first complaint should be dismissed.

Financial gain (s 21A(2)(o))

Financial gain is not necessarily an inherent characteristic of an offence of break, enter and steal: ***Hejazi v R*** [2009] NSWCCA 282 per Basten JA at [9] – [15], particularly at [10]. The sentencing judge referred to circumstances of aggravation and in that context said that it "was clear the offences were committed for a financial gain noting that the items taken were of some significant value". It was submitted, unsuccessfully, that financial gain could not be a circumstance of aggravation because it was an inherent characteristic of the particular class of offence.

Selling drugs to feed a drug addiction is not selling them for financial gain: ***Cicciarello v R*** [2009] NSWCCA 272 per Allsop P, Fullerton and McCallum JJ at [12] – [18]. A sentencing judge was found to have erred in finding that a drug supply offence was within the mid-range of objective seriousness taking into account that it was committed for "financial gain" when he also accepted the offender's evidence that he was selling drugs in order to fund his own addiction.

Offence committed whilst on conditional liberty (s 21A(2)(j))

Having a warrant outstanding for breach of parole does not amount to conditional liberty: ***Morrison v R*** [2009] NSWCCA 211 per Grove J at [4] – [7] and R A Hulme J at [43] – [45]. The offender in this case had breached parole which had then been revoked and a warrant of apprehension issued. The period of parole had been due to expire in the month before he committed an offence of break, enter and steal. The Crown conceded the error but argued that the offender was "at large". Grove J clarified that when he spoke in *R v King* [2003] NSWCCA 352 at [39] of an offender being "at large" being added to factors he listed in *Re Attorney General's Application (No 1) (Ponfield)*]1999] NSWCCA 435; 48 NSWLR 327 at [48] as enhancing an offence of break, enter and steal he was referring to an offender at large after escaping from lawful custody.

It is an aggravating feature if an offence is committed in breach of an order under the *Child Protection (Offenders Prohibition Orders) Act* 2004 or in breach of an apprehended violence order under the *Crimes (Domestic and Personal Violence) Act* 2007: ***Sivell v R*** [2009] NSWCCA 286 per Fullerton J at [26] – [30]. Sivell was sentenced for an offence of possessing child pornography. It was submitted, unsuccessfully, that the sentencing judge had erred in regarding the fact that the offence was committed whilst he was subject to an interim prohibition order imposed under s 7 of the *Child Protection (Offenders Prohibition Orders) Act* 2004 as a circumstance of aggravation. There was no condition of the order that the offender refrain from possessing child pornography. Nevertheless, the commission of such an offence was described (at [29] as a "breach" of the order.

Offence part of a planned or organised criminal activity (s 21A(2)(n))

This aggravating factor is engaged only when the particular offence is part of a more extensive criminal undertaking: ***Williams v R*** [2010] NSWCCA 15 per McClellan CJ at CL at [14] – [22], particularly [20]. The offender was sentenced for a single offence of break, enter and steal but it involved a substantial amount of property from a house in a very remote rural location including artwork of indeterminable value. The sentencing rejected a prosecution submission that the offence was the result of professional planning, organisation and execution but found that the aggravating factor provided in s 21A(2)(n) was applicable. He was found to have erred in doing so but the error did not influence the sentence to any significant extent because the offence was professionally planned in the sense referred to by Grove J in *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327 at [48].

Similarly, in ***Knight v R*** [2010] NSWCCA 51, James J held (at [20]) that a judge had erred in finding that it was an aggravating feature of two drug supply offences that they were "planned, albeit without much sophistication, as street level dealing in drugs is planned without much sophistication, and were part of an organised criminal activity". The two offences were constituted by the finding of two types of drugs in the offender's possession at the same time. James J determined that there was no evidence that either offence was part of a planned or organised criminal activity.

Victim vulnerability (s 21A(2)(l)) and breach of trust (s 21A(2)(k))

In ***Ali v R*** [2010] NSWCCA 35 the offender was a taxi driver who sexually assaulted an intoxicated young female passenger. It was contended that the sentencing judge had erred in having regard to her vulnerability as an aggravating feature under s 21A(2)(l). Johnson J held (at [58] – [62]) that it was appropriate for the judge to take into account both the victim's vulnerability and that the offender breached the position of trust he was in in relation to a passenger in his taxi who was both intoxicated and in ill-health, although he did not specifically refer to provisions of s 21A(2) in saying so.

Section 21A(3) *Crimes (Sentencing Procedure) Act* 1999

Good character (s 21A(3)(f))

It is erroneous to take the offences for which an offender stands for sentence into account in declining to find the person is of otherwise good character: ***Pfeiffer v R*** [2009] NSWCCA 145 per McClellan CJ at CL at [17] – [18]. In this case the sentencing judge found the offences were not "out of character" because they occurred over a lengthy period of time and involved the repeated obtaining of moneys from the victims and also that a further offence was committed about two years later.

Good prospects of rehabilitation (s 21A(3)(h))

An offender who maintains his or her innocence is not precluded from a finding that he or she has good prospects of rehabilitation and is unlikely to re-offend: ***Alseedi v R*** [2009] NSWCCA 185 per Giles JA at [65]. The offender had been convicted after trial of a number of sexual assaults. The sentencing judge had said, erroneously, that he could not make a finding that the offender had good prospects of rehabilitation because "the most obvious impediment to that finding being made is that the offender continues to maintain his innocence. His failure to admit his guilt suggests that nothing, apart of course from the sentence I must impose upon him, will prevent him from in future doing something similar to what he has done in the past".

Remorse (s 21A(3)(i))

There are varying degrees of remorse: ***Morrison v R*** [2009] NSWCCA 211 per R A Hulme J at [22] – [32]. In sentencing for an offence of break, enter and steal a judge found that the offender was remorseful and had acknowledged the loss caused by his offence. However he also remarked that the remorse was limited to the extent that the offender did not inform authorities as to where he had disposed of the stolen goods and also had not provided the name of another person who was seen in the getaway vehicle. It was contended on appeal that the judge erred in finding that the remorse was limited but it was held that the judge was simply acknowledging that whilst the offender was remorseful, it was not as complete as it possibly could be.

Restitution is a powerful way to demonstrate an offender's remorse: ***OH Hyunwook v R*** [2010] NSWCCA 148 per Kirby J at [32]. In this case the sentencing judge had implicitly found that the offender was remorseful but was critical of legal advice he had received that prevented him making any offer to pay the victim's medical expenses. The judge had said, in part, "I always have a limited acceptance of expressions of remorse unless they are backed up by something concrete".

Plea of guilty (s 21A(3)(k) and s 22)

In ***Devine v R*** [2009] NSWCCA 261, the sentencing judge noted that the offender had pleaded guilty in the Local Court and also that the Crown conceded that the plea was entered at the first available opportunity but did not quantify any reduction of the sentence on account of the utilitarian value of the plea. The Crown submitted that it could be inferred that the judge did reduce the sentence despite the omission to state that he had. Fullerton J considered whether such an inference could be drawn and concluded that it could not. In doing so she noted that the total sentence imposed was one of 2 years which would mean a starting point of 32 months prior to a 25 per cent reduction. She considered such a starting point, although theoretically open to the judge, unlikely. The appeal was allowed and the sentence reduced to one of 18 months.

Announcing that a discount for a plea of guilty is to be applied and then imposing a sentence that is the maximum that can be imposed whilst still permitting the sentence to be suspended does not promote transparency in the sentencing process where the unspecified starting point is a curious number: ***R v Huang*** [2010] NSWCCA 68 per Grove J at [6] and R A Hulme J at [86] – [87. In this case the judge said he would allow a discount of 10 per cent and then imposed a suspended sentence of 2 years. The starting point, which was not specified, must have been one of 2 years and about 3 months which seemed rather unlikely.

It was open to a sentencing judge to allow a discount of 20 per cent for a plea of guilty entered 16 months after the offender had been charged and where there had been a dispute as to facts requiring the calling of evidence at the sentence hearing: ***Donaczy v Regina*** [2010] NSWCCA 143 per Allsop P at [35] – [41]. The applicant had contended that the judge had wrongly reduced the discount because of the dispute as to the facts. Allsop P did not think the judge had taken the factual dispute into account but said that even if he did, this was not illegitimate.

Assistance to authorities (s 21A(3)(m) and s 23)

There is no "standard deduction" of sentence for a plea of guilty and assistance to authorities: ***FS v R*** [2009] NSWCCA 301 per Rothman J at [20] – [25]. The sentencing judge had allowed a combined discount of 40 per cent, saying, "the standard deduction is 40 per cent unless there are exceptional circumstances. It was held that the judge had either misunderstood or misapplied the principles set out by Howie J in *R v Sukkar*]2006] NSWCCA 92; 172 A Crim R 151.

Assistance to authorities in other jurisdictions may be taken into account: ***Shaw v R*** [2010] NSWCCA 23 per McClellan CJ at CL at [12] – [23]. However, in this case, the assistance the offender had provided to Queensland authorities had already been taken into account when he was sentenced in that State prior to be extradited and dealt with for offences committed in New South Wales.

Assistance to authorities can be reflected in both reduction of sentence and the type of sentence imposed: ***R v Farrawell-Smith*** [2010] NSWCCA 144 per Barr AJ at [17] – [23]. This was a Crown appeal in which it was asserted that the sentencing judge had double counted by allowing combined discounts for the respondent's pleas of guilty and assistance of 40 per cent on one count and 50 per cent on another count and then suspended the sentences, in part, because of the assistance. It was held that with regard to what was said in *Dinsdale v The Queen* (2000) 202 CLR 231 by Kirby J at [85] and *R v JCE* (2001) 129 A Crim R 18 by Fitzgerald JA at [17], whilst the discounts were excessive, the judge was entitled to take the assistance into account in deciding to suspend the sentences.

Standard Non-Parole Periods

In respect of offences for which a standard non-parole period is prescribed it is necessary for a sentencing judge to express findings and reasons as to the objective seriousness of an offence and, if there is a departure from the standard non-parole period, the reason for such departure: ***Mayall v R*** [2010] NSWCCA 37 per Howie J at [32] – [32]. In this case the sentencing judge simply observed that the offender had pleaded guilty and so he was not obliged to impose the standard non-parole period but would give consideration to it as a guidepost. He imposed non-parole periods of 3 years for each of two offences that had prescribed standard non-parole periods of 8 years.

It was an error for a judge to have regard to standard non-parole periods in sentencing for offences committed prior to their introduction: ***McGrath v R*** [2010] NSWCCA 48 per Macfarlan JA at [35] – [38]. In this case the judge was sentencing for offences committed in 2001 and 2002. Standard non-parole periods took effect from 1 February 2003 for offences committed on and after that date. The judge stated an awareness of this but said, nevertheless, that he would have regard to those that applied to the offences in question.

It is necessary for sentencing judges when not imposing a standard non-parole period to explain the reasons for the departure as well as the extent of it: ***R v Parkinson*** [2010] NSWCCA 89 per McClellan CJ at CL at [32] – [38]. An overall non-parole period of 3 years 9 months was imposed for three offences each carrying a standard non-parole period of 10 years. The sentencing judge provided no reasons for a departure from the standard non-parole period to that degree.

It is not necessary for a sentencing judge to articulate the constituents of "an abstract offence in the middle of the range" with which to compare the objective seriousness of the offence in question: ***Dunn v R*** [2010] NSWCCA 128 per Grove J at [12] – [18] and ***Hristovski v R*** [2010] NSWCCA 129 by Johnson J at [37] – [38].

(Further cases relevant to this topic are to be found below under the heading "Objective seriousness assessment").

OTHER ISSUES IN SENTENCING

Common law offences

It was a serious error to fetter the sentencing discretion to the maximum penalty for a single offence committed in the course of a conspiracy that involved the commission of numerous criminal offences: ***R v Brown*** [2010] NSWCCA 73 per Howie J at [57] – [62]. The offender was sentenced for the common law offence of conspiracy to cheat and defraud. The sentencing judge

had regard to the maximum penalty provided for the offence in s 178BA of the *Crimes Act* 1900 (now repealed) of imprisonment for 5 years. The conspiracy, however, involved numerous offences including offences contrary to s 178BA and s 300 (maximum 10 years).

Community service orders – sentencing after revocation

There is no presumption that a failure to perform work pursuant to a community service order results in a prison term and there is no mathematical formula to be applied to convert unserved hours of work into a period of imprisonment: ***Bonsu v R*** [2009] NSWCCA 316 per Howie J at [14]. The sentencing judge in this case proceeded upon a notion that his sole function upon revocation of a community service order was to sentence the offender to prison for a period of one month per 50 hours of unperformed work. Howie J emphasised that s 115 of the *Crimes (Administration of Sentences) Act* 1999 required that the sentencing discretion be re-exercised in respect of the offence committed, taking into account the work that had been performed.

Concurrence, accumulation and totality

The sentences imposed in ***R v SJH*** [2010] NSWCCA 32 for 8 child sexual assault offences committed against the offender's daughter of a 6 year period failed to reflect the totality of criminality because the sentencing judge ordered that the sentences for 7 of the offences be completely subsumed within the longest sentence. The judge purported to comply with the totality principle by ordering that some of the subsumed sentences be partially accumulated with other subsumed sentences.

Crimes Act (Cth) – s 4K(4)

Erroneous use was made of the provisions of s 4K(4) of the *Crimes Act* 1914 (Cth) to impose a single sentence of imprisonment for 11 counts of fraud: ***Thorn v R*** [2009] NSWCCA 294. Section 4K makes provision for continuing and multiple offences, including that such charges, in specified circumstances, "may be joined in the same information, complaint or summons". Subsection (4) permits the imposition of a single penalty. Howie J referred to *Putland v R* [2004] HCA 8; 218 CLR 174 in determining that the section did not permit a single penalty to be imposed for multiple indictable offences.

Delaying sentencing until more serious charges finalised

A problem arose in ***Smale v R*** [2009] NSWCCA 220 when the resolution of proceedings in the District Court was deferred for three years until the offender was dealt with for more serious matters in the Supreme Court. The offender was sentenced for murder and robbery in company to 18 years. The District Court then dealt with the other matters and a judge assessed the

appropriate sentence as being 7 years with a non-parole period of 5 years with a finding of special circumstances being made. He was then faced with little option but to partially accumulate that sentence with the result being an overall non-parole period that was 86 per cent of the new total sentence. Observations were made (at [31]) about the undesirability of deferring sentencing until more serious charges are dealt with.

De Simoni principle

A judge erred in having regard to an injury sustained by the victim of an offence of assaulting a police officer in the execution of his duty pursuant to s 58 of the *Crimes Act* 1900): ***McIntyre v R*** [2009] NSWCCA 305 per Johnson J at [34] – [55]. The error was a breach of the principle in *R v De Simoni* (1981) 147 CLR 383.

There was no error in taking into account an injury which amounted to grievous bodily harm when sentencing for an offence of malicious wounding with intent to inflict grievous bodily harm: ***Bourke v R*** [2010] NSWCCA 22 per McClellan CJ at CL. The offender had not been sentenced for a more serious offence than that for which he was charged or for an aggravated form of the offence charged. *McCullough v R* [2009] NSWCCA 94 is distinguishable in that it was concerned with an offence against s 35 whereas the present case is concerned with an offence against s 33.

Extra curial punishment

A failure of a judge to use the term "extra curial punishment" does not mean that it has not been taken into account: ***Brooks v R*** [2009] NSWCCA 265 per Buddin J at [21] – [32]. The offender had sustained significant injuries in the collision which gave rise to charges of aggravated driving causing grievous bodily harm. The sentencing judge did not use the term 'extra curial punishment" which led to a submission on appeal that he had failed to take the offender's injuries into account. It was noted, however, that the judge had made specific reference to the injuries, saying that the offender was deserving of some leniency and made a finding of special circumstances with that consideration in mind.

There was no error in a judge refusing to take into account as extra curial punishment injuries sustained by the offender when his victim retaliated: ***Clinton v R*** [2009] NSWCCA 276 per Howie J at [31] – [34]. The offender committed an offence of aggravated entering a dwelling house with intent to steal. He was armed with a knife. The victim struck him on the head with a stool, causing a laceration that bled heavily and required some 20 stitches. It was submitted on appeal that he was entitled to have regard paid to extra curial punishment. Howie J held that there was no such entitlement. He noted that the injuries were relatively minor and the actions of the victim were not disproportionate to the threat faced and indicated that he would have come to the same conclusion as the sentencing judge.

There was no error in a judge refusing to take into account as a mitigating factor the public humiliation suffered by an offender: ***Kenny v R*** [2010] NSWCCA 6 per Basten JA at [9] – [24] and Howie J at [42] – [50]. The offender was a local councillor with the prospect of a political career but suffered significant public denigration when charged with child sexual assault offences. The judge noted this fact but declined to find that he had suffered extra curial punishment.

Fact finding

Sentence proceedings miscarried when a judge rejected evidence of the offender which was untested: ***O'Neil-Shaw v R*** [2010] NSWCCA 42 per Basten JA at [23] – [32]. Evidence as to the relationship between the offender and the victim of an offence of maliciously inflicting grievous bodily harm with intent was provided by a number of witnesses in the form of affidavits. The deponents were not required for cross-examination. The offender gave evidence but was not cross-examined on his claim that he had been mistreated by the victim who was his stepfather. This was a consequence of an agreed approach taken by the Crown Prosecutor and senior counsel for the offender. The sentencing judge, however, rejected the offender's assertions on the subject. The matter was remitted to the District Court pursuant to s 12(2) of the *Criminal Appeal Act* 1912.

Form 1

It was inappropriate for two serious child sexual assault offences to be placed on a Form 1 and taken into account when an offender was sentenced for a third serious child sexual assault offence, particularly when the three offences concerned separate victims: ***Eedens v R*** [2009] NSWCCA 254 per Howie J at [17] – [19]. Howie J provided a number of reasons for this criticism, including that the sentence for the one offence could not sufficiently reflect the totality of the offender's criminal conduct, nor denounce the fact that three children had been abused in the way that they were. He particularly noted that one of the offences on the Form 1 carried a standard non-parole period and said that it was generally inappropriate that a standard non-parole period offence be placed on a Form 1.

Sentencing judges should be careful to ensure that they exercise the supervisory role accorded to them by s 33(2)(b) of the *Crimes (Sentencing Procedure) Act* 1999: ***C-P v R*** [2009] NSWCCA 291 per McClellan CJ at CL at [6] – [9]. In this case the offender was sentenced to two counts of armed robbery and one count of being an accessory after the fact to an offence of aggravated car jacking. Eight offences were on a Form 1 including serious robberies, possession of ammunition car theft and knowingly dealing with the proceeds of crime. McClellan CJ at CL noted that s 33(2) contemplates that the court must supervise the use of the Form 1 procedure. He regarded what occurred in this case as inappropriate.

Howie J reiterated the remarks in the above cases in ***El-Youssef v R*** [2010] NSWCCA 4, stating (at [15]), "this is another case where a serious matter was inappropriately placed onto a Form 1 with the result that the judge could not impose a sentence to reflect the seriousness of that offence".

Irrelevant considerations

It is erroneous to reduce a sentence in order to have a juvenile offender released on parole prior to turning 21 when he/she would be transferred to a correctional centre: ***TG v R*** [2010] NSWCCA 28 per Howie J at [20] – [26].

The fact that an offender does not have anything in common with other inmates and will find it difficult to relate is an irrelevant consideration. Feelings of personal isolation, discomfort, loss or frustration arising from the normal effects of imprisonment have no part to play in sentencing an offender once it is determined that the only appropriate sentence is a period of full-time custody: ***R v Hunter*** [2010] NSWCCA 54 per Howie J at [47] – [50].

Joint criminal enterprises and differentiating the roles played by participants

In ***Johnson v R; Moody v R*** [2010] NSWCCA 124, there was a divergence of view as to whether any differentiation should be made in assessing the culpability of participants in an armed robbery. Johnson argued that as his role was as driver of the getaway car he was less culpable than Moody who entered premises and threatened people whilst armed with a firearm. Barr AJ was of the view (at [94]) that it was more serious to enter premises and threaten people's lives with a firearm. Simpson J (at [11] – [21]) was of the view that some caution needs to be exercised in drawing fine distinctions between what the participants of a joint criminal enterprise actually did. Her Honour did not think that Moody's offence was more serious than Johnson's because he was the actual perpetrator. His participation made Moody's offence possible. James J (at [3] – [7]) noted that in sentencing participants in the same joint criminal enterprise a judge should "begin with" and "not lose sight of" the fact that they were all participants in the commission of the same crime but added that it is not the case that the offenders are necessarily to be regarded as having had the same objective criminality. It was open to the sentencing judge to decide to give some limited significance to the different roles played by the two offenders. However, drivers of getaway vehicles should not necessarily receive a lesser sentence.

Mental condition of offender

Finding a causal connection between an offender's mental condition and the commission of an offence is a finding of fact that an appeal court is bound by unless it was not open on the evidence or unless error is demonstrated within *House v R* (1936) 55 CLR 499 at 504-505: ***Mercael v R*** [2010] NSWCCA 36 per James J at [66] – [76]. A psychiatrist expressed an opinion in the first of a

number of reports that the court might take into account in mitigation the offender's likely severely depressed mood at the time of the incident. He did not reiterate this opinion in the subsequent reports. James J queried (at [73]) whether this could be taken as an opinion that there was a causal connection. If it was, it was a bare assertion without elaboration, inadequate to establish such a connection per *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705. It was open to the sentencing judge to have rejected a submission that there was a causal connection with the commission of the offence.

Motive and its relevance to moral culpability

In ***Quealey v R*** [2010] NSWCCA 116 the offender discharged a firearm at a house in which her former partner was an occupant on two occasions on the one night. It was contended on appeal that the judge should have found that her moral culpability was reduced for the reason that she was motivated by the recent disclosure of her daughter's alleged sexual abuse at the hands of the former partner. Latham J held (at [23] – [29]) that the motive explained the conduct but did not reduce the offender's moral culpability to any significant degree.

Non-parole periods for Commonwealth offences

Non-parole periods that are 60 to 66 per cent of the total term are usually regarded as appropriate in sentencing for Commonwealth offences although departure from this range is permissible in appropriate circumstances. However there would need to be special circumstances to warrant anything less than 60 per cent: ***R v Jones; R v Hill*** [2010] NSWCCA 108 per Rothman J at [31] – [40].

Objective seriousness assessment

Parity does not inform a sentencing judge's findings as to the objective seriousness of an offence: ***Xue v R*** [2009] NSWCCA 227 per Hoeben J at [40] – [44]. Xue had been sentenced for a serious drug offence which involved the supply to a man called Gao on two occasions within a fortnight. Gao was charged with separate offences in respect of the two occasions and also with further supply offences committed at a later time. The judge who sentenced Gao found his offences fell slightly below the mid-range of objective seriousness, a finding which the Court of Criminal Appeal found was open to be made. The judge who sentence Xue found his offence was in the middle of the range. Hoeben J rejected a submission that the judge erred in this finding because of the lesser finding made in respect of Gao.

There have been a number of recent cases in which it has been held that where a standard non-parole period offence does not fall in the middle of the range of objective seriousness it is necessary for the sentencing judge to make a finding as to the extent to which it is above or below the mid-range. A finding that the offence is simply above or below is insufficient. In ***McEvoy v R***

[2010] NSWCCA 110, Simpson J said that, despite the use of the words "with precision" by McClellan CJ at CL in *R v Cheh* [2009] NSWCCA 134 at [22], "it would, in my view, be sufficient for a sentencing judge to indicate that a particular offence was significantly above or below mid-range, slightly above or below mid-range, or at the top or bottom of the range". McClellan CJ at CL subsequently said in ***R v Sellars*** [2010] NSWCCA 133 at [12] that when he had spoken in *Cheh* of "precision" he was endeavouring to emphasise that if an offence falls outside the mid-range a sentencing judge should identify where it falls rather than merely state that it falls above or below the range. Apart from these two cases, just in the last 3 months the same or similar error has been found in ***R v Nicholson*** [2010] NSWCCA 80, ***AWKO v R*** [2010] NSWCCA 90, ***Dunn v R*** [2010] NSWCCA 128, ***R v Farrawell-Smith*** [2010] NSWCCA 144, ***Mitchell v R*** [2010] NSWCCA 145, ***Corby v R*** [2010] NSWCCA 146, ***OH Hyunwook v R*** [2010] NSWCCA 148 and ***R v LP*** [2010] NSWCCA 154.

Errors have also been found in matters taken into account by sentencing judges in the assessment of the objective seriousness of an offence such as an offender's plea of guilty, that he was on conditional liberty at the time of the offence and "other subjective circumstances": see ***R v Nicholson***, supra, and ***R v McEvoy***, supra.

Parity

The parity principle does not apply where offenders are not co-offenders: ***Meager v R*** [2009] NSWCCA 215 per Latham J at [10] – [13]. Meager was sentenced for drug supply. Her offence comprised 14 separate supplies within a period of a month, the total amount involving just under three grams. She sourced her drugs from Collier who was sentenced for a supply offence that involved a greater quantity of heroin over a longer period of time. Meager complained on appeal about her sentence of 4 years 6 months with non-parole period of 2 years 6 months because Collier was sentenced to 3 years with a non-parole period of 2 years. Latham J accepted the Crown submission that Meager and Collier were not co-offenders and so the parity principle had no application. She distinguished the decision of *Mitchell v R* [2008] NSWCCA 192 relied upon by the applicant and said it should be confined to its own facts.

Disparity in sentences passed upon co-offenders needs to be *marked* before intervention is called for: ***England v R; Phanith v R*** [2009] NSWCCA 274 per Howie J at [61] – [68]. His Honour took the opportunity in this case, with reference to authority in the Court of Criminal Appeal and the High Court of Australia, to make the point that appellate intervention is only justified when there is a disparity of sentence if it is such that can be described as "marked", "gross", "glaring", "manifest" or the like.

Ordinarily, disparity is unlikely to be found in relation to a finding of special circumstances because the personal circumstances of co-offenders will commonly differ but there may be cases where all relevant facts and circumstances being equal, a finding of special circumstances in the case of one

offender and not in the other may give rise to a justifiable sense of grievance: ***Lau v R*** [2010] NSWCCA 43 per McClellan CJ at CL at [14] – [17]. This was found to be such a case and the offender's non-parole period was reduced so that it was of the same proportion of the total term as in the case of his co-offender.

It will be a rare case in which an adult offender can invoke the parity principle where the co-offender is a child dealt with in the Children's Court: ***Ruttley v R*** [2010] NSWCCA 118 per Simpson J at [53] – [60]. However, the penalty imposed upon the child is not irrelevant. There remains an issue of proportionality.

There was no legitimate sense of grievance when two offenders sentenced for proceeds of crime offences received markedly different sentences (12 years as opposed to 4 years 6 months) in ***R v Wing Cheong Li; Wing Cheong Li v R*** [2010] NSWCCA 125. The co-offender had been dealt with for an offence that carried a maximum penalty of 12 years whereas 25 years was prescribed in respect of the applicant's offence. There were other circumstances which warranted differentiation as well.

Parole orders

There is no power to make a parole order when a sentence exceeds three years: ***R v Muldrock; Muldrock v R*** [2010] NSWCCA 106 per McClellan CJ at CL at [20] – [22]. The sentencing judge imposed a total term of imprisonment for 9 years with a non-parole period of 96 days and purported to make a condition that the offender only be granted parole on the basis that he be taken to a facility that provides a supervised therapeutic environment for sex offenders with an intellectual disability. Section 51 of the *Crimes (Sentencing Procedure) Act* 1999 only provides a court the power to impose conditions "on any parole order made by it". The power to make a parole order provided by s 50 only applies where a sentence is for a term of 3 years or less.

Pre-sentence Custody

The preferred manner of taking into account pre-sentence custody is to back-date the sentence: ***Wiggins v R*** [2010] NSWCCA 30 per Howie J at [3] – [15]. In this case the sentencing judge had back-dated the sentence to a date when the offender returned to custody following conviction and said that he had also taken into account an earlier four month period of custody. This lead to argument on appeal as to whether the judge had in fact taken that period into account. Howie J referred to numerous authorities for the proposition that back-dating is the preferable course and said, "this is yet another case where the sentencing judge has not taken that course and yet given no reasons for not having done so".

There was a different approach to taking pre-sentence custody into account in ***Pulitano v R*** [2010] NSWCCA 45. A judge imposed a suspended sentence and there was a question as to whether he had taken into account a four month period of pre-sentence custody. Giles JA referred (at [8]) to the option of back-dating sentences as "generally to be preferred" but noted that such a course was not available when a sentence is suspended, the only option being to reduce the term of the sentence.

Protective custody

There is no mathematical formula that is to be applied in taking into account that an offender has or will be held in protective custody: ***Clinton v R*** [2009] NSWCCA 276 per Howie J at [18] – [24]. The offender had been held in protective custody whilst on remand for a period of about 15 months. A submission that the sentencing judge should have given to that period "the equivalence of at least 20 months or more ordinary prison time" was rejected.

Remarks on sentence

Both the offender and members of the public in court should be able to understand the basis for the sentences from what is said at the time of sentencing: ***R v Hersi and Hersi*** [2010] NSWCCA 57 per Howie J at [7]. In this case the judge said that he requested his "comments to be added to the comments I made on the earlier occasion this matter was in court", something Howie J described as a "somewhat unusual course". He was also critical of the need for the Court of Criminal Appeal to have to read the transcript of addresses and dialogue between the Bench and counsel in order to understand the reasons for sentence.

Repealed offences

A sentencing judge was found to have erred in ***Orkopoulos v R*** [2009] NSWCCA 213 in sentencing for offences against s 78K (sexual intercourse with a male aged between 10 and 18 years) by not taking into account that s 78K was subsequently abolished. There were multiple offences committed up until February 2000. Section 78K was repealed in 2003. A modest reduction was made to the sentences imposed. In the circumstances, McClellan CJ at CL found (at [100]) that considerations of punishment, retribution and deterrence of other persons from committing criminal offences of a similar character had the same significance as they would have had if the offence had remained but personal and general deterrence with respect to the particular offence was of no continuing significance.

Representative charges

Different views were expressed in ***Giles v Director of Public Prosecutions (NSW)*** [2009] NSWCCA 308 as to whether a sentencing judge was entitled to increase a sentence for an offence where it was representative of other uncharged offences. Basten JA was of the view that the fact that the offences for which the offender in this case was to be sentenced constituted part of an ongoing course of conduct placed them in the higher range of cases. R S Hulme J was of the view that conduct which is not the subject of a charge may not be taken into account so as to result in the imposition of a sentence higher than would be merited by the conduct charged. Johnson J found the reasoning of Basten JA persuasive but concluded that the issue should await determination by the Court of Criminal Appeal in a case where the court has the assistance of submissions from the parties.

Special circumstances

A sentencing judge who accumulated sentences overlooked the fact that the result was a non-parole component was 80 per cent of the total term: ***Wakefield v R*** [2010] NSWCCA 12 per Grove J at [22] – [28]. The Court intervened so as to reduce the non-parole portion of the sentence to 75 per cent of the total.

Statistics and comparative cases

There continues to be frequent statements as to the limited utility on appeal of comparing sentences imposed in other cases (apart from co-offenders) and Judicial Commission sentencing statistics; see, for example, ***Han v R*** [2009] NSWCCA 300, per Campbell JA at [2] – [3] and Rothman J at [32] – [42].

Statistics generally

It is appropriate to take the opportunity to say something about what appears to be a common misunderstanding. I have encountered it in submissions in the Court of Criminal Appeal. One of the criteria that may be selected in refining a statistical search is "Number of offences" under which can be selected "Total", "Multiple offences" or "One offence only". It seems to be thought that selecting "Multiple offences" will yield statistics for the overall total sentence imposed for multiple offences. That is not correct. The Judicial Commission only maintain statistics for each sentencing exercise for what it calls the "principal offence". The following appears in "Explaining the Statistics" (http://jirs/menus/notices/pens_about.php):

> The statistics are appearance (or person) based and only the "principal offence" for each finalised matter is used. All secondary offences are excluded from the data. Past data reveals that in just over half of cases the offender has only one proven offence. This constitutes the "principal offence" for the purposes of the statistics.

> Where two or more charges are proved against a person, the offence with the most severe penalty is selected as the principal offence. If two or more charges attract the same sentence, the offence which carries the highest maximum penalty is selected as the principal offence. If two or more offences have the same statutory maximum penalty and the same sentence, the offence with a Form 1 attached (see further below) is selected.

Summary disposal possible

The applicant in ***Dunn v R*** [2010] NSWCCA 128 contended that the sentencing judge failed to have regard to the fact that the offence for which he was sentenced could have been dealt with in the Local Court. Grove J held (at [23] – [29]) that it could not. The applicant had been charged and committed for trial for causing grievous bodily harm with intent, an offence which is triable only on indictment. In the District Court he pleaded not guilty to that charge but guilty to recklessly causing grievous bodily harm. The Crown accepted that plea. In these circumstances, there never was any chance that the applicant could have been dealt with in the Local Court.

Suspended sentences

In ***R v Nicholson*** [2010] NSWCCA 80 at [13] – [16], Howie J was critical of the prosecution having taken no action to have an offender dealt in the Local Court with for breaching a suspended sentence bond before he was sentenced in the District Court for an offence which constituted the breach. It meant that the Local Court had no power to do other than order that the activated sentenced be subsumed within the sentence imposed in the District Court.

Victim impact statements

Great care is required in making use of the content of victim impact statements in making findings adverse to an offender: ***McCartney v R*** [2009] NSWCCA 244 per Grove J at [18] – [21]. Grove J noted that such statements are usually unsworn and the assertions within them untested.

A sentencing judge made reference to victim impacts statements in making a finding that the aggravating circumstance under s 21A(2)(g) (substantial injury, emotional harm, loss or damage) was proved in ***Aguirre v R*** [2010] NSWCCA 115. James J held that in the circumstances it was permissible for the judge to have done so. The circumstances were that the statements were tendered without objection and there was no argument by experienced counsel as to whether there should be any limit on the use made of them by the judge.

Worst case category

A sentencing judge was found to have erred in characterising aggravated sexual assault offences as being the worst case category in ***Stephens v R*** [2010] NSWCCA 93. There is a useful discussion of authorities on the issue in the judgment of Fullerton J at [43] – [65].

Specific offences

Driving offences involving death or grievous bodily harm

The fact that a single act of driving caused similar injuries to two victims who were in proximity to each other was not a proper basis to order that sentences for two counts of dangerous driving occasioning grievous bodily harm be served concurrently: ***R v Read*** [2010] NSWCCA 78 per Giles JA at [35] – [42]. In the course of dealing with this issue, Giles JA reviewed a number of authorities concerned with the totality principle and the discretion to order sentences be served concurrently or otherwise.

Drug offences

The fact that the quantity of a drug is modestly in excess of the minimum required for the offence and that the purity was minimal were not mitigating factors: ***Lorraway v R*** [2010] NSWCCA 46 per McClellan CJ at CL at [31] – [34]. The challenge on appeal was to the sentencing judge rejecting a submission that this matters operated in mitigation. The judge concluded that they were neither aggravating nor mitigating features. McClellan CJ at CL said they were matters which required consideration but it was inappropriate to speak in terms of aggravation or mitigation.

Child pornography

Whiley v R [2010] NSWCCA 53 was a case in which an excessive sentence was imposed for child pornography offences. The offender was sentenced to a total of 4 years for two counts of producing child pornography contrary to s 91H of the *Crimes Act* 1900 (maximum penalty 10 years). He was a prisoner with a bad record and one day when his cell was searched there were found 18 sheets of drawings and 24 pages of handwritten text, all of a highly graphic nature describing or depicting child sexual activity. James J determined that the objective gravity of the offences was near the bottom of the range. He had regard to a number of matters: the material was not produced for sale or distribution but was for the offender's own gratification; the images, being drawings and not photographs, and text were produced from imagination and did not involve the exploitation of any actual child; and the quantity of material was nothing like that considered in many other cases. The sentences were reduced to 12 months.

In ***Minehan v R*** [2010] NSWCCA 140 at [94], after a review of cases dealing with sentencing for child pornography offences, I listed 13 factors relevant to the assessment of the objective seriousness of offences of that nature. The judgment also includes (at [96] – [101])a discussion of the significance of general deterrence, denunciation and prior good character in such cases.

Fraud

General deterrence is important in sentencing for identity crimes and frauds utilising electronic banking systems: ***Stevens v R*** [2009] NSWCCA 260 per Spigelman CJ at [1] – [7] and McClellan CJ at CL at [79]. The Chief Justice noted the then imminent legislative change (*Crimes Amendment (Fraud and Forgery) Bill* 2009) involving more focussed offences and increased maximum penalties but stated that the significance of general deterrence would remain a matter to which particular weight must be given.

Kidnapping

In ***Allen v R*** [2010] NSWCCA 47, Latham J (at [21]- [22]) reiterated factors relevant to an assessment of the objective gravity of an offence of kidnapping under s 86 of the *Crimes Act* 1900: the duration of the detention; the extent of fear or terror occasioned; the manner of treatment and what is demanded of the victim; the purpose of the detention; and the extent (if any) to which third parties were subjected to ordeal or anguish by reason of fear for the welfare of the victim.

Proceeds of crime offences

An offence of dealing with the proceeds of crime contrary to s 400.4(1) of the *Criminal Code (Cth)* was described as "an unusual use of a money laundering offence" and "a highly technical version of the offence": ***Thorn v R*** [2009] NSWCCA 294 per Howie J at [27] and [31]. The offender was involved in the commission of GST fraud offences by himself and his partner. Because there were no joint criminal liability provisions in the Code he was only charged in respect of the offences he committed himself. He was also charged with a money laundering offence that related to the proceeds of some of his own frauds as well as the frauds committed by his partner. Howie J noted that more typically a money laundering offence relates to dealing with money the product of some other person's criminal activity so as to hide its source. In this case the offender merely transferred money obtained from fraudulent claims so that he could use it to gamble. It was found (at [33]) that the sentencing judge should have treated the offence as towards the lowest range of the type of offending covered by the section.

It is an abuse of process to charge a proceeds of crime offence where the proceeds are from a substantive offence also charged: ***Nahlous v R*** [2010] NSWCCA 58 per McClellan CJ at CL, Howie and Rothman JJ at [13] – [21]. The offender in this case sold decoders (used to receive pay

television without payment of a subscription to a service provider). On the last occasion before he was arrested he sold 50 to an undercover police officer and received payment of $15,000. He was charged with offences against the *Copyright Act* 1968 (Cth) as well as with an offence of dealing with the proceeds of crime. The latter related to the $15,000. He received by far the longest sentence for this offence. It was held that he should never have been charged with it and that if he had applied for a permanent stay of proceedings because of an abuse of process it could not have been refused. The sentence for that offence was quashed and the offence was dismissed pursuant to s 19B(1)(c) of the *Crimes Act* 1914 (Cth).

Robbery

The range of sentences being imposed for a large number of armed robberies is generally too low: ***McIvor v R*** [2010] NSWCCA 7 per Howie J at [17] – [22], Tobias J agreeing with Hidden J not deciding. Howie J referred to other cases and statistics in coming to this conclusion. He did not indicate the source of the statistics to which he referred. The Judicial Commission does not maintain statistics for the overall sentence imposed upon a person sentenced for multiple offences.

SUMMING UP

Comment about leave to cross-examine being granted under s 38 Evidence Act 1995

There was no error in a judge telling a jury that he had granted leave to the prosecutor to cross-examine a witness who was unfavourable: ***Lee v R*** [2009] NSWCCA 259. The trial concerned an allegation that the accused had sexual intercourse without consent with his son's girlfriend. The accused's wife was called to give evidence by the Crown. Her evidence included that a short time before the alleged offence she had engaged in sexual activity with the accused but he had been unable to achieve an erection because of alcohol consumption. In the absence of the jury the judge granted the prosecutor leave to cross-examine the witness on this subject. When the jury returned to the court room the judge told them that the evidence was unfavourable to the Crown and that he had granted leave for the prosecutor to cross-examine her.

No complaint was raised at the trial but on appeal it was contended that this was tantamount to the judge telling the jury that he thought the witness was a liar who was in collusion with the accused and so should not be believed.

Grove J (at [36] – [37]) rejected this assertion. He characterised what the judge said as simply being things that would have been apparent, or would become apparent, to the jury in any event. He added (at [38]) that if a judge does elect to comment to a jury about a s 38 ruling (which is not

obligatory), care should be taken to avoid the possibility of any implication that the mere making of the ruling is an adverse reflection on the creditworthiness of the witness.

Absence of warning against tendency reasoning in respect of context evidence

In a trial concerning allegations of child sexual assault there was no miscarriage of justice occasioned by the judge not warning the jury that they must not engage in tendency reasoning in respect of evidence of sexual misconduct on other occasions: ***Toalepai v R*** [2009] NSWCCA 270 per Howie J at [47] – [54]. The only direction given by the judge, belatedly, was that the jury could not substitute the evidence of the other acts for the specific offences charged. It was contended on appeal that a full direction should have been given explaining the nature of the evidence and warning the jury against tendency reasoning. It was further contended that such a direction is required as a matter of law and so rule 4 of the *Criminal Appeal Rules* could not be applied.

The appellant relied upon what had been said in *Rodden v R* [2008] NSWCCA 53; 182 A Crim R 227. Howie J, however, identified a number of additional features in that case that indicated that there was a risk that the jury might have engaged in tendency reasoning. Upon an analysis of the evidence in the present case there was no such risk. Howie J added, however, that it would have been preferable for the judge to have given the recommended direction in the Bench Book. He was also critical of the cavalier attitude of the prosecutor in relation to the evidence of other acts in the light of the care which the Court of Criminal Appeal has insisted should be given to the admission of such evidence.

Larceny as an available alternative verdict in a trial for robbery

The accused in ***Mifsud v R*** [2009] NSWCCA 313 was tried for robbery in company. The allegation was that he and two other men attended a home and assaulted an occupant. After the men had left the victim realised that his wallet was missing. The jury raised with the judge a question whether it was necessary for the violence to have been for the purpose of robbery. There was a possible view of the evidence that the taking of the wallet was opportunistic and not the intention of the assailants at the time of the violence. The judge proposed directing the jury that they could return an alternative verdict of larceny. However, the representatives of both Crown and defence persuaded him that larceny was not an available alternative to robbery. It was contended on appeal that the judge misdirected the jury when he reminded them of the elements of the principal offence and told them that if they taking of the wallet was an afterthought then that was not robbery.

Simpson J (at [42] – [52]), having regard to the analysis of Smart AJ in *R v King* [2004] NSWCCA 20; 59 NSWLR 515, held that larceny was an alternative that should have been left to the jury. Resolution of the question turned upon whether the evidence in the trial made it appropriate to

leave the alternative. Simpson J concluded that in the circumstances of the case, larceny was not "fanciful"; a verdict for the alternative would have represented a "viable outcome" and would have been "rational"; and it was not "comparatively trifling or remote" when considered against the principal offence. The verdict was set aside and a re-trial ordered.

Content of a Longman "warning"

As noted earlier in this paper, ***TJ v R*** [2009] NSWCCA 257 was a case in which it was held that a direction of the type referred to in *Longman v R* [1989] HCA 60; 168 CLR 79 was required. The direction given by the trial judge was:

> Because of the delay in the accused learning of these allegations, he has been prejudiced in the conduct of his defence. I therefore caution you that it may be wrong for you to convict on the complainant's evidence unless, after scrutinising her evidence very carefully indeed, you are well satisfied that her evidence was both truthful and accurate.

There was a divergence as to whether the direction was correct. It is well settled that the direction is intended to be a warning but the question was whether it should be expressed to be a "warning", or in substance be a warning. After extensive analysis of authority, McCallum J (at [126] – [132]) concluded that the direction was sufficient to satisfy the requirement that it be cast in the form of an authoritative judicial warning of the dangers inherent in the trial. Use of the word "warning" was neither necessary nor always sufficient to satisfy the requirement stated in *R v BWT* [2002] NSWCCA 60; 54 NSWLR 241 that a *Longman* direction be framed "in terms" as a warning.

Hidden J agreed with additional comment (at [77] – [78]).

McClellan CJ at CL, however, was of the view(at [71] – [72]) that the authorities, also extensively reviewed, required that the word "warn" or "warning" had to be used. The direction in this case was framed as a caution rather than a warning. Further, the use of the terms "may be wrong" and "well satisfied" further reduced the force of the direction.

Elucidation upon "beyond reasonable doubt"

The trial judge in ***RWB v R; R v RWB*** [2010] NSWCCA 147 fell into error when he attempted to explain to a jury when a doubt is reasonable and when it is not but there was no miscarriage. The judge said, in part, "If you think it (a doubt) is just a fanciful or merely theoretical doubt that you would not personally call reasonable yourself, then it is not a reasonable doubt". Simpson J traced the course of authority on the subject in considerable detail and added (at [48]) her "voice to the chorus that has urged trial judges to avoid the temptation to embark upon an explanation of the

well known concept of 'beyond reasonable doubt'". Her Honour identified (at [49] – [53]) two exceptions to the total prohibition on expanding upon the "formulaic direction", where counsel's address is such as to call for some remediation and where the jury seeks additional assistance. In relation to the latter she noted that the response in *R v Southammavong; R v Sihavong* [2003] NSWCCA 312 that, "The words 'beyond reasonable doubt' are ordinary everyday words and that is how you should understand them" was held not to have constituted a miscarriage of justice.

Another error of the trial judge in ***RWB v R; R v RWB*** (supra) was to tell the jury that the failure of defence counsel to cross-examine the complainant about a particular topic about which the accused had raised in his evidence would indicate that the accused had failed to tell counsel about it. It was held by Simpson J (at [101] – [102) that the this was erroneous but that no miscarriage resulted. The inference that the accused had failed to include the subject in his instructions was not the only inference available and so trial judges should exercise great caution in directions to the jury concerning the failure of an accused's counsel to comply with the rule in *Browne v Dunn* (1893) 6 R 67.

Whether a "Shepherd direction" is required in a circumstantial evidence case

It was contended in ***Rees v R*** [2010] NSWCCA 84 that a jury should have been directed that one of the circumstances relied upon by the prosecution was an indispensable intermediate fact that they should be satisfied had been proved beyond reasonable doubt. Beazley JA held otherwise and in the course of doing so provided a detailed discussion (at [48] – [55]) of the circumstances in which a direction of the type referred to in *Shepherd v R* [1990] HCA 56; 170 CLR 573 should be given.

LEGISLATION

The ***Crimes (Appeal and Review) Amendment (Double Jeopardy) Act* 2009** (which took effect from 24 September 2009) inserted new s 68A in the principal Act so as to end the long standing practice of an appeal court, including the Court of Criminal Appeal, dismissing a prosecution appeal against sentence, or imposing a less severe sentence than it would otherwise consider appropriate, because of the double jeopardy involved in the respondent standing for sentence a second time.

Section 105 of the principal Act makes provision for applications for an acquitted person to be retried. It provided that there could be no such application in respect of a person acquitted at a retrial ordered pursuant to the section, but a new s 105(1A) provides that there can be if the acquittal at the retrial was tainted.

The ***Crimes Amendment (Fraud, Identity and Forgery Offences) Act* 2009** amended the principal Act in significant ways in relation to fraud, forgery and identity theft crimes. Fraud

offences in Part 4 (e.g. s 178BA obtaining money etc by deception) were removed. A new Part 4AA was inserted to define certain concepts and proscribe various activities in the nature of fraud. A new Part 4AB deals similarly with identity offences. The majority of existing Part 5 (forgery and false instrument offences) was omitted with the balance being renumbered Part 5A. A new Part 5 was inserted to define certain concepts (e.g. when a document is a "false document") and to provide for offences of making, using and possessing false documents and making or possessing equipment for making false documents. The provisions took effect on 22 February 2010.

The ***Criminal Procedure Amendment (Case Management) Act* 2009** amended and added to provisions in the principal Act for the purpose of providing to courts a greater level of control in the nature of case management. The provisions took effect on 1 February 2010. New Practice Note SC CL2 applying to proceedings in the Common Law Division took effect on the same day.

The ***Crimes (Sentencing legislation) Amendment (Intensive Correction Orders) Act* 2010** abolishes the concept of periodic detention and creates a regime for "intensive community correction". They will be available when an offender has been sentenced to imprisonment for not more than 2 years. Mandatory conditions will be prescribed by regulation and a court may order further conditions. Provisions are made for the suspension, revocation and reinstatement of orders. Revocation will result in an offender serving at least one month in full time detention before becoming eligible to apply for reinstatement. The mandatory conditions provided by regulation (cl 175 *Crimes (Administration of Sentences) Regulation* 2008) include that an offender is prohibited from using illicit drugs and must submit to drug and alcohol testing. Surveillance or monitory may be directed by a supervisor. Curfew conditions can be imposed. Community service work of at least 32 hours per month must be performed. Participation in rehabilitation programs may be directed. Commencement of the provisions has yet to be proclaimed.