# LEGAL}{ EAGLES CLE

Continuing Legal Education for Criminal Lawyers

## PAPER BY MARTIN BLACKMORE, SC, HIS HONOUR, DISTRICT COURT OF NEW SOUTH WALES PRESENTED AT LEGAL EAGLES CLE CONFERENCE HANOI VIETNAM 3/1/2014 – 8/1/2014

### *RECENT CHANGES TO THE SENTENCING LAWS*

When I came to consider preparing this paper the sheer enormous scope of it became obvious and somewhat daunting. As the participants in the conference come from all over Australia and other places as well it was difficult to decide what should be included and what left out. So in an attempt to make the paper worthwhile to most participants I have concentrated on cases that have a wider application rather than looking at individual cases from individual states of Australia unless those cases can be said to have some wider implication. Having said that I have included a schedule at the back of the paper outlining cases and some legislative changes that have been made this year that are probably only going to be relevant to practitioners in individual states. There are more of those cases from NSW simply because there are more cases decided there than anywhere else.

When looking for sentencing cases with the widest possible implication the obvious place to start is the High Court. I have taken a little liberty here. I have considered cases that were also decided in 2012. In that time there have been a number of important decisions. I will give a brief explanation of the issues involved, the facts of each case and the result. The summary that I will provide is mine and any comment on the utility of the case is also mine. Hopefully that will be of assistance. But as with all cases that are sought to be relied on in court proceedings it is necessary for a practitioner who refers to the case to at least read it. I intend to discuss only some of these cases during the conference.

One of advantages of looking at cases from all around Australia and the legislation that is being put in place by respective governments is that it demonstrates the degree to which those governments, of all persuasions, are legislating in this area of sentencing. Almost without exception the legislation designed to limit the discretion of sentencing judges on the basis that it is perceived that they “out of touch” and are too lenient on crime. This will be one of the major topics I will address at the conference.

**HIGH COURT**

***Bui v Director of Public Prosecutions (Cth)* [2012] HCA 1**

*The application of a Victorian Law, which provides that double jeopardy, is not to be taken into account on a Crown Appeal, with respect to a Crown Appeal, when the appeal is in relation to a Commonwealth offence.*

*Facts*: The appellant pleaded guilty to importing heroin, a Commonwealth offence. She was sentenced in the County Court (Vic) to a recognizance with immediate release. The Commonwealth DPP successfully appealed to the Court of Appeal (Vic) which imposed a full-time custodial sentence of 4 years with a non-parole period of 2 years. The Court of Appeal held that ss 289-290 of the *Criminal Procedure Act* 2009 (Vic), which prevents reliance on double jeopardy in Crown appeals, applied. [The equivalent provision in NSW is s 68A of the *Crimes (Appeal and Review) Act* 2001; check other jurisdictions]

*The issue*: Section 16A(1) of the *Crimes Act* 1914 (Cth) requires a court sentencing a Commonwealth offender to impose a sentence of a "severity appropriate in all the circumstances", while s 16A(2) outlines a list of matters in addition "to any other matters" that the court must take into account if "relevant and known to the court". One of the listed matters is the offender's mental condition under s 16A(2)(m).

The appellant submitted that the Court of Appeal erred by failing to take into account the "principle" of double jeopardy, expressed as "presumed anxiety and distress of the appellant standing for sentence again". The appellant submitted that this principle could be incorporated under "any other matters" in s 16A(2) and operated as an "automatic discount" on the sentence that would otherwise be imposed: [19].

*Held*: The High Court (French CJ, Gummow, Hayne, Kiefel and Bell JJ in a single judgment) dismissed the appeal. The double jeopardy provisions in ss 289-290 of the *Criminal Procedure Act* 2009 (Vic) did not apply. No question of picking up the Victorian provisions arises because the issue can be resolved by reference to s 16A itself.

Section 16A does not accommodate the common law of double jeopardy

Section 16A does not accommodate the principle of "presumed anxiety" described by the appellant. To read the section in the manner suggested by the appellant would introduce a notion for which there is no textual foundation. Further, applying an automatic discount would not be consistent with the requirement of s 16A(1) that a sentence be appropriate in its severity: [19]. There is also no warrant for interpreting s 16A as encompassing concepts that are addressed only to an appellate court, such as double jeopardy: [20].

Actual distress of a respondent in a Crown appeal can be considered under s 16A(2)(m)

Although presumed anxiety cannot be read into the text of s 16A(1), *actual* mental distress can be taken into account under s 16A(2)(m): [21]–[23]; *DPP (Cth) v De La Rosa* (2010) 273 ALR 324. Simpson J's view at [279]–[280] is to be preferred in that case. The view of Allsop P and Basten JA in *De La Rosa* that a respondent would not have to prove actual anxiety and distress under s 16A(2) does not accord with the opening words of the sub-section that the court must take account of matters that are relevant *and known* to the court: [23]. In the present case, the Court of Appeal did consider evidence of actual anxiety and distress as a result of the Crown appeal in determining whether to intervene, and in re-sentencing: [24].

The double jeopardy principle relied on by the appellant is a common law principle. Section 80 of the *Judiciary Act* 1903 (Cth), which enables state courts to exercise federal jurisdiction, allows the common law to apply where it has not been modified by state legislation and "[s]o far as the laws of the Commonwealth are not applicable or…their provisions are insufficient": [26]–[27]. In the present case, there are no gaps in the Commonwealth provision of s 16A: [28]. There is "no need to resort to the Victorian provisions" on double jeopardy "because the judge made rule does not apply in the context of s 16A": [29].

*The result*: Appeal dismissed.

***Crump v New South Wales* [2012] HCA 20**

*Was the introduction of strict parole conditions for persons who had previously been sentenced to life imprisonment in breach of s73 of the Constitution in that it had the effect of varying an order of the Supreme Court.*

*Facts*: In 1974 the plaintiff was convicted of murder and sentenced to life imprisonment. No non-parole period was fixed. In 1997 he applied to the Supreme Court under s 13A of the *Sentencing Act* 1989 to have his sentence redetermined. McInerney J made a determination that the plaintiff be sentenced to life imprisonment with a minimum term of 30 years, which made him eligible for parole in November 2003. In 2001, s 154A of the *Crimes (Administration of Sentences) Act* 1999 was introduced. It tightened parole eligibility requirements, so that, pursuant to s 154A(3), a person in the plaintiff's position "may" be released to parole "if and only if" the Parole Authority is satisfied the offender: (a) (i) is in imminent danger of dying or is incapacitated to the extent that he or she no longer has the physical ability to do harm to any person, and (ii) has demonstrated that he or she does not pose a risk to the community, and (b) the Authority is satisfied that, because of those circumstances, the making of such an order is justified.

*Issue*: The plaintiff challenged the validity of s 154A. The question for determination by the High Court was: “Is s 154A … invalid in that it has the effect of varying or otherwise altering a judgment, decree, order or sentence of the Supreme Court of New South Wales in a ‘matter’ within the meaning of s 73 of the Constitution?”.

*Held*: The High Court (Gummow, Hayne, Crennan, Kiefel and Bell JJ in a joint judgment; French CJ and Heydon J agreeing in separate judgments) answered that question: "No": [39], [61], [75].

Section 154A did not impeach, set aside, alter or vary the plaintiff's sentence: [34]; [60]; [71]. Statutes governing parole can and do change over time, a practical reality over which judges have no control. The sentencing determination by McInernery J did not create any right or entitlement in the plaintiff to his release on parole and, in that regard, had no operative effect. The sentencing determination constituted a fact by reference to which the parole system (including s 154A) operated. The use of the phrase "if and only if" in s 154A(3) to govern pars (a) and (b) of that sub-section, qualified the jurisdictional facts which had to apply before the Parole Authority could make an order directing the plaintiff's release on parole: [60].

*Result*: Appeal dismissed.

***Yates v The Queen*** **[2013] HCA 8**

*What constitutes being a constant danger to the community such that an order of indefinite detention can be made in Western Australia.*

*Facts*: The applicant is an intellectually disabled man. He has been in continuous custody since 1987 following his conviction for an aggravated sexual assault of a 7 year old girl. The sentence expired in 1993. The sentencing judge directed that on the expiration of the term of imprisonment that the appellant be detained during the Governor's pleasure in a prison pursuant to s 662 of the *Criminal Code Act (WA)* 1913.

*The issues*: In *Tunaj v The Queen* [1984] WAR 48 it was held that an order under s 662 should be made “only in very exceptional circumstances” where “the convicted person ha[d] shown himself to constitute a danger to the public.” *Chester v The Queen* (1988) 165 CLR 611 at [21] affirmed the decision in *Tunaj* and said that for an order to be made under s 662 evidence must establish the convicted person is “so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the public.”. In July 1987 (before the High Court decision in *Chester*) the majority of the Western Australia Court of Criminal Appeal allowed a severity appeal but declined to interfere with the s 662 order. The applicant appealed to the High Court against the WA SCA decision to uphold the s 662 order.

*Held*: The Court (French CJ, Hayne, Crennan and Bell JJ, Gageler J agreeing) allowed the appeal and quashed the s 662 order. In 1987 courts in Western Australia were not authorised to make orders for indefinite detention of a convicted person other than on acceptable evidence proving demonstrable necessity for the order: [34]. The evidence was not capable of demonstrating that the applicant was so likely to commit further crimes of violence, including sexual offences, that he constituted a constant danger to the community: [36]. The opinion that the applicant was at risk of re-offending was not an opinion that he was a constant danger to the community.

*Result*: Order for indefinite detention quashed.

***State of NSW v Kable* [2013] HCA 26**

*Was Kable able to sue the State of NSW for false imprisonment, when he was imprisoned for a period of time following the introduction of NSW legislation which was subsequently ruled as being invalid by the High Court.*

*The facts*: The *Community Protection Act* 1994 (NSW) (CP Act) empowered the Supreme Court to order the preventative detention of a specified person if satisfied that he or she would probably commit a serious act of violence if released. The Supreme Court ordered Mr Kable's detention for six months. Mr Kable (the respondent) appealed to the High Court. It set aside the order and held that the CP Act was invalid upon the basis that the CP Act was beyond the legislative power of the NSW parliament. See *Kable vs DPP* (1996) 189 CLR 51 (*Kable (No 1)*).

*The issues*: Following the High Court judgment in *Kable (No 1)*, the respondent commenced proceedings in the Supreme Court claiming, *inter alia*, damages for false imprisonment by reason of the detention order. Judgment was entered against him and he appealed to the Court of Appeal. The Court of Appeal held that the detention order was not a "judicial order" and the respondent had an action for damages for false imprisonment. NSW appealed this decision.

*Held*: The Court (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ in a joint judgment, Gageler agreeing with separate reasons) allowed the appeal and set aside the orders of the Court of Appeal. The respondent did not have an action for false imprisonment because the order made by the Supreme Court detaining him was valid until it was set aside. Therefore, there was lawful authority for the respondent's detention.

The NSW Court of Appeal decision misstated the effect of *Kable (No 1)* in holding that in exercising power under the CP Act, the Supreme Court was not exercising judicial power or

authority and was not acting, institutionally, as a superior court. Rather, the majority in *Kable (No 1)* held that the CP Act was invalid because it required the Supreme Court to exercise judicial power and act institutionally as a court, but to perform a task that was inconsistent with the maintenance of the Supreme Court's institutional integrity as required by Ch III of the Constitution: [17].

The detention order was therefore a judicial order made by a "superior court of record" and effective until it was set aside. The order was not set aside until after the respondent's release from detention, so the order provided lawful authority for the respondent's detention.

Several features of the proceedings and the order disposing of them point to the order being made by a judge of the Supreme Court in his judicial capacity. Further, the manner in which the proceedings were conducted also point towards this conclusion: [27].

The order for detention was made by the Supreme Court of NSW which is a superior court of record. The Court set out the fundamental principles concerning the meaning of "superior court of record" at [29]–[34]. The Court further noted that there must be a point where decisions made in the exercise of judicial power are given effect despite the particular decision later being set aside or reversed. One way to mark this point is to treat orders of a superior court of record as valid until set aside: [38]. If this were not the case, an order made by a superior court of record would have no more than provisional effect until the time for review or appeal had elapsed and the exercise of judicial power could provide no adjudication of rights and abilities to which immediate effect could be given: [39].

*Result*: Appeal allowed. Order of the Court of Appeal set aside.

***Munda v Western Australia* [2013] HCA 38**

*Various issues with regard to Crown Appeals and an Aboriginal appellant from a disadvantaged background.*

*Facts*: The appellant pleaded guilty to the manslaughter of his de facto spouse. As an Aboriginal man he had experienced social disadvantage, alcohol abuse and violence in his indigenous community. He had a history of committing violence against the deceased.

The Crown appealed the sentence imposed in the Supreme Court of Western Australia (term of 5 yrs 3 mths, non parole period (npp) 3 yrs 3 mths). The Court of Appeal allowed the appeal and increased the sentence (term of 7 yrs 9 mths, npp 5 yrs 9 mths).

*The issues*: are identified in the summary below.

*Held*: The High Court (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ in a joint judgment; Bell J dissented) dismissed the appellant's appeal.

Manifest inadequacy in Crown appeals and use of comparable cases

The appellant argued that the Court of Appeal did not assess the seriousness of his offending by comparing similar cases, and therefore could not have been convinced that the sentence was outside the appropriate range so as to be satisfied that it was manifestly inadequate: [30].

However, there was nothing unorthodox in the Court of Appeal's approach to the question of manifest inadequacy. Its view was properly informed by the maximum penalty, the gravity of the offending on the scale of seriousness, and the personal circumstances of the offender: [33]. Although McLure P used the phrase "weighting errors" in her judgment, it is clear from the context that her Honour was not using the phrase to introduce a discussion of specific error but to expose the reasoning by which she reached a conclusion that the sentence imposed was so unreasonable and plainly unjust as to manifest the error of inadequacy: [35]; *House v The King* (1936) 55 CLR 499 at 505.

The appellant also argued that the initial sentence was not markedly different from that imposed in cases which were "most closely comparable" with his case, and that without a yardstick to indicate the sentence was inadequate, there was no basis for the Court of Appeal to allow the appeal: [38].

This aspect of the appellant's argument should be rejected for three reasons.

*First*, the argument assumes that only "closely comparable" cases can provide a yardstick with which to judge the adequacy of a sentence: [39]. In this regard, the appellant relied on *Hili v The Queen* (2010) 242 CLR 520 at [62] but *Hili* did not say that a yardstick derived by reference to comparable cases was an essential precondition of finding a sentence was manifestly inadequate. Rather, while it was acknowledged that such a disparity is one pointer towards inadequacy, the joint judgment expressly approved the statement of Simpson J in *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [303]–[305] that previous sentences may be used to establish a range of sentences imposed

but not that the range is correct. In particular, the range of past sentences does not fix the boundaries within which future judges must, or even ought, to sentence.

*Secondly*, as the joint judgment stated in *Markarian v The Queen* (2005) 228 CLR 357, the maximum penalty balanced with all of the other relevant factors provides a yardstick. The Court of Appeal noted the present case was a serious example of manslaughter which carries a maximum penalty of 20 years imprisonment: [40].

*Thirdly*, the appellant's argument that his sentence was higher than the most comparable case of *R v Gordon*[2000] WASCA 401 does not succeed. *Gordon* was a Crown appeal decided by reference to considerations of double jeopardy which are no longer material, and therefore the decision affords little guidance: [41].

*Circumstances of social disadvantage*

The same sentencing principles apply irrespective of an offender's membership of an ethnic or other group: *Neal v The Queen* (1982) 149 CLR 305 at 326. The weight to be attached to factors which exist only by reason of the offender's membership of an ethnic or cultural group is a matter of discretion for the judge at first instance or the appellate court: *Neal v The Queen* at 326. It would be contrary to the principle in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by other persons, or to consign individual offenders, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving of protection and vindication by the criminal law: [53].

Although it may be argued that general deterrence is diminished in communities of prolonged social disadvantage where it is unreasonable to expect individuals to rationally calculate the consequences of their misconduct, the State has an obligation to recognise that a life is taken, vindicate the dignity of the victim and, on behalf of the community, express denunciation and punishment: [54]–[55]. Circumstances which might make general deterrence of lesser importance might at the same time mean the protection of society is of greater importance: [58]; *R v Engert* (1995) 84 A Crim R 67 at 68. A judge is required to reach a sentence which balances many different and conflicting features: *Markarian v The Queen* (2005) 228 CLR 357 at [37]. It is not possible to say that the Court of Appeal's synthesis of competing considerations was affected by error: [60].

*The effect of traditional punishment on sentencing*

There is something to be said for the view that the circumstance that the appellant is willing to submit to traditional punishment is not a consideration material to the fixing of a proper sentence. Punishment for crime is meted out by the state: offenders do not have a choice as to the mode of their punishment: [61]. The prospect that the appellant may face traditional corporal punishment ("payback") in future was however taken into account in his favour by the sentencing judge: [62]. The Crown accepted it was a relevant factor and the Court of Appeal did not take a different view: [62], [127]. This case does not afford an occasion to express a concluded view on the subject. The appellant did not suffer any injustice by reason of payback being given only limited weight in the courts below: [63].

*Residual discretion*

The appellant raised an issue as to whether s 41(4) of the *Criminal Appeals Act* 2004 (WA), which abolished the common law principle of double jeopardy in Crown appeals, altered the exercise of a court's power in relation to such appeals: [64]. All members of the Court of Appeal accepted or assumed that, notwithstanding s 41(4), the Court retained a residual discretion under s 31 to decline to allow an appeal against an erroneously lenient sentence.

The appellant relied on the remarks made by the majority in *Green v The Queen* (2011) 244 CLR 462 at [36] concerning the purpose of a prosecution appeal under s 5D of the *Criminal Appeal Act* 1912 (NSW), namely, to lay down principles for the governance and guidance of sentencing courts, which is a limiting purpose that does not extend to the general correction of errors made by sentencing judges: [68]. However, the reference to "principles" encompasses the avoidance of manifest inadequacy or inconsistency in sentencing standards: [69].

In the present case, McLure P's statement (Mazza JA agreeing) in the Court of Appeal that, save in a case in which parity considerations were raised, the residual discretion is only likely to be exercised if the error has *not* resulted in a manifestly inadequate sentence, was said to be unduly narrow: [73]; Bell J agreeing at [90]. However, none of the matters urged by the appellant, including the delay in hearing and determining the appeal, was apt to exert a claim upon the residual discretion to dismiss the Crown appeal: [73].

*Result*: Appeal dismissed.

***Bugmy v The Queen* [2013] HCA 37**

*How should a sentencing court deal with the issue of social deprivation when sentencing an Aboriginal offender.*

*The issues*: Two questions were addressed. First, what must be shown in a Crown Appeal for the Appeal court to overturn the discretionary decision of the sentencing judge. Second, should Aboriginal offenders be presumed to come from a deprived background or should each case be determined on its own facts. If the latter is the case can it be said that the effect of a deprived background lessons over time.

*The Facts*: The appellant was sentenced in New South Wales to an effective non-parole period of four years and three months with a balance of term of two years for two offences of assaulting a correctional officer contrary to s 60A(1) of the *Crimes Act* 1900 and one offence of causing grievous bodily harm with intent contrary to s 33(1)(b). The offences took place while the appellant was on remand at a correctional centre and led to the victim of the s 33(1)(b) offence losing vision to one eye.

The appellant was an Aboriginal person who grew up in Wilcannia in a family environment where alcohol abuse and violence was common. He witnessed his father repeatedly stab his mother. From the age of 12, he was in juvenile detention centres and had spent much of his adult life in prison: [12].

The Director of Public Prosecutions (NSW) successfully appealed against the sentence for the s 33(1)(b) offence. The appellant submitted in the High Court that the New South Wales Court of Criminal Appeal (CCA) erred by failing to make an express finding that the sentence imposed at first instance was manifestly inadequate and by failing to consider the residual discretion not to intervene in the appeal. The appellant also took issue with an observation by the CCA (extracted at [25]) that the extent to which social deprivation in a person's youth and background can be taken into account diminishes with the passage of time particularly where there has been substantial offending.

Held: The Court (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; Gaegler J agreeing subject to one point below) allowed the appellant's appeal and remitted the case to the CCA.

*Crown appeal*

The authority for the CCA to resentence was not enlivened by its view that it would have given greater or lesser weight to certain matters: [24], *House v The King* (1936) 55 CLR 499 at 504-505. The power to resentence could only be engaged if the Court was satisfied the judge's discretion miscarried because the sentence imposed was below the range of sentences justly available for the offence. In that event, the Court was required to consider whether the Crown appeal should nevertheless be dismissed in the exercise of the residual discretion. The Court neither decided the sentence was manifestly inadequate, nor considered the exercise of the residual discretion. Accordingly the appeal must be allowed to enable the CCA to determine the original Crown appeal: [24], [49].

*Sentencing Aboriginal offenders from a deprived background*

The appellant urged the Court to follow Canadian authorities to the effect that a causal link between systemic and background factors affecting Aboriginal offenders was not required in order to take those matters into account: [34]; *R v Ipeelee* [2012] 1 SCR 433. That is not the

law in NSW. Unlike the Canadian equivalent, the *Crimes (Sentencing Procedure) Act* 1999 does not direct courts to give particular attention to the circumstances of Aboriginal offenders. There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender: [36]. "An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence": [37]. To accept the submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders when sentencing every Aboriginal offender would be antithetical to individualised justice. Specific material that tends to establish such deprivation must be identified in each case: [41].

*R v Fernando* (1992) 76 A Crim R 58 gives recognition to social disadvantage at sentence but it is not about sentencing Aboriginal people per se: [37]; *Kennedy v R* [2010] NSWCCA 260 cited with approval. Many of the propositions in *Fernando* address the significance of intoxication at the time of the offence which is not usually a matter in mitigation. It recognises that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor.

The Director acknowledged, and it should be accepted, that the effects of profound deprivation do not diminish over time and they should be given "full weight" in every sentencing decision. The majority said,

> "The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
>
> Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender."

Gaegler J did not accept the exposition of the principle by the Director. Attributing full weight to an offender's deprived background in every sentencing decision is not to suggest that it has the same (mitigatory) relevance for all the purposes of punishment. As was observed in *Veen v The Queen* (No 2) (1988) 164 CLR 465 at 476, giving weight to the conflicting purposes of punishment is what makes sentencing so difficult: [44]. Factors which point in one direction in relation to one sentencing consideration may point in a different direction in relation to another consideration: [44]–[45], *Engert* (1995) 84 A Crim R 67 at 68 per Gleeson CJ. An issue in the remitter is whether the appellant's background permitted the weight that

would usually be given to personal and general deterrence for offences committed by prisoners against prison officers to be moderated in favour of rehabilitation to the extent that it was by the judge: [46].

*Result*: Appeal allowed. Case remitted back to the CCA.

**New South Wales**

**Section 54B – Standard non parole periods**

This provision is unique to NSW. The provision deals with what are called standard non parole periods where the non parole period is the period that an offender must spend in prison. In New South Wales there are no remissions, for example for good behaviour. The law is that the sentence imposed by the sentencing judge is the sentence that is served.

Standard non parole periods are provided for a number of identified offences. In theory a standard non parole period should be applied in every case in which it is found that the objective facts see the offence fall within a range described as middle of the range of seriousness. After this provision was originally enacted the Court of Criminal Appeal in NSW in 2004 decided how it would be applied in a case called *R v Way.* Thereafter sentencing courts followed that decision (as they were required to do) in sentencing offenders for which the offence carried a standard non-parole period.

In 2011 an appellant took a case to the High Court challenging the decision in *Way.* The appeal was successful and in *Muldrock v The Queen* the High Court substantially revised the way in which a sentencing court should take into account the fact that the offence carried a standard non parole period. In effect the court found that the sentencing court should merely take it into account with the other relevant factors such as the maximum penalty applicable. As you will appreciate many hundreds if not thousands of sentences involving cases that carried a standard non parole period were passed between 2004 and 2011. The challenge for the Court of Criminal Appeal was how to deal with future appeals. The next case is an example of how the court is addressing that challenge.

***ACHURCH v THE QUEEN (NO 2)*** **[2013] NSWCCA 117**

*Sentence – Sentencing procedure – Other matters – Reopening proceedings to correct sentencing errors – Penalty ''contrary to law'' – Correction of Muldrock v The Queen (2011) 244 CLR 120 error – Distinction between appeal and reopening proceedings.*

*Issues:* Was the penalty ''contrary to law''?

*Facts:* The applicant was sentenced to terms of imprisonment by the Court of Criminal Appeal following a successful Crown appeal against sentences that had been imposed by

the District Court for three drug offences. The offences for which the applicant was sentenced included two offences that carried standard non-parole periods. Subsequent to the Court of Criminal Appeal's decision, the High Court handed down the decision in *Muldrock v The Queen* (2011) 244 CLR 120, which relevantly overruled the Court of Criminal Appeal's decision in *R v Way* (2004) 60 NSWLR 168 so far as it determined the approach to sentencing in respect of offences which carried a standard non-parole period. The applicant contended that, in light of *Muldrock*, the sentences imposed upon him by the Court of Criminal Appeal were ''contrary to law'', because they were imposed in reliance on the principles laid down in *Way*. He submitted that the Court of Criminal Appeal should reopen the proceedings under the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 43, and impose a penalty in accordance with the law.

*Held:* (dismissing the application) (1) The use of the words ''contrary to law'' in s 43(1)(a) and ''required to be imposed by law'' in s 43(1)(b) could be read as extending no further than to either the imposition of penalties which there was no power to lawfully impose, or failing to impose a penalty which was mandatory to impose in the circumstances. However, the words in question are open to a wider interpretation and courts have consistently construed the section more liberally. The case law makes it clear that the section can apply in circumstances where the penalty, while within the range of penalties which as a matter of power could be imposed, is not one which would be imposed if correct sentencing principles were applied. Quaere whether the cases which have given s 43 a broad interpretation were correctly decided.

(2) Section 43 is not a proxy for an appeal. In an appeal against sentence under the *Criminal Appeal Act 1912* (NSW), ss 5(1) or 5D, the jurisdiction to impose a different sentence is enlivened upon error being demonstrated, although the court must be satisfied that a different sentence is warranted in law. By contrast the *Crimes (Sentencing Procedure) Act*, s 43, focuses on the outcome. For there to be jurisdiction under s 43, error must be identified and it must be shown that the error led to a penalty which was not otherwise open to the court to impose. Section 43 does not entitle an applicant to a rehearing on the merits.

(3) Section 43 is a discretionary provision designed to correct manifest error. Generally speaking the only circumstances in which it should be exercised is where the error in question is apparent from the sentence itself, not from an analysis of the legal reasoning which underpins the sentence.

(4) Section 43 should not be used as a vehicle to review what might colloquially be described as *Muldrock* appeals, with a possible exception of cases where it is alleged that the Court of Criminal Appeal erroneously sentenced on the basis of *Way*. In the case of sentences imposed by other courts, the appropriate course is for an application for leave to appeal to the Court of Criminal Appeal to be made out of time. It would be up to the court hearing the application for leave to establish whether it was appropriate for leave to be granted.

(5) Where the court in question was the Court of Criminal Appeal, and the case had been brought before the court to enable it to consider whether an application under s 43 is an appropriate method to deal with applications for resentencing by persons who claim they have been wrongly sentenced as a result of the application of the principles laid down in *Way*, it was appropriate to consider whether the preconditions to the exercise of jurisdiction under s 43 were made out.

(6) Having regard to the subsequent decision in *Muldrock*, the reasoning of the Court of Criminal Appeal was erroneous. However, having regard to all of the facts, matters and circumstances relevant to the imposition of the sentence, the sentences which were imposed in the Court of Criminal Appeal were within the discretion of that court and could, in accordance with principle, have been lawfully imposed by the court. The penalty was appropriate and thus not ‘‘contrary to law’’ within the meaning of s 43(1)(a).

*Result*: Appeal dismissed.

Subsequently section 54B of the Act was amended to reflect the High Court’s judgment in *Muldrock*. The amended provision states in part:

The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.

Note that *Achurch* has been appealed to the High Court.

**Other cases:**

***WU v THE QUEEN* [2011] NSWCCA 102**
*Sentence – Relevant factors – Totality – General principles – Refusal to volunteer offences when previously sentenced for similar offences – Application of totality in relation to previous sentence – Right to silence.*

*Issues:* Is the totality principle applicable?

*Held:* The application of totality principles is not a matter of leniency. A failure to volunteer commission of offences does not deprive the offender of the application of the totality principle so far as it requires recognition of the appropriate sentence imposed for all the offences committed, or else there would a fundamental conflict with the right to silence.

***HOANG THANH DANG v THE QUEEN* [2013] NSWCCA 246**

*Drug offences – Sentence – Generally – Drug use causing limited harm – Versus supply – Deterrence.*

*Issues:* Use causing limited harm versus supply.

*Held*: Within the parameters fixed by the legislature, the exercise of discretion by the court will reflect various purposes of the criminal law, including, perhaps primarily, general and personal deterrence. Punishment may involve an element of public retribution, although the role of the courts in that regard should be tempered so as to discriminate between expression of enduring values and the ill-considered emotive responses of the moment. Further, deterrence is not promoted by a sentence which is seen to be arbitrary, nor one which interferes with an expectation of rehabilitation. General deterrence is a large element of a condign punishment and will reflect a range of values. Drug use which causes limited harm to others should not attract as heavy a punishment as would actual supply to others.

***R v POGSON* [2012] NSWCCA 225**

*Sentence - Purpose of sentence - Reformation and rehabilitation - Where not relevant Misleading information in prospectus - Appropriateness of intensive correction orders.*

*Issues*: Are intensive correction orders confined to circumstances where rehabilitation is relevant?

*Facts*: The respondents were company directors, who had pleaded guilty to offences of concurring in making a false or misleading statement. Additionally, one of the respondents pleaded guilty to knowingly making a false or misleading statement in a document lodged with Australian Securities and Investment Commission. The sentencing judge found that the respondents were unlikely to re-offend; accordingly, rehabilitation was way of intensive correction orders rather than actual imprisonment. The Crown appealed, arguing that in the absence of the necessity of rehabilitation, general deterrence was relevant and actual imprisonment was required.

*Held***:** There is nothing in the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 7, which confines the imposition of an intensive correction order to persons who have an identified need for rehabilitation, or of whom it can be positively said there is a risk of reoffending.

***R v LOVERIDGE* [2013] NSWSC 1638**

Homicide – Manslaughter – Sentence – Particular cases – Manslaughter by unlawful and dangerous act – Unprovoked ‘‘king hit’’ on victim – Attack one in series of aggressive and violent conduct 18-year-old offender – Intoxicated at time of offence – Juvenile criminal record indicative of disregard for the law – Offender on conditional liberty at time of offence – Sincere remorse – Guilty plea – Positive prospects of rehabilitation – Finding of special circumstances warranted – Six years imprisonment – Non-parole period four years.

After this decision the Parliament has determined that it is necessary to put in place a new offence. There is some consider controversy about this offence which effectively provides for

a 20 year term of imprisonment for someone who punches a person (at least) once from which they die.

***Victoria***

***Legislation***

**The end of suspended sentences in Victoria**

The *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act* 2013 has effectively ended the use of suspended sentences in Victoria. For reasons which are not obvious from over the border suspended sentences became a matter of real controversy in Victoria. The provision for this penalty option was eliminated in some serious offences in 2011 and with the introduction of this Act, they will be abolished for all offences by mid 2014. This is a political decision. Again it follows the theme of parliaments involving themselves in the minutiae of sentencing law attempting to restrict the discretion of the court in the sentences that are applied. That is in effect what happened in NSW with the introduction of standard non parole periods. And it appears that this is what the Parliament has in mind to do in Victoria. No doubt it is based on a perception that too many suspended sentences were being imposed in cases that were regarded as objectively serious such that a full time term of imprisonment should have been imposed. It can be accepted that the government were not thinking that some lesser sentence should be applied.

Whilst I was aware of the debate that was occurring in Victoria about suspended sentences at the time, I have now specifically attempted to research why it was considered necessary to take this course. The Press release from the Premier of the State provided the following explanation:

A suspended sentence is where an offender is convicted and sentenced to imprisonment, but the imprisonment is suspended as long as the offender does not re-offend. In the vast majority of cases, the offender then walks from the court completely free and without supervision.

With the abolition of suspended sentences, if a judge thinks an offender should not go to jail in a particular case, the judge will need to say so openly and impose a community correction order or other sentence, instead of the law pretending the offender is being sent to jail when they actually walk free.

“Labor's ‘soft on crime’ approach has allowed offenders sentenced on paper to a term of imprisonment to walk out of court completely free and back into the community, too often returning straight to re-offending,” Mr Clark said.

“The Coalition Government is determined to repair the damage caused by 11 years of Labor being soft on crime, be it lack of police, failures in parole, not enough prison beds or weak sentencing laws.

“Under a Coalition Government, community safety is and always will be paramount."

Frankly this statement appears to grossly understate the seriousness of the imposition of a suspended sentence. Clearly a suspended sentence is markedly less serious than the imposition of full time imprisonment. But in NSW the sentence effectively hangs over the head of the offender because a breach of the conditions of the sentence almost inevitably leads to a term of full time imprisonment being imposed. This leads to better compliance with conditions imposed as part of the sentence. In my view the sentence is still useful in many cases, particularly where the offender is on the cusp of full rehabilitation. It is interesting that it does not appear that any attempt was made to amend the law rather than repeal it entirely. In my view a useful amendment of the suspended sentence law would be to extend the period of the suspension so that the sentence imposed hangs over the head of the offender for a longer period than the actual sentence. That is how the Commonwealth legislation works and in my view it would be a useful addition to the law in NSW. In Victoria the loss of this form of penalty will, I am sure, hamper the job of sentencing offenders and will almost certainly lead to persons going to prison who ought not to have suffered that ultimate penalty. But equally it is likely to lead to persons receiving penalties that are objectively less than they ought to have received because the sentencing court does not have the option of a suspended sentence. Rather than being tough on crime, as the Parliament intends, it is likely that the sentences imposed on offenders will, on balance, be more lenient. It will be interesting to see if there is any subsequent analysis of those sentences. For an academic analysis of the arguments for and against suspended sentences see: Bartels, L, *‘An examination of the arguments for and against the use of suspended sentences’* (2010) 12 Flinders Law Journal 119.

**Changes to the Parole Board in Victoria**

In Victoria the government has made substantial changes to the way in which parole is administered. The *Corrections Amendment (Parole Reform) Act 2013* provides for a change of the membership of the parole board. The provisions also allow for greater supervision of parolees and what occurs when parole is breached.

***Cases***

***BARBARO v THE QUEEN* [2012] VSCA 288**

*Sentence — Sentencing procedure — Role of parties — Prosecutor — Crown submissions on sentencing range — Obligation of judge to entertain.*

*Issues*: Is a judge under an obligation to hear Crown submissions on sentencing ranges?

*Held*: The function of a Crown submission on range was to assist the sentencing judge to promote consistency of sentencing and reduce the risk of appealable error. The informing notion was the reasonable expectation of a judge that assistance would be offered where a prosecutor perceived a risk that the judge might otherwise fall into error: in that case, it was the prosecutor's duty to raise the matter and offer to provide a submission on range. However, should a judge decline to entertain the submission, that was the end of the matter. While it might be prudent for a judge to hear such a submission, he was under no obligation to do so. Furthermore, no question of procedural fairness arose if a judge declined to hear a submission of law which he or she adjudged to be unnecessary or unhelpful and such a refusal did not constitute failure to take into account a relevant consideration in a public law sense, given that a judge was not bound to take such a submission into account.

***BRITTAIN v MANSOUR* [2013] VSC 50**

*Sentence – Sentencing orders – Fines – Nature and availability – ''Special condition'' – To pay money to charity – By undertaking to court – ''Fine''.*

*Issues***:** Was the special condition an impermissible fine?

*Facts***:** The defendant pleaded guilty to a charge under the *Food Act 1984 Vic*. The hearing was adjourned under of the *Sentencing Act 1991* (Vic), s 75, on an undertaking given to the court to be of good behaviour. As a special condition of that undertaking, the defendant was required to pay the sum of $2,500 to a charitable organisation.

*Held***:** (1) The ''special condition'' that the offender pay $2,500 to a charity was a ''fine'' as it was payable under an order of a court that was made on the defendant being found guilty of an offence. This fine was not in accordance with the provisions of the *Sentencing Act*, Pt 3B, Div 1.

(2) As such, the magistrate erred by imposing a condition on the defendant's undertaking that he make a payment of $2,500 to a charity when adjourning the proceeding.

***HARDS v THE QUEEN* [2013] VSCA 119**

*Sentence – Sentencing procedure – Sentencing statistics, schedules, tariffs, comparisons, etc – General principles – Role of median sentence.*

*Issues***:** What is the role of the median sentence?

*Held***:** The median sentence is a statistical indicator only. It is quite wrong to treat it as having any role as a starting point, or a benchmark, for sentencing in a particular case. The question to be addressed is: what do current sentencing practices indicate about the appropriate range of sentences for an offence of this kind by this offender? The median reflects the whole range of cases in the period under review, in all gradations of seriousness. Sentencing practices are to be discerned both by reference to statistics and, where available, by reference to comparable cases. Cases which can be seen to be comparable in gravity to the case at hand are likely to give the most useful guide to the applicable range.

***DIRECTOR OF PUBLIC PROSECUTIONS (CTH) v FATTAL*** **[2013] VSCA 276**

*Offences and other matters relating to terrorism – Sentence – Conspiracy to commit acts in preparation for terrorist acts – Appeal against sentence – Ground of manifest excess.*

*Issues***:** Were the sentences manifestly excessive?

*Facts***:** The appellants were convicted of conspiracy to commit acts in preparation, or planning for, terrorist acts contrary to the *Criminal Code* (Cth), ss 11.5(1) and 101.6(1). They were each sentenced to 18 years imprisonment with a minimum non-parole period of 13 years and six months.

*Held***:** (1) The intention of the legislature in creating the offences under the *Criminal Code*, Div 101, was to intercept and prevent terrorist acts at a very early stage. The amateurish level at which the conspiracy was conducted, together with the fact that it did not advance to a significant degree, were not factors that were capable of diminishing the criminal culpability of the appellants.

(2) The terrorist act contemplated by the appellants involved a plan for the intentional killing of innocent persons. The fact that the acts engaged in were clumsy did not render the conspiracy any less dangerous.

(3) In all the circumstances, it was open to the sentencing judge to conclude that the offences required significant sentences, particularly in light of the need for community protection, and the absence of any remorse on behalf of the appellants. The sentences imposed were not manifestly excessive.

***R v PETERS*** **[2013] VSC 93** ***(Vic Sup Ct, T Forrest J)***

Acts intended to cause or causing danger to life or bodily harm or serious injury – Sentence – Negligently causing serious injury (55 counts) – Medical practitioner with addiction to narcotics – Culpably negligent re-use of tainted injecting needles and syringes – Infection of patients with hepatitis C – Serious breaches of professional trust – Head sentence 14 years – Minimum term 10 years.

***DIRECTOR OF PUBLIC PROSECUTIONS v LEYS* [2012] VSCA 304**

*Sentence – Sentencing orders – Non-custodial orders – Community based orders – Availability – Combination of sentencing orders – Multiple offences – Suspended prison sentences and community correction order – Aggregate prison sentences in excess of three months – Lawfulness.*

*Issues***:** Was the sentence unlawful?

*Held***:** The *Sentencing Act 1991* (Vic), s 44(2), prohibits the imposition of a community correction order on any offence in proceedings involving multiple offences where at least two terms of imprisonment are imposed on separate offences and the aggregate of those terms of imprisonment exceeds three months. This is not altered by the fact that the term of imprisonment is (wholly or partly) suspended.

***RUIZ v THE QUEEN* [2013] VSCA 313**

*Sentence – Relevant factors – Response to charges – Co-operation with police or assistance to authorities – Generally – Weight to be given to cooperation with authorities.*

*Issues*: What weight should be given to the accused's cooperation with authorities?
*Facts*: After his conviction for conspiracy to import a commercial quantity of a border controlled drug, the appellant provided more information to the Australian Federal Police and he gave evidence against one of his accomplices in circumstances that would regularly attract a significant sentencing discount. He described arrangements that were made for the cocaine to be shipped into Australia. He was able to identify the speakers in intercepted telephone calls, and to explain the purpose of the calls but refused to implicate a third co-accused.

*Held*: Had his cooperation with authorities been complete, he may have been re-sentenced in a manner which would have resulted in his immediate eligibility for parole. Instead, sentence of 12 years' imprisonment with non-parole period of seven years reduced to nine years' imprisonment with non-parole period of five years and six months.

***South Australia***

***Amendment of Criminal Law (Sentencing) Act 1988***

The South Australia government has put in place a series of statutory discounts following a plea of guilty. The provisions focus on the time at which the plea is entered. I have not set out the full terms of the provisions which also include factors to be taken into account on sentence.

The important provisions in relation to the plea of guilty in the Magistrates Court allow for a:

- 40% discount for a plea of guilty in the Magistrates court within one month of the first appearance in that court.
- For a plea more than 4 weeks after the defendant first appears in a court in relation to the relevant offence, if a date has been set for a trial for the offence not less than 4 weeks before that day or in any other case before the commencement of the trial for the offence the sentencing court may reduce the sentence that it would otherwise have imposed by up to 30%.
- In a case where the plea is less than 4 weeks before the day set for trial for the offence, and if the defendant satisfies the sentencing court that he or she could not reasonably have pleaded guilty at an earlier stage in the proceedings because of circumstances outside of his or her control the sentencing court may reduce the sentence that it would otherwise have imposed by up to 30%.
- Finally in other circumstances the sentencing court may, if satisfied that there is good reason to do so, reduce the sentence that it would otherwise have imposed by up to 10%.

In relation to other cases, and this includes indictable offences, a similar but more complicated regime applies. The legislation allows for a 40% discount for a plea of guilty 4 weeks after first appearing in court with respect to the relevant offence; 30% for a plea after 4 weeks but before committal to trial; 20% for a plea between the day the defendant is committed for trial and 12 weeks after the first date fixed for arraignment. In a case where the defendant pleads guilty and convinces the court that he could not plead guilty at an earlier stage a discount of 30% is allowed. In other circumstances a 10% discount.

This regime of discounts will be reviewed 2 years after the implementation.

**Amendment to section 38 *Criminal Law (Sentencing) Act 1988* – Suspended sentences**

The legislation has been amended to prevent the imposition of suspended sentences in relation to a series of offences and in other circumstances where the offence committed is aggravated.

***Cases***

***R v CHALMERS* [2012] SASCFC 128**

*Sentence - Sentencing orders - Non-custodial orders - Suspended sentence of imprisonment - Particular cases - Aggravated causing harm with intent to cause harm - Joint revenge attack - Stomping on upper body, legs and buttocks.*

*Issues*: Should the sentences for aggravated causing harm with intent to cause harm be suspended?

*Facts*: The appellants (B and C) had been sentenced following a late guilty plea and a trial by judge alone respectively for an offence of aggravated causing harm with intent to cause harm. B and C had been involved in an altercation with a group of three men, one of whom struck B with a bottle above his eye. The appellants pursued the group and accosted the victim (V), who had not been the attacker, who had become separated from the rest of his group. B punched V to the face, stomped on his upper body a number of times, while C stomped on V‟s legs and buttocks. V suffered a subdural haemorrhage and damage to his eardrums. Having concluded that the sentencing judge had made a material error of fact, the question for the court was whether the appellants‟ sentences ought to be suspended.

*Held*: There were good reasons to suspend the sentences of both appellants: when considering the question of suspension, a lack of prior convictions and previous good character were significant. Material B provided clearly demonstrated his good character, and workplace references clearly demonstrated that he was conscientious: he had demonstrated he was a responsible person who had good family support and had shown contrition and remorse. B had only contested whether his conduct had been intentional or reckless, and the fact that he had suffered a head injury meant that his late plea did not show a lack of contrition.

Similarly, although C‟s references were not as compelling as B‟s, the court accepted that he appreciated the seriousness of his offending and was genuinely contrite. Both appellants had excellent prospects for rehabilitation and were unlikely to reoffend. In light of the fact that the appellants had already spent five months in prison, their sentences and non-parole period were reduced by that amount, with their respective sentences suspended upon entering into good behaviour bonds.

***R v THOMPSON* [2012] SASCFC 149**

*Sentence - Sentencing orders - Non-custodial orders - Deferral of and remand for sentence - Deferral of sentence - When appropriate.*

*Issues***:** When is it appropriate to defer sentence?

*Held***:** (1) The deferment of sentence under the *Criminal Law (Sentencing) Act 1988* (SA), s 19B, is to be reserved for the exceptional case. It is only when deferment will elicit information that the court needs and does not have that deferment should be contemplated. If there is no reasonable prospect of learning anything further of significance by deferring sentence, the court should not do so.

(2) In practice, s 19B is more likely to be engaged when there is a finely balanced question whether to suspend all, or part, of the sentence. While the power, on its terms, also extends

to cases in which a sentence of immediate imprisonment must be imposed but a question remains as to the length of the sentence and the non-parole period, the discretion to defer sentencing will rarely be exercised for that purpose.

(3) The approach to be adopted in determining whether or not to defer sentence will, as a general rule, be to ask: (a) whether the appropriate penalty, on the assumption that the defendant has the capacity to reform and demonstrates such capacity and commitment and taking into account all other relevant factors, is a bond or a suspended sentence; and (b) if it is, whether there is a real expectation founded upon solid grounds and not mere sentimentality that such reform is likely to occur; and (c) whether a deferred sentence would afford the defendant the opportunity to pursue the possibility of reform, so as to provide the court with evidence of capacity and prospects for reform that will then allow the court to fashion an order that will best protect the community and serve the purposes of punishment where it otherwise is not in a position to do so.

(4) Here, where the gravity of the offending and the defendant‟s offending history required the imposition of an immediate custodial sentence, s 19B should not have been invoked

***R v M*** **[2013] SASCFC 39**

Appeal against sentence – Grounds for interference – Sentence manifestly excessive or inadequate – Crown appeal against sentence – Refusal of intervention order – Five counts of rape – Aggravated serious criminal trespass – Theft – Guilty pleas after alibi notice disproved – Seven years' imprisonment – Four years' non-parole – Rape sentences wholly concurrent – Victim appellant's former partner – Offences committed in breach of bail agreement – Attack inside victim's home – Sexual attack with sledgehammer – Particular regard for general deterrence required where relationship breakdown – Too much weight given to appellant's personal circumstances and rehabilitation – Vicious and brutal attack on defenceless woman – Guilty plea did not demonstrate genuine contrition – Sentence so manifestly inadequate it brought administration of justice into disrepute – No need to identify specific error – Appellant resentenced – Head sentence 13 years – Nine years' non-parole – Intervention order made – Appeal allowed – Intervention orders (Prevention of Abuse) Act 2009 (SA).

***R v BFG*** **[2013] SASCFC 24**

*Homicide – Murder – Sentence: Particular cases – Minimum term, non-parole period – Mandatory minimum non-parole period – Interaction of statutory provisions.*

*Issues*: Must the mandatory minimum non-parole provision be read down?

*Facts*: The *Criminal Law (Sentencing) Act 1988* (SA), s 32(5)(ab), provided that the mandatory minimum non-parole period of a person sentenced to life imprisonment for murder was 20 years. Under s 10(1a), a court, in determining the sentence for an offence, must disregard any mandatory minimum non-parole period in respect of the sentence for the offence. The applicant contended that the provisions conflicted, so that s 32(5)(ab) must be read down in light of s 10(1a).

*Held*: (By Sulan J; Anderson and David JJ agreeing) It is evident that s 10(1a) is intended to apply to the setting of a head sentence for an offence, and does not require a court to disregard the minimum non-parole period. Therefore, the mandatory minimum non-parole provision applies.

***Western Australia***

***GILLESPIE v WESTERN AUSTRALIA* [2013] WASCA 149**

*Property offences – Robbery – Circumstances of aggravation – Procedure – Determination of aggravating circumstance by jury or judge alone – Statutory construction – Plea of guilty to robbery – Denial of circumstance of aggravation.*
*Issues***:** What is the procedure to be followed for an offence of robbery in which the indictment avers a circumstances of aggravation which would alter the maximum sentence to which the accused is liable?

*Held***:** (1) (by Mazza JA; Pullin JA agreeing) The *Sentencing Act 1995* (WA), s 7(3), requires an accused to be charged and convicted of committing the offence in certain circumstances in order to be liable to the statutory penalty imposed in such circumstances. Where an offender enters a plea of guilty to robbery and not guilty to the circumstances said to give rise to the higher penalty, there must be either a trial by jury, or by judge alone pursuant to an order under the *Criminal Procedure Act 2004* (WA), s 118, in order for the requirement of conviction to be satisfied.

(2) When a circumstance of aggravation is pleaded in an indictment, a verdict of a jury, or of the judge in the case of trial by judge alone, should be obtained in respect of that circumstance. The matter should not be resolved by a trial of issues.

(3) (by Martin CJ, dissenting) Where the accused enters a plea of guilty to the substantive offence but denies the presence of the circumstance of aggravation, the question of whether or not the offence was committed in the circumstance of aggravation is a question of fact which bears only upon the question of whether the offender is liable to the greater maximum penalty pursuant to the *Sentencing Act*, s 7(3)(a). By virtue of s 146, that question is to be determined by a judge alone.

***Australian Capital Territory***

***NELSON v HEIL* [2013] ACTSC 11**

*Fitness to plead or be tried – Diversionary order – Discretion of Magistrates Court (ACT) – —Appropriate to dismiss charge and refer accused to tribunal.*

*Issues*: How should the discretion to make a diversionary order be exercised?

*Held*: (1) The *Crimes Act 1900* (ACT), s 334, is available at every stage of a summary trial and applies in a wide range of circumstances. It is a discretionary decision, even though a value judgment is involved.

(2) The benefit of the section can be afforded a defendant without a plea being entered.

(3) To find whether it is —appropriate to deal with the defendant under the section, the court must give consideration to the possible proceedings under the ordinary criminal justice system. Accountability may very well be a pertinent issue in deciding whether it is appropriate to divert the defendant. Both the seriousness of the offence and the defendant's antecedents, to which s 334 requires the court to have regard, are highly relevant. It may be highly relevant as to whether the defendant's mental impairment was treatable or otherwise amenable to management within the mental health system. It would also be relevant whether the mental impairment contributed to the commission of the offence, and whether the defendant was floridly ill, though not unfit to plead.

(4) The court has a discretion to proceed (or not) under s 334, notwithstanding that the magistrate has in contemplation that a disposition order may later be made under s 331.

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