THE HIGH COURT ON CRIME 2011-2013

Stephen Odgers (and Mirko Bagaric)

CONSTITUTIONAL VALIDITY

Momcilovic v The Queen [2011] HCA 34

In *Momcilovic*, two important constitutional questions with significance for the criminal law were resolved. The Court held, by majority, that:

> (a) there was no s 109 inconsistency between Victorian legislation which criminalises drug trafficking and the Commonwealth Criminal Code which creates a similar offence with a different penalty (accordingly the Victorian legislation was valid); and
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> (b) section 36(2) of the Victorian Charter of Human Rights and Responsibilities, which provides that the Supreme Court may make a declaration that a statutory provision cannot be interpreted consistently with a human right, is valid and such a declaration is not amenable to the appellate jurisdiction of the High Court.

By a process of ordinary statutory construction, French CJ, Gummow, Hayne, Crennan and Kiefel JJ held that s 5 of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), which provides that "any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him … unless the person satisfies the court to the contrary" does not apply to the offence of trafficking contrary to s 71AC of the Act. Accordingly, there was no reversal of the onus of proof and no inconsistency with the Victorian Charter of Human Rights and Responsibilities.

Perhaps you might mention that this is the only decision of the High Court dealing with either the Human Rights Charter 2004 (ACT) or the Charter of Human Rights and Responsibilities 2006 (Vic) and that the majority of the Court (Heydon J dissenting) upheld the validity of the Victorian Charter, but in obiter the minority took a narrow view of the operation of the interpretation clause (s 32) of the Victorian Charter.

Crump v State of New South Wales [2012] HCA 20

This judgment upheld the validity of legislation which changed parole entitlement after a sentence had been imposed. This legislative change did not impermissibly alter a judicial determination.

The High Court unanimously disallowed an appeal challenging the validity of 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) which placed strict conditions on the release of serious offenders (one of which was the appellant) including that before being eligible for parole, they must be ‘in imminent danger of

dying, or … incapacitated to the extent that …[they] no longer [have] the physical ability to do harm to any person'.

In 1974, the appellant and a co-accused were convicted of murder and conspiracy to murder. Both offenders received life terms. The sentencing remarks of the trial judge were to the effect that they should spend the remainder of their lives in gaol. The sentencing judge further added:

> I believe that you should spend the rest of your lives in gaol and there you should die. If ever there was a case where life imprisonment should mean what it says - imprisonment for the whole of your lives - this is it.

This comment had no statutory basis. At the time of sentence, the Governor had power to release offenders on licence. This was later changed as part of a suite of laws which aimed to achieve 'truth in sentencing'. The changes included allowing courts to impose a set head sentence and non-parole period in relation to offenders that had been sentenced to life imprisonment. In 1997, the offender was re-sentenced to life imprisonment with a minimum term of 30 years' imprisonment; thereby making him eligible for parole in November 2003. Section 154A commenced in July 2001 and had the effect of reducing his eligibility for parole.

The High Court stated that sentences do not create rights or entitlements to be released on parole. This is a matter for the executive, as was noted by the High Court in the earlier decision of *Power v The Queen* [1974] HCA 26. The plurality (Gummow, Hayne, Crennan, Kiefel and Bell JJ) in this case dismissed the appeal on the basis that sentencing determinations do not 'create any right or entitlement in the plaintiff to his release on parole'.

The brevity of the judgment appears to reflect the weakness of argument on appeal. To this end it is noteworthy that in *Baker v R* [2004] HCA 45 the High Court upheld the validity of earlier changes to the parole criteria and Gleeson CJ expressly stated:

> Legislative and administrative changes to systems of parole and remission usually affect people serving existing sentences. The longer the original sentence, the more likely it is that an offender will be affected by subsequent changes in penal policy.

The accuracy of *Baker* was not challenged in *Crump*.

French CJ and Heydon J delivered separate judgments. French CJ's judgment usefully sets out the limits on the legislative powers of state legislatures which derive from Ch III of the Commonwealth Constitution. At [31] he states:

> Limits upon the power of State legislatures to make laws affecting State courts and their decisions are derived by implication from Ch III of the Constitution as explained in a number of decisions of this Court beginning with Kable v Director of Public Prosecutions (NSW)[74]. State legislatures cannot abolish State Supreme Courts[75] nor impose upon them functions incompatible with their essential characteristics as courts, nor subject them, in their judicial decision-making, to direction by the executive[76]. A State legislature cannot

> authorise the executive to enlist a court of the State to implement decisions of the executive in a manner incompatible with the court's institutional integrity[77]. Nor can a State legislature enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member[78]. State legislatures cannot immunise statutory decision-makers from judicial review by the Supreme Court of the State for jurisdictional error[79].

The challenged legislation in Crump did not exceed any of these limits.

Assistant Commissioner Michael James Condon v Pompano Pty Ltd [2013] HCA 7

The chief issue raised was whether s 10 of the *Criminal Organisation Act* 2009 (Q), which permits the Supreme Court of Queensland on application by the Commissioner of the Queensland Police Service to declare an organisation to be a "criminal organisation", is invalid under the Commonwealth Constitution because the procedures prescribed by the Act for the Queensland Supreme Court to decide whether to make a declaration impair the institutional integrity of that Court.

The principal submission of the respondents, who alleged invalidity, was that the institutional integrity of the Supreme Court was impaired because the Act permits the Court to receive and act upon material ("criminal intelligence") which must not be disclosed to a respondent to an application for a declaration or to any representative of the respondent. Information that relates to actual or suspected criminal activity must be kept from a respondent if the Supreme Court is satisfied that disclosure of the information could reasonably be expected to prejudice a criminal investigation, enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or endanger a person's life or physical safety.

The High Court held, unanimously, that the legislation did not impair the institutional integrity of the Supreme Court and was valid. However, the reasons given to support that conclusion varied somewhat. The plurality, Hayne, Crennan, Kiefel and Bell JJ, simply observed at [167] that "under the impugned provisions the Supreme Court retains its capacity to act fairly and impartially" – it was held that this "points firmly against invalidity" (at [169]) without further explanation. It was not explained how the Court's "capacity to act fairly" would remedy the adoption of a procedure whereby the Supreme Court might make final orders on the basis of such "criminal intelligence". In contrast, French CJ accepted that the mandated procedures "undoubtedly represent incursions upon the open court principle and procedural fairness" but observed that the Supreme Court "retains its decisional independence and the powers necessary to mitigate the extent of the unfairness to the respondent in the circumstances of the particular case". Those powers included the power of the Court itself to call witnesses, to determine what weight, if any, to give to criminal intelligence and to refuse to act upon such intelligence where to do so would give rise to a degree of unfairness in the circumstances of the particular case. The Chief Justice did not refer to the inherent jurisdiction of the Supreme Court to stay proceedings as an abuse of process. However, Gageler J did, and it was only that ultimate safeguard against procedural fairness which, in his Honour's view, saved the legislation from incompatibility with Chapter III of the Constitution. Gageler J observed at [177] that Chapter III mandates the observance of procedural fairness as an immutable

characteristic of a Supreme Court and of every other court in Australia – it is not entirely clear whether the other members of the Court accept that proposition.

***Monis v The Queen* [2013] HCA 4**

The question that arose was whether s 471.12 of the *Criminal Code (Cth)* (which relevantly provides: "A person is guilty of an offence if: (a) the person uses a postal or similar service; and (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, … offensive") was invalid on the basis that it impermissibly restricted the implied freedom of communication about government or political matters. That issue was to be resolved by the application of the "Lange test", which asks two questions (as formulated by the plurality judgment in *Monis* at [276]):

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

The High Court was evenly split. French CJ, Hayne J and Heydon J, in separate judgments, considered that the first question should be answered "yes" and the second question "no", with the consequence that the law was invalid. Crennan, Kiefel and Bell JJ, in the plurality judgment, agreed that the first question should be answered "yes" but answered the second question "yes" (emphasizing the objective nature of the test and the requirement of knowledge or recklessness on the part of the offender), with the consequence that the law was valid. Pursuant to s 23(2) of the *Judiciary Act*, the consequence of that evenly divided court was that the "decision" appealed from was "affirmed", that is, the appeal was dismissed. The decision of the NSW Court of Criminal Appeal had been that both Lange questions should be answered "yes", so that the result is that s 471.12 is not invalid.

Of course, it is apparent that attempting to draw any further conclusions about the application of the Lange test in future cases is fraught with uncertainty. The reasoning of the plurality in the High Court was not the same as the reasoning of the members of the NSW Court of Criminal Appeal, notwithstanding the fact that the questions were answered in the same way. More important, how the High Court, differently constituted, will deal with similar issues raised in the future is impossible to predict.

However, two points should be made. The first point is that all members of the High Court agreed with the NSW Court of Criminal Appeal that it was appropriate to "read down" the statutory language ("offensive") so that it was directed to "seriously offensive" communications. Thus, the plurality judgment observed that what was required was "a degree of offensiveness at the higher end of the spectrum, although not necessarily the most extreme. Words such as "very", "seriously" or "significantly" offensive are apt to convey this" (at [336]). It was noted that, when directing a jury, it might be "useful" to give "examples of the type of reaction which an offensive communication might engender" to show the level of seriousness of the offence and to point out that "one would expect such a communication to be likely to cause a

significant emotional reaction or psychological response. The former may range from shock through to anger, hate, disgust, resentment or outrage, and the latter may include provocation, anxiety, fearfulness and insecurity" (at [338]). The other members of the High Court accepted such a construction of the provision but considered, unlike the plurality, that even when so read down the provision still breached the Lange test.

The second point is that Heydon J made it very plain that, while he agreed with French CJ and Hayne J that the provision was invalid on the basis that it failed to meet the Lange test, he would have held that no implied freedom of communication about government or political matters should be recognized as a basis for statutory invalidity - if that issue had had been argued before the Court. In that regard, his views may be seen to be very much in the minority.

OMISSIONS

***Director of Public Prosecutions v Poniatowska* [2011] HCA 43**

The question in this case was whether s 135.2(1) of the Commonwealth Criminal Code, which creates an offence of obtain a financial advantage from a Commonwealth entity knowing there is no entitlement to the financial advantage, makes an omission to act a physical element of the offence. A physical element of s 135.2(1) is that a "person engages in conduct" (s 135.2(1)(a)) and section 4.1(2) provides that, in the Code, "engage in conduct" means "(a) do an act; or (b) omit to perform an act". However, s 4.3 of the Code limits the circumstances in which an omission to perform an act can be a physical element of an offence. It provides:

> An omission to perform an act can only be a physical element if:
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> (a) the law creating the offence makes it so; or
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> (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

It was common ground in the High Court that there was no statutory duty upon the respondent to perform any act, so that s 4.3(b) was not engaged. The question considered in the High Court was whether the terms of s 4.3(a) were satisfied. In the South Australian Full Court, Doyle CJ and Duggan J had held that the offence created by s 135.2(1) could not be committed by any omission, on the basis of the common law principle that an omission will attract criminal liability only if the omission is a failure to perform a legal duty (and neither 135.2(1) or any other Commonwealth law imposed such a duty). In the High Court, the plurality judgment of French CJ, Gummow, Kiefel and Bell JJ reached the same conclusion (that s 135.2(1) does not make any omission a physical element of the offence) but for an entirely different reason. There was no reliance on importation of common law principles into the Code. Rather, the plurality stated at [44]:

> The principles of criminal responsibility stated in the Code proceed from the view that the criminal law should be certain and that its reach should be able

> to be ascertained by those who are the subject of it. Section 4.3 is a reflection of those ideas. The exceptions to the general principle that it states do not extend to criminalising the omission of any act which is able to be causally related to a result of conduct.

That is, the goal of providing a comprehensive statement of each of the elements of a criminal offence would not be met by criminalizing the omission of any act that could be causally related to some specified result - an offence-creating provision will only make an omission to perform an act a physical element of the offence where the provision proscribes the omission of a specified act (at [37]). This approach may be contrasted with the High Court's judgment in *R v LK; R v RK* [2010] HCA 17, where it was held at [107] that "the words 'conspires' and 'conspiracy' in s 11.5(1) are to be understood as fixed by the common law subject to express statutory modification", notwithstanding the fact that s 11.5(2) appeared to have expressly provided for the elements of conspiracy under the Code.

DPP (Cth) v Keating [2013] HCA 20

In *DPP (Cth) v Keating* [2013] HCA 20 the High Court considered s 4.3(b) of the Commonwealth Criminal Code, which provides that an "omission to perform an act" can be a physical element if "the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform". The question was whether legislation which purported to create a duty retrospectively could satisfy the requirements of this provision. The Court held that "criminal responsibility under s 4.3 is confined to the failure to do a thing that *at the time of the failure* the law requires the person to do" (at [49]). Accordingly, the retrospective creation of the duty could not make the omission to do an act in compliance with that duty a basis for criminal responsibility under the Code. Given this holding, it was not necessary to decide whether the retrospective creation of the duty was invalid on the basis that it infringed the separation of judicial and legislative powers mandated by the Constitution.

In *Commonwealth Director of Public Prosecutions v Poniatowska* [2011] HCA 43, 244 CLR 48 the High Court had considered s 4.3(a) (which provides that an "omission to perform an act" can be a physical element if "the law creating the offence makes it so") and held that a law creating an offence which used the words "engages in conduct" (defined to include "omits to perform an act") did not make an omission to perform an act a physical element of the offence for the purposes of s 4.3(a) of the Criminal Code because it did not proscribe "the omission of a specified act" (at [37]). The Court considered that the Code principles of criminal responsibility "proceed from the view that the criminal law should be certain and that its reach should be able to be ascertained by those who are the subject of it", so that s 4.3(a) would not "extend to extend to criminalising the omission of any act which is able to be causally related to a result of conduct". In *Keating*, the High Court emphasised the use of the present tense ("there is a duty to perform") in s 4.3(b) in concluding that criminal responsibility is confined to the failure to do a thing that at the time of the failure the law requires the person to do. The Court also took into account the principle relied upon in *Poniatowska,* that the criminal law should be

certain and its reach ascertainable by those who are subject to it a case where legislation had been enacted, to support the same conclusion.

CONSPIRACY

Agius v The Queen [2013] HCA 27

In *R v LK; R v RK* [2010] HCA 17, the High Court analysed s 11.5 of the Commonwealth Criminal Code, dealing with the general principles applying to conspiracy. In *Agius*, the High Court applied some of this analysis in respect of s 11.5 to s 135.4 of the Code, which creates in s 135.4(5) the offence of conspiring with another person to dishonestly cause a loss, or to dishonestly cause a risk of loss, to a third person (where the third person is a Commonwealth entity). Thus, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ held that common law concepts inform the meaning of the term "conspires" in this provision (at [32]) and the conditions of guilt specified in s 135.4(9) are not elements of the offences but are "epexegetical of what it is to 'conspire' with another person to commit an offence" (at [34], [36]).

It was argued in the High Court that the words "entered into an agreement" in s 135.9(a) should be read literally, so that in a case where it was alleged by the prosecution that conspirators entered the relevant agreement at a time prior to the legislation enacting the offence under s 135.4(5) coming into force (which was 24 May 2001), the prosecution must inevitably fail (since the requirements of s 135.4(9)(a) must be proved to exist and the Code should not be given retrospective effect). This argument was rejected. French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ held at [36], consistently with the common law position, that "[i]t requires, before a person can be found guilty of an offence against the section, that the Crown prove the existence of or participation in an agreement. It does not require that the Crown prove that the agreement was formed after the date on or after 24 May 2001". As Gageler J stated at [56], "the physical element of conspiracy may be satisfied by continuing adherence to an existing agreement".

Finally, the High Court held at [41] that the conduct element for the offence may be satisfied by "conduct" in its extended sense, which, by virtue of s 4.1 of the Code, includes "a state of affairs". Thus, so far as each party to the agreement is concerned, continued participation in an agreement is a state of affairs over which each participant is capable of exercising control (see s 135.4(12)). It is a continuing offence. As French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ stated at [43], "[e]ach day that a party adheres to the agreement is another day on which the offence of conspiracy is committed".

JOINT ENTERPRISE/EXTENDED COMMON PURPOSE

Huynh v The Queen [2013] HCA 6

The High Court reaffirmed that in a case based on joint enterprise or extended common purpose requires proof that the offender participated in some way in furtherance of the criminal enterprise – "[l]iability attaches to all the parties to the agreement who participate in some way in furthering its execution" (French CJ, Crennan, Kiefel, Bell and Gageler JJ at [37]). However, such participation may be

satisfied by mere presence when the crime is committed pursuant to the agreement (at [38]).

MANSLAUGHTER

Burns v The Queen [2012] HCA 35

The Court held that supplying drugs to another person does not constitute an unlawful and dangerous act, which could ground the offence of manslaughter. The appellant supplied methadone to a person who died as a result of the combination of this drug with a prescription drug. The appellant was convicted of manslaughter in circumstances where the prosecution case alleged two alternative bases for the offence. The first was that supplying methadone was an unlawful and dangerous act. The other was that by not calling for medical attention for the victim, the appellant had committed manslaughter by criminal negligence. The second basis stemmed from the fact that the victim was 'out of it' when he was given the drugs and was found dead in a toilet block behind the appellant's premises.

The High Court allowed the appeal. Given that the case was put in the alternative and the basis on which the appellant was convicted was not known, the Court ordered a retrial. The plurality (Gummow, Hayne, Crennan, Kiefel and Bell JJ) stated:

> To supply drugs to another may be an unlawful act but it is not in itself a dangerous act. Any danger lies in ingesting what is supplied….
>
> The Crown's concession that the unlawful supply of methadone was not an act capable of founding liability for manslaughter should be accepted. The supply of the methadone was not an act that carried an appreciable risk of serious injury. That risk arose when the drug was consumed. The cause of the death of the deceased in law was the consumption of the methadone and not the anterior act of supply of the drug[138].

From the jurisprudential perspective, the more important aspect of the case is the examination by the plurality of the circumstances in which the law imposes a positive duty to assist other people. Their Honours stated:

> Criminal liability does not fasten on the omission to act, save in the case of an omission to do something that a person is under a legal obligation to do[144]. As a general proposition, the law does not impose an obligation on individuals to rescue or otherwise to act to preserve human life[145]. Such an obligation may be imposed by statute or contract or because of the relationship between individuals. The relationships of parent and child, and doctor and patient, are recognised as imposing a duty of this kind. A person may voluntarily assume an obligation to care for a helpless person and thereby become subject to such a duty[146]. Outside limited exceptions, a person remains at liberty in law to refuse to hold out her hand to the person drowning in the shallow pool[147].
>
> The appellant had no relationship with the deceased beyond that of acquaintance. … In question is the source of the legal duty which obliged the appellant to obtain medical assistance for the deceased and how her failure to do so can be said to have been a cause of his death.

> The appellant was not in a relationship with the deceased which the law recognises as imposing an obligation to act to preserve life. She had not voluntarily assumed the care of the deceased nor had she secluded him such as to deny him the opportunity that others would assist him. …

French CJ delivered a judgment with similar reasons. Heydon J noted that the Court was effectively bound to accept the Crown concession that supplying drugs can constitute manslaughter by unlawful and dangerous act. He agreed with the principles set out by the plurality regarding liability for omissions but was of the view that a retrial was appropriate on the basis that the evidence could ground an alternative basis for manslaughter by unlawful and dangerous act, in that the accused rather than simply supplying methadone to the deceased, in fact, injected the drugs into him.

INSIDER TRADING

Mansfield v The Queen; Kizon v The Queen [2012] HCA 49

The Court unanimously (Heydon J delivering a separate judgment) held that an insider-trading offence set out in s 1002G of the *Corporations Act 2001* (Cth), can be committed even if the relevant information is false. The Court rejected the submission that a lie is not information for the purposes of the offences. The Court took a broad view of the meaning of information and in doing so, the plurality stated:

> The word "information" in its ordinary usage is not to be understood as confined to knowledge communicated which constitutes or concerns objective truths. Knowledge can be conveyed about a subject-matter (whether "fact, subject, or event") and properly be described as "information" whether the knowledge conveyed is wholly accurate, wholly false or a mixture of the two. The person conveying that knowledge may know or believe that what is conveyed is accurate or false, whether in whole or in part, and yet, regardless of that person's state of mind, what is conveyed is properly described as "information"….

DANGEROUS DRIVING CAUSING DEATH

King v Queen [2012] HCA 24

The Court by majority rejected an appeal by an accused against convictions for culpable driving contrary to s 318(1) of the *Crimes Act 1958* (Vic). The appeal related to the manner in which the trial judge directed the jury regarding the lesser alternative offences of dangerous driving causing death contrary to 319(1) of the *Crimes Act*. The accused submitted that the test for the alternative offence made it appear too minor an offence to encapsulate the gravamen of what was alleged against him, thereby increasing the likelihood that the jury would find him guilty of the more serious offence of culpable driving. In particular, the accused complained about the aspect of the direction that dangerous driving is established where the driving ‘significantly increased the risk of harming others’ and that there is no need to show that the accused was ‘deserving of criminal punishment’.

The trial judge's directions accorded with the law at that time, however, the law was changed by the decision of *R v De Montero* (2009) 25 VR 694, which imposed a higher level of culpability for the s 319 offence. It was held that the offence required driving which caused 'a considerable risk of serious injury or death to members of the public'.

The plurality (French CJ, Crennan and Kiefel JJ) stated that *De Montero* was wrongly decided and that the trial judge's directions were not erroneous, except that it was wrong to state that the offence required the prosecution to establish that the accused deserved criminal punishment. The Court accepted that dangerous driving is not a form of criminal negligence and the level of risk that is necessary to constitute the offence is similar to the offence in s 52A of the *Crimes Act 1900* (NSW).
This misdirection by the trial judge regarding the concept of criminal punishment was held not to constitute a miscarriage of justice. At [52] the plurality stated:

> In seeking to instruct the jury that the direction, applicable to s 318 of the Crimes Act, about whether the conduct of the driver was deserving of punishment by the criminal law, was not applicable to s 319, the trial judge did not err in law. … The direction was infelicitous but did not involve a misstatement of the law. It was not argued that it in any way qualified the correct direction given by the trial judge in relation to s 318. The direction given by the trial judge in relation to s 319 did not constitute a departure from trial according to law. It did not constitute a miscarriage of justice…

The plurality also made the broader point that in relation to the offence of culpable driving. a direction along the lines that negligence deserving of criminal punishment is inappropriate, given that it is likely to confuse jurors who are unlikely to know the difference between criminal and civil standards of negligence.

Bell J and Heydon J (in separate dissenting judgments) also held that the instructions to the jury were erroneous and, in particular, that it was incorrect to instruct in terms of criminal desert regarding the dangerous driving offence. However, they held that this constituted a miscarriage of justice – which could not be glossed over by the proviso.

The minority views are the more persuasive. The accused was charged with a criminal offence. The alternative to the offence (a serious offence of itself) was described in a way that made it seem that it was not a criminal act. This was wrong. It is speculative to suggest that this did not damage his chances of being guilty of the lesser offence. Speculation should have little place in activities that are defining of human lives.

ABUSE OF PROCESS

***Moti v The Queen* [2011] HCA 50**

On 3 November 2008 the appellant was charged with seven counts of engaging in sexual intercourse with a person under the age of 16 years whilst outside Australia contrary to s 50BA of the Crimes Act 1914 (Cth). All counts related to one complainant and were alleged to have occurred in 1997. On 27 December 2007 he was deported from the Solomon Islands and flown to Australia.

The High Court held by majority (Heydon J dissenting) that further prosecution of the charges would be an abuse of process because of the role that Australian officials played in the appellant being deported to Australia, and should be permanently stayed. The Acting High Commissioner in Honiara believed, correctly, that Mr Moti had seven days in which to appeal before he could lawfully be deported and conveyed that opinion to her superiors in Canberra. Despite this, her superiors authorised Australian officials in Solomon Islands to supply travel documents relating to Mr Moti knowing that those documents would be used to deport Mr Moti before his deportation was lawful. Given the basic proposition that the *end* of criminal prosecution does not justify the adoption of any and every *means* for securing the presence of the accused, the knowing connivance of the Australian Government in the appellant's unlawful deportation meant that there was an abuse of process, bearing in mind the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes.

You might mention that the majority appeared to collapse the jurisprudence that previously applied to determine whether illegal extradition should result in a permanent stay into the general principles governing abuse of process.

On the other hand, the High Court rejected an argument that there was an abuse of process resulting from the fact that substantial payments were made to the complainant and to her family by the Australian Federal Police. The payments followed repeated statements by the complainant and her father to the effect that the complainant would not participate any further in the prosecution of the appellant unless she and her family were brought to Australia and given "financial protection". The payments were said to be made to provide for the "minimal daily needs" of the complainant and her family and, for part of the time, to provide accommodation in Vanuatu. The High Court held that the payments were not unlawful and "were not designed to, and did not, procure evidence from the prosecution witnesses". It was not open to conclude that the payments were "an affront to the public conscience" justifying a stay of the appellant's prosecution. Equally, it had not been shown that the payments would result in a trial that was not fair.

Likiardopoulos v The Queen [2012] HCA 37

The High Court unanimously rejected an appeal by an accused who was convicted of murder. The deceased died following a prolonged assault by the accused and others which lasted for two days. The appeal grounds related to an alleged abuse of process by the prosecution in proceeding with a murder charge against the accused in circumstances where pleas to lesser offences were accepted by the prosecution by five other people who were involved in the death of the victim. The second ground was that the trial judge should not have left the murder charge based on accessorial liability to the jury. Both grounds failed. The plurality stated:

> It is well settled that the circumstances which may amount to an abuse of process are not to be narrowly confined[36] and it is possible to envisage cases in which an exercise of prosecutorial discretion may amount to an abuse of the process of the court. However, there is nothing in the conduct of the proceedings arising out of the death of the deceased that has produced

> unfairness of the kind that would lead a court to intervene to prevent the abuse of its process[37].
>
> Prominent among the factors bearing on the exercise of the prosecutorial discretion is likely to be consideration of the evidence available to establish guilt of the more serious offence[38]. The appellant's submission that there was "on the record" an acceptance by the court at the instance of the Crown "that these people are not murderers" is apt to mislead in this context. Commonly, the factors informing the Director's election to accept pleas to lesser offences will not be known….
>
> There was no unfairness and the administration of justice was not brought into disrepute, by reason of the acceptance of pleas of guilty to lesser offences from the persons whom the Crown alleged had acted at the appellant's urging, in prosecuting the appellant as an accessory to the murder of the deceased.

French CJ delivered a separate judgment concurring with the plurality; and expressly noting that in some circumstances the prosecutorial discretion may be reviewable by the courts. Heydon J delivered a separate judgment in which he too declined to revisit the law regarding participatory liability.

STATUTORY REVERSAL OF THE BURDEN OF PROOF

***Momcilovic v The Queen* [2011] HCA 34**

In *Momcilovic*, the High Court considered the application of s 5 in the Victorian Drugs Act to an offence of trafficking in a drug of dependence under s 71AC of the Act. The term "traffick", in relation to a drug of dependence, is defined in s 70(1) to include "have in possession for sale, a drug of dependence". However, s 5 of the Act extends the concept of possession to encompass a deemed possession based upon occupancy of premises in which drugs are present:

> Meaning of possession
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> Without restricting the meaning of the word possession, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary.

The High Court accepted that, applying common law and statutory rules of interpretation, including the interpretive rule created by s 32(1) of the Victorian Charter of Human Rights and Responsibilities, s 5 reverses the onus of proof and casts a legal onus on an accused person to negative possession of drugs in premises occupied by the accused, not only an evidential burden requiring the accused to do no more than introduce evidence capable of negativing possession.

On the other hand, the High Court held that this did <u>not</u> require the appellant to prove that she was not aware of the existence of drugs present in premises that she occupied. Section 73(2) of the Act provides that unauthorised possession by a person of a drug of dependence in a quantity that is not less than the applicable traffickable quantity "is prima facie evidence of trafficking by that person in that drug of dependence."

Bearing in mind that "traffick" is defined to include "have in possession *for sale*", the Court concluded that s 5 did not apply to an offence under s 71AC – the appellant could not intend to sell drugs unless she was aware of their existence. While s 73(2) might assist the prosecution to establish a prima facie case, awareness of the existence of the drugs still had to be proved beyond reasonable doubt by the prosecution.

EVIDENTIAL BURDEN

***The Queen v Khazaal* [2012] HCA 26**

The Court upheld a conviction against the accused for the offence of making a document connected with assistance in a terrorist act contrary to s 101.5(1) of the *Criminal Code* (Cth). The conviction was quashed on appeal by New South Wales Court of Criminal Appeal, and this decision was overturned by the High Court.
The charged related to an electronic book (titled: 'Provisions on the Rules of Jihad') authored by the accused in 2003, which he published online (under a pseudonym). The book was written in Arabic and encouraged acts such martyrdom, violent jihad and assassination, and identified people who should be assassinated. The book also had content regarding training for assassination.

The offence is not committed if the book was not made to facilitate assistance in a criminal act. Section 13.3 places the burden on the accused to adduce evidence establishing a reasonable possibility that the making of the book was not related to a terrorist act. Thus, the evidential burden is placed on the accused. The accused did not give evidence but submitted that evidence adducted by prosecution that he was a journalist and research suggested that the book did not have a terrorist link. The trial judge rejected the accused's submission and held that the evidential burden had not been discharged. The New South Wales Court of Criminal Appeal disagreed.

The accused cross-appealed, submitting that the trial judge gave an incorrect direction regarding the meaning of the phrase: 'connected with ... assistance in a terrorist act' in s 101.5(1). The High Court disagreed with the accused in relation to both matters.
In the plurality judgment, Gummow, Crennan and Bell J, stated that the evidential burden had not been satisfied because:

> It may be accepted that the respondent was right to contend that the operative words in s 13.3(6), "adducing or pointing to evidence that suggests a reasonable possibility" in relation to the relevant negative state of affairs in s 101.5(5) required no more than slender evidence. The prosecution did not disagree. It may also be accepted that, for the purposes of establishing whether the evidential burden (as defined in s 13.3(6)) has been discharged, the evidence may be taken at its most favourable to the accused.
> … Here, there had been no exclusion of any evidence relied upon by the respondent to support his contention that his making of the e-book was not intended to facilitate assistance in a terrorist act.
> In the absence of any evidence of his intention in making the e-book, the evidence that the respondent had acted lawfully in the past as an accredited journalist interested in Islam, and had published material about Islam, was incapable of supporting or raising an inference that the respondent's making of the e-book was a lawful activity not intended to facilitate the terrorist act

> particularised in the indictment in relation to count 1. Such evidence said nothing about the respondent's situation in making the e-book.

The Court also rejected the submission that: "The words 'connected with' mean that the [e-book] must itself have been capable of directly assisting in the commission of a terrorist act. A mere remote connection will not suffice", and approved of a broader use of the term as charged by the trial judge. French CJ and Heydon J delivered separate concurring judgments.

SPOUSAL RAPE IMMUNITY

PGA v The Queen [2012] HCA 21

The High Court by majority (Bell J and Heydon J dissenting) held that the common law in Australia in 1963 did not incorporate the doctrine of spousal immunity to rape. In 2010, the accused was charged with a number of offences, including two of rape against his wife. The rapes were alleged to have occurred in 1963. At this time, the elements of rape in South Australia were defined by the common law. In the earlier decision of *R v L* (1991) 174 CLR 379 the High Court stated that the concept of a wife giving irrevocable consent to sex with her husband was not a part of the common law at that time– if, in fact, this was ever the position. In *PGA*, the Court expanded on this analysis and held that if the husband's immunity to rape was part of the common law, this had changed at least prior to 1935 when the *Criminal Law Consolidation Act 1935* (SA) was enacted. Section 48 of this Act criminalised rape – although the elements were still defined by the common law.

MARITAL PRIVILEGE

Australian Crime Commission v Stoddart [2011] HCA 47

The High Court held that the common law no longer recognizes the existence of a spousal privilege against incrimination of the spouse. French CJ and Gummow J held that there was insufficient authority to support a privilege against spousal incrimination. Crennan, Kiefel and Bell JJ held that the "assumption" made in respect of such a privilege by text writers did not mean that the common law courts had developed such a doctrine. Only Heydon J dissented. Of course, a separate question is whether a person should be compelled in a criminal proceeding to give evidence incriminating of his or her spouse. The uniform Evidence legislation, for example, confers a discretion on a court to permit a person not to testify against his or her spouse.

THIRD PARTY CONFESSIONS

Baker v The Queen [2012] HCA 27

In this case, the High Court revisited the issue of the admissibility of admissions made by third parties in criminal cases. Nearly 20 years earlier, the High Court in *Bannon v R* [1995] HCA decided that such evidence was not admissible. In *Baker*, the Court unanimously reached the same result. The appellant also submitted that a narrower exception should apply in relation to the admissibility of third party confessions, in

that they should be admitted where they are made by co-accused. This submission was also rejected.

A striking aspect of this case (given that special leave was given) is the brevity with which the Court dealt with arguments. The plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell) stated, at [56], that:

> The consequence of upholding the broad contention would be to effect a significant alteration to the common law of evidence in those States which to date have chosen not to adopt the uniform Evidence Act or to modify the hearsay rule along the lines of the English legislation or otherwise. In circumstances in which the application of the hearsay rule in the appellant's trial did not occasion a miscarriage of justice [because the relevant statement by the co-accused did not provide unambiguous support for the accused's position), the invitation to effect that change should be rejected.

Heydon J delivered a separate judgment to similar effect. The case is of no wider significance than the admissibility of third party confessions. However, the Court made some tentative observations that such admissions may be made admissible in the jurisdictions governed by the Uniform Evidence Acts: see the plurality [55], and Heydon J at [115] to [119]. Also, the Court displayed no enthusiasm for the argument that the common law should be developed and adapted in light of the Uniform Evidence Acts.

SIMILAR FACT EVIDENCE

BBH v The Queen [2012] HCA 9

The differing ways in which the justices classified evidence of alleged prior sexual misconduct highlights the fine distinction between relationship evidence; propensity evidence and irrelevant evidence. The majority Heydon J, Bell J and Crennan and Kiefel JJ stated that evidence by the complainant's brother that he had seen the accused (the father) in a sexual position with the complainant in relation to an event that was not charged was propensity evidence and admissible because it satisfied the test for admissibility (which in Queensland is the 'another rational view test' set out in *Pfennig v The Queen* [1995] HCA 7 - which is adopted in Criminal Code (Qld). The other three members of the Court held that the evidence was inadmissible because it was equivocal (the incident described by the brother may have had a non-sexual explanation) and, hence, not be relevant. The contrasting perspectives are reflected in the opinions of French CJ and Heydon J.

French CJ noted generally, at [53], that:

> Typically the cases about the admissibility of propensity evidence in relation to sexual offences have been decided on the premise that logical relevance has been established. The species of propensity evidence designated "similar fact evidence" has been admitted or excluded by reference to whether or not the probative force of the evidence outweighs its merely prejudicial effect. …

He then stated that the evidence in this case was not admissible because it may have had a non-sexual explanation:

> The evidence was irrelevant because it was equivocal. As counsel for the applicant said, all the complainant's brother was able to give was a snapshot of an incident. The brother offered, in retrospect, an innocuous explanation for what had occurred. Whatever arguments might be constructed to support the proposition that, for reasons to do with the potential consequences of his testimony for his father, he was stating a theory in which he did not believe, the explanation he gave was rationally open. His evidence was not admitted as evidence of an uncharged act although, as noted earlier, the trial judge's directions may have left the jury with the belief that they could treat it as such. Despite being admitted as evidence of "guilty passion" it was not probative of a sexual act. In the circumstances, if it was not probative of a sexual act, it was not probative of guilty passion.

Hayne J, with whom Gummow J agreed, adopted a similar position.

Heydon J noted (citing Wigmore) that when assessing the relevance of evidence, a "measure of reasonable doubt need not be applied to the specific detailed facts, but only to the whole issue". He then added:

> In assessing questions of relevance in relation to admissibility, it is not for judges to speculate about possible constructions of the evidence which are adverse to the interests of the tendering party. It is necessary to assess relevance by taking the proposed evidence at the highest level it can reasonably be put at from the tendering party's point of view. It is not correct for judges in jury trials to assess the probative value of the evidence for themselves, and reject it as irrelevant if they identify aspects of it which may make it unconvincing or not probative in the fashion which the tendering party alleges. The possibility or likelihood, even, that evidence is fabricated does not make it irrelevant….

Bell J decided the matter with a linear application of the test in *Pfennig*. She stated:

> The admissibility of W's evidence fell to be determined after the complainant's evidence was completed. The question of whether there was a rational view of the camping incident consistent with the applicant's innocence did not depend upon the applicant advancing an innocent explanation for the incident. However, it was apparent from the cross-examination that the occurrence of the incident was in issue. In determining whether the …[suggested alternative explanation for the evidence] was a rational one, it was appropriate to consider the improbability of that explanation being true, in circumstances in which it appeared the applicant had no recall of such an event.

A similar position was adopted by Crennan and Kiefel JJ in their joint judgment. The different reasons advanced in *BBH* will further cloud the law relating to similar fact evidence. The minority, in effect, stated that the exception in *Hoch v R* [1988] HCA 50 (whereby the possibility of concoction can so dramatically undercut the

weight of the evidence that it is inadmissible) should extend to situations where the evidence in dispute is weak for other reasons.

DNA EVIDENCE

Aytugrul v The Queen [2012] HCA 15

This involved an appeal based on the manner in which DNA evidence against an accused (charged with murder) was presented by the prosecution. The Court unanimously held that there was no error when evidence of DNA results was tendered as an 'exclusion percentage' accompanied by 'an equivalent frequency ratio', and an explanation of the concepts and the relationship between the two was provided to the jury.

The DNA evidence consisted of a hair located on the thumbnail of the deceased. The results of the analysis showed that the hair could have come from the appellant and that one person in 1,600 people would have the DNA profile that was found in the hair. This form of presenting the data is termed 'the frequency ratio'. Mathematically, it means that 99.9 per cent of the population would not have DNA that matched the hair. This form of presenting the data is called 'the exclusion percentage'.

It was submitted that the trial judge made an error in allowing the DNA evidence to be expressed in exclusion terms due to its prejudicial nature, and that it should have been excluded under either section 137 or 135 of the *Evidence Act* 1995 (NSW). In rejecting this submission, the plurality (French CJ, Hayne, Crennan and Bell JJ) held:

> This aspect of the appellant's submissions proceeded from an understanding of the term "evidence" that sought to apply both s 137 and s 135 on the footing that "evidence" about frequency ratios would be different and distinct from "evidence" about exclusion percentages[32]. Given the mathematical equivalence of the two statements, there may be some doubt about the validity of approaching the application of the two sections on the basis that there were two distinct pieces of evidence in issue. There is no need, however, to resolve this question.
>
> The appellant accepted that the evidence about exclusion percentages was relevant – that is, that it was evidence that could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue[33]. The appellant's submissions thus accepted that evidence expressed in the form of an exclusion percentage had, of itself, some probative value. And given that the exclusion percentage and the frequency ratio were no more than different ways of expressing the one statistical statement, the probative value of the exclusion percentage was necessarily the same as that of the frequency ratio.

Heydon J delivered a separate judgment, in which he also disallowed the appeal for similar reasons. His judgment contains a thorough account of the meaning of 'probative value'.

An interesting aspect of the case is that the Court declined to rely on literature supporting the inference that statistics presented in certain ways (e.g., exclusion

percentages) carry greater persuasion (and sometimes undue persuasion) than the same data presented in other statistical terms. The plurality stated that 'non-law' literature which conveyed such views was not admissible because it was not a matter of judicial notice (as incorporated in s 144 of the *Evidence Act 1995* (NSW)) and it was not the subject of expert evidence. However, there was no indication at the hearing that such literature would not be received by the Court. Further, the Court phrased the issue in terms of whether, as a general rule, exclusion percentages should be rejected in evidence; as opposed to the more specific issue of whether it should be excluded on the facts of the case. Thus, the outcome of this case is likely to be narrowly confined.

SUMMING UP TO A JURY

Huynh v The Queen [2013] HCA 6

In this unanimous judgment (French CJ, Crennan, Kiefel, Bell and Gageler JJ) the High Court reaffirmed the proposition that the duty of a judge with regard to summing up to the jury at the end of a criminal trial is "to decide what the real issues in the case are and to direct the jury on only so much of the law as they need to know to guide them to a decision on those issues" (at [31]). That proposition was applied in two ways.

First, a complaint that the trial judge had failed to direct the jury in a case based on, in the alternative, joint enterprise/extended common purpose required proof that the offender participated in some way in furtherance of the enterprise was rejected on the basis that "proof of the agreement and not participation in it was the issue" in the trial – none of the appellants had raised any issue about participation (they were all present nearby when the principal offence was committed) and, notwithstanding that "participation" was an element of the offence, it was not necessary to direct the jury that it must be proved in the circumstances of this case. While it is common to direct a jury regarding (all) the elements of the offence, omission to specify an element of liability that is not in issue in the trial is not legal error.

Second, while it would commonly be appropriate in a trial of multiple accused "to separate for the jury's consideration the evidence properly relevant and material in the case of each, and to present the case made against each of the accused separately", that is not always necessary and would not be appropriate in a case where "the whole of the oral evidence was common to the three cases, and that many of the factual issues were common to liability in each case" (at [40]). While "[i]t was the responsibility of the trial judge to structure the summing-up in a way that he assessed would most effectively distil the issues for determination in each case and, to the extent that it was necessary to do so, to remind the jury of the evidence bearing on the determination of those issues", separating the cases in respect of each accused would have resulted in "needless repetition" and the way in which the summing up was structured "fairly put the case of each appellant".

Queen v Getachew [2012] HCA 10

This case was decided (unanimously) on a narrow point. The proposition that it stands for is the entrenched doctrine that a trial judge should only direct a jury on issues that

from the evidential perspective have been raised at trial. The accused in this case was convicted of rape.

The complainant and three people, one of whom was the accused, were drinking together in the early hours when they returned to a house. The accused and complainant laid together on a mattress. The complainant stated that when she awoke, the accused was penetrating her – after she had resisted his advances before she fell asleep. At trial the accused elected to not give evidence. The accused's case was that penetration did not occur.

The Victorian Court of Appeal upheld the accused's appeal on the basis that the trial judge did not charge the jury that it should consider the possibility that the accused had a subjective belief that the complainant consented to sexual intercourse, even though she was sleeping. Belief in consent is a defence to rape in Victoria – although, as the High Court emphasised in this case, at [23]:

> the relevant mental element for the offence of rape as awareness that the complainant was not or might not be consenting or … not giving any thought to whether the complainant was not or might not be consenting. Belief in consent is not the controlling concept. It is relevant only so far as it sheds light on the accused's awareness that the complainant was not or might not be consenting.

The High Court allowed a Crown appeal against the decision of the Court of Appeal. It noted that s 37 of the Crimes Act 1958 (Vic) states that prescribed directions are to be given to a jury if relevant to a fact in issue, and this is buttressed by s 37AA which requires certain directions to be given if evidence is led or an assertion is put that the accused believed that the complainant was consenting. Accordingly, a direction about consent was inapposite in this case, given that no evidence was tendered or assertion made that the accused believed that the complainant was consenting.

Hargraves v The Queen; Stoten v The Queen **[2011] HCA 44**

The High Court re-affirmed an earlier judgment, *Robinson v The Queen* (1991) 180 CLR 531, which held that it would deflect the jury from its fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt for a trial judge to suggest that the accused's evidence be evaluated on the basis of his or her interest in the outcome of the trial. However, it was held that merely inviting the jury to take into account "self-protection" as a possible interest bearing on the credibility of any witness would not have been seen by the jury as directed to the accused. It was not a comment such as would, in the context of the whole summing up to the jury, deflect the jury from its task of deciding whether the prosecution had proved its case beyond reasonable doubt. The comments, therefore, did not cause a miscarriage of justice.

SENTENCING

Muldrock v The Queen **[2011] HCA 39**

The Court allowed an appeal in respect of the application of the "standard non-parole

period" provisions in Division 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). In so doing, the Court effectively ruled that, for more than a decade, the NSW Court of Criminal Appeal Section has regarded that Division as much more prescriptive than it really is. 54B(2) provides:

> When determining the sentence for the offence, the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.

French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ concluded at [25] that it is an error to characterise s 54B(2) as framed in "mandatory" terms. The High Court accepted a submission that "the effect of the section is not to mandate a particular [non-parole period] for a particular category of offence rather it preserves the full scope of the judicial discretion to impose a non-parole period longer or shorter than the [standard non-parole period]". The reference to "the full scope" of the judicial discretion being preserved should be emphasized. It was concluded at [26]:

> Section 54B(2), read with ss 54B(3) and 21A, requires an approach to sentencing for Div 1A offences that is consistent with the approach to sentencing described by McHugh J in *Markarian v The Queen*: "[T]he judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case." (emphasis added)

The standard non-parole period, like the maximum penalty, should be regarded only as a "legislative guidepost". It may be concluded that the High Court has largely rendered the "standard" non-parole period regime as the "entirely discretionary but with additional guidepost" non-parole period regime. Further, while "a central purpose of Div 1A is to require sentencing judges to state fully the reasons for arriving at the sentence imposed", there is no "need to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period". Rather, the judge is required only "to identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed", although the point may be made that such a requirement is already imposed by general sentencing principles.

The High Court also looked at the significance of intellectual disability in determining a sentence for a sex-offender. It was observed that this was a case where "punishment, in the sense of retribution, and denunciation did not require significant emphasis", there was "no requirement for general deterrence" and it was open to "view personal deterrence as likely to be advanced by a sentence that required the appellant to undergo appropriately tailored treatment in a secure facility". These considerations supported a reduced head sentence but also indicated that the plurality considered that it was permissible to impose a proportionally very short non-parole period in "focusing on rehabilitation and not on denunciation, punishment and deterrence". Thus, whatever the appropriate head sentence, it was legitimate to focus on rehabilitation when determining the appropriate non-parole period.

This analysis tends to confirm the proposition that, while the considerations which the sentencing court must take into account when fixing the non-parole period will be the same as those applicable to the setting of the head sentence, the weight to be attached to these factors and the way in which they are relevant will differ due to the different purposes behind each function (see *Bugmy v The Queen* (1990) 169 CLR 525 at 531-2, 537). Further, no assumption should be made regarding a "usual" proportion between the non-parole period and the head sentence (cf *Hili v The Queen; Jones v The Queen* [2010] HCA 45 at [42] – [44]). Thus, while the head sentence of 9 years imposed on Muldrock was manifestly excessive, it was open to the sentencing judge to impose a non-parole period that "required the [offender] to undergo appropriately tailored treatment in a secure facility" (at [58]), bearing in mind the fact that he suffered from a "significant" intellectual disability. That is, it was open to the sentencing judge to impose a very short non-parole period (relative to the head sentence) bearing in mind that this was a case where "punishment, in the sense of retribution, and denunciation did not require significant emphasis", there was "no requirement for general deterrence" and it was open to "view personal deterrence as likely to be advanced by a sentence that required the appellant to undergo appropriately tailored treatment in a secure facility".

***Green v The Queen; Quinn v The Queen* [2011] HCA 49**

This case involved a Crown appeal against sentence where the issue arose how the appeal court should take into account a lenient sentence imposed on another person involved in the criminal enterprise to cultivate cannabis. That other person had been convicted of a lesser offence with a lower maximum penalty and no standard parole period but, in sentencing the two respondents, the sentencing judge had applied the principle of parity to achieve what he regarded an appropriate sentence for the respondents. Bell J (and Heydon J), in dissent, considered that the parity principle did not apply at all, because the respondents and the third man were not true "co-offenders". However, the plurality of French CJ, Kiefel and Crennan JJ considered that they were "co-offenders" because they were participants in the same criminal enterprise, even though they had been charged with different crimes. While this can create significant practical difficulties in comparing the sentences, the " foundation of the parity principle in the norm of equality before the law requires that its application be governed by consideration of substance rather than form" (at [30]). The parity principle requires that like offenders should be treated in a like manner, and allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances.

APPEAL AGAINST CONVICTION

Handlen v The Queen; Paddison v The Queen [2011] HCA 51

The appellants were each charged with multiple drug-related offences under the Commonwealth Criminal Code, including two counts of importing a commercial quantity of border controlled drugs into Australia. Their trial was conducted on the mistaken assumption that guilt of the importation offences could be established by proof that the appellants were parties to a joint criminal enterprise to import the drugs into Australia. At the date of the appellants' trial, this was not a basis for attaching criminal responsibility and thus only basis upon which criminal responsibility could

be fixed on the appellants for the importations was under s 11.2 of the Code for aiding, abetting, counselling or procuring the substantive offences of another person.

Notwithstanding this error, the Queensland Court of Appeal had dismissed their appeal against conviction under the "proviso" that "no substantial miscarriage of justice" had resulted. However, the High Court (Heydon J dissenting) upheld each of the appellants' appeals against conviction, and ordered a new trial. While the verdicts on the importation counts reflected the jury's satisfaction that each appellant was a party to the group exercise to import the drugs, it did not follow "that the jury must have been satisfied of the facts necessary to establish the appellants' guilt of the importation offences" (at [47]) under s 11.2 of the Code. For that reason, it was not open to apply the proviso.

Douglass v The Queen **[2012] HCA 34**

The High Court unanimously allowed an appeal by an accused who was convicted by judge alone in South Australia for the offence of aggravated indecent assault of his granddaughter - who was three years of age at the date of the offence and five years old at the trial.

The only evidence against the accused was an unsworn statement by the complainant, in the form of an interview by her with a psychologist working for the Child Protection Agency. The trial judge also allowed limited cross-examination of the complainant. The accused gave sworn evidence, in which he denied the offence.

The first ground of appeal was that the reasons given by the trial judge were inadequate because the judge did not expressly state that the accused's sworn denial was rejected. This ground was allowed by the Court, which noted:

> In this case, the failure to record any finding respecting the appellant's evidence left as one possibility that the judge simply preferred CD's evidence and proceeded to convict upon it applying a standard less than proof beyond reasonable doubt. The absence of reasons sufficient to exclude that possibility constituted legal error. It is unnecessary to address the consequence of that error in circumstances in which, as will appear, the appellant's second ground must succeed.

The second ground of appeal was that the evidence was not sufficient to establish guilt beyond reasonable doubt. This is a difficult ground to establish, given that it normally involves fine distinctions regarding the coherency of evidence and the credibility of witnesses. This ground was also allowed. The High Court emphasised that proof beyond reasonable doubt is an exacting standard and that concessions should not readily be made regarding inconsistent accounts given by the same witness on core issues relating to the alleged offence, merely because of the age of the witness. Such concessions may be apt in child protection cases, but not in criminal cases where the liberty of an individual is at stake. The Court stated:

> The criminal standard of proof is a designedly exacting standard. A different, lesser, standard is applied by courts dealing with contested issues involving the care and protection of children. This was not such a proceeding. In the

> circumstances of this trial, it was an error for the Court of Criminal Appeal to hold that it had been open to the trial judge to be satisfied of the reliability of CD's statements in the interview, and to reason from that, despite the appellant's denials, to a conclusion that his guilt had been proved beyond reasonable doubt.

Patel v The Queen **[2012] HCA 29**

The Court overturned three convictions for manslaughter and one of unlawfully doing grievous bodily harm against Dr Jayant Patel on the basis that irrelevant prejudicial evidence had been admitted at trial. This occurred essentially because the prosecution changed its case on the 43rd day of a trial which lasted for 58 days.

The events underpinning the counts stemmed from surgery the accused performed on four patients while he was a surgeon at the Bundaberg Base Hospital. The prosecution case at the commencement of the trial focused on the quality of the surgery the accused performed. It was alleged that the standard of care he displayed was so low that it breached the duty set out in section s 288 of the *Criminal Code*, which states:

> It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.

However, this position changed to a focus on whether the decision to perform surgery in each case should have been made.

The accused submitted that the offence contained in section s 288 did not apply to the decision whether to proceed with and only applied to the surgery itself. This was rejected by the Court, which stated that it imposed a duty with respect to the decision to proceed with surgery. The plurality (French CJ, Hayne, Crennan and Kiefel JJ) stated, at [24]:

> It may be accepted that the word "act" in the phrase "doing such act" refers back to "surgical or medical treatment ... or ... any other lawful act". The act to which it refers is not, however, restricted to the act of surgery. It refers to surgical treatment, which may readily be understood to encompass all that is provided in the course of such treatment, from the giving of an opinion relating to surgery to the aftermath of surgery. It would be a strange result if the section was taken as intending to impose a duty with respect to the conduct of surgery and its aftermath, but not to require the exercise of skill and care in the judgment which led to it.

The prosecution's case at the start of the trial was that the accused was grossly negligent in the manner in which he performed surgery and the follow-up procedures he employed. A large amount of evidence was lead to this effect. However, the prosecution case weakened as the trial progressed and the prosecution focused on the appellant's medical judgment to perform the surgery in the first place as forming the

basis of the alleged offending. As a result, a large amount of the evidence that had been adduced to that point was not relevant; it was also detrimental to the accused. The court emphasised that the test for criminal negligence is objective and the accused's actual surgical skills are irrelevant to the quality of the decision to commend surgery.

The trial judge instructed the jury that the case was not concerned with how the surgery was performed, but rather the accused's judgment in commending the surgery to the patients. The plurality recognised, at [113], 'that trial judge gave careful and succinct directions as to some of the most prejudicial evidence, such as evidence of errors in surgery' however, concluded, in the same paragraph that: 'it cannot be concluded that the directions were sufficient to overcome the prejudicial effects of the evidence, individually and collectively, upon the jury'.

The Court also noted that the defence did not object to the admissibility of much of the prejudicial evidence but concluded, at [117], that 'it cannot be inferred that the appellant's counsel made a considered, tactical decision not to object'. It also noted that in exceptional cases a failure to object to evidence does not preclude this point being taken on appeal. The proviso was not applied because, at [129], it was stated:

> The sheer extent of the prejudicial evidence in the context of a wide-ranging prosecution case is likely to have overwhelmed the jury. The jurors were not given directions that they must exclude much of it from their minds. In practical terms any such directions would have been useless.

This decision is to be contrasted with that in *Dupas v The Queen* [2010] HCA 20, where the High Court assumed that judicial directions are effective to negate bias.

***Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14**

The High Court focused on whether the proviso should have been exercised, but provided no further explanation regarding when it is applicable.

The appellant was convicted of an Occupational Health and Safety offence after a transporter who was working on its premises was killed by a fork-lift driven by a contractor (who was engaged as a chicken catcher) and who was unlicensed to drive the vehicle. At the trial, the judge did not direct the jury that the prosecution needed to negate beyond reasonable doubt that by engaging apparently qualified contractors the appellant had complied with its obligation to maintain a safe workplace.

The Victorian Court of Appeal held that this was an error, but that no substantial miscarriage of justice occurred. The High Court disagreed, holding that the case was not one where it was appropriate to apply the proviso.

Prior to this case, the test for when it was appropriate to apply the proviso was unclear. However, it is clear that it has no application where, on an objective consideration of the evidence properly admitted, the court cannot be satisfied that the accused was guilty beyond reasonable doubt.[1] In Weiss v The Queen it was also held

[1] Weiss v The Queen (2005) 224 CLR 300, at [40].

that even if the evidence properly admitted at trial proves the accused's guilt beyond reasonable doubt the proviso may still have no operation. It had also been previously noted that the proviso should not be applied where the error involved a 'serious breach of the presuppositions of the trial' (Weiss, above at [46]); a departure from the 'essential requirements of a fair trial' (AK v State of Western Australia [2008] HCA, [23]) or resulted in the applicant losing a chance of an acquittal (Grey v R [2001] HCA 65, [56]).

In this case, the plurality (French CJ, Gummow, Hayne and Crennan JJ) High Court stated there is no single test that can be used to guide the application of the proviso, yet at the same time it is not a discretionary decision.

> Two points of immediate relevance follow from the Court's decision in Weiss that no single universally applicable criterion can be stated to identify either when the proviso does apply or when it does not apply. First, contrary to the respondent's submissions, it is neither possible nor useful to attempt to argue about the application of the proviso by reference to some supposed category of "fundamental defects" in a trial. To do so distracts attention from the necessary task of statutory construction. The question presented by the proviso is whether there has been a "substantial miscarriage of justice"….
>
> So understood it is evident that it is wrong to speak of the proviso as conferring some "discretion" on the Court of Appeal. The proviso directs attention to whether the error or errors identified as having occurred at trial (which constitute the point or points raised in the appeal that might be decided in favour of the appellant) are not such as to have occasioned any substantial miscarriage of justice. Describing that decision as "discretionary" is at least distracting, if it does not invite error. It is distracting because the description requires consideration of which of the several different ways in which the concept of "discretion" can be used[25] is intended. It invites error if it suggests that the proviso need not be applied even if no substantial miscarriage of justice has actually occurred.

Cooper v The Queen **[2012] HCA 50**

The High Court (Heydon J dissenting) allowed a conviction appeal by the appellant who was convicted of murder in circumstances where the trial judge left two alternative scenarios to the jury, one based on sole responsibility and the other based on liability pursuant to a joint criminal enterprise. The Court of Appeal held that the second alternative should not have been left open to the jury but affirmed the conviction because the error did not involve a substantial miscarriage of justice pursuant to 6(1) of the *Criminal Appeal Act 1912* (NSW).

The High Court allowed the appeal because it held that the Court of Criminal Appeal of the Supreme Court of New South Wales wrongly applied the proviso. The case raises no point of general principle. Rather, the case illustrates another example of the incorrect application of the proviso, where the Court of Appeal appeared to apply the incorrect test. The plurality stated:

> It is now well-established[9], and it must again be emphasised that, as this Court held in Weiss v The Queen[10], there are three propositions which are

> fundamental to the application of the proviso to the common form criminal appeal statute. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Second, the task is objective, and is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial. Third, the standard of proof of criminal guilt is proof beyond reasonable doubt...
> What is presently important is that the Court of Criminal Appeal did not conclude that it was satisfied beyond reasonable doubt that either Ms Quinn did not say the words attributed to her or the description of events she gave to C was false.
> Rather, the point seen as determinative of the proviso appears to have been[20] that "when the whole of the evidence is considered, the case that the appellant at least struck the blow that caused [one of the most serious injuries to the deceased] is such, that ... there has been no substantial miscarriage of justice within the meaning of the proviso to s 6(1)".
> This reasoning does not apply the principles set out in Weiss.

***Baini v The Queen* [2012] HCA 59**

The High Court has provided authoritative guidance on section 276 of the Victorian *Criminal Procedure Act 2009,* which has replaced the common form proviso. That provision requires an appellant to show that "there has been a substantial miscarriage of justice". The judgment of the High Court in *Baini* has largely dispelled any concern about the difference in burden of proof. More important, the High Court's guidance regarding the operation of s 276 raises the possibility that an appellant might actually be better off under the Victorian model, at least in the light of the continuing uncertainties regarding the operation of the common form appeal provisions. In *Baini*, the plurality judgment (French CJ, Hayne, Crennan, Kiefel and Bell JJ) appears to have established the following propositions with respect to s 276:

> - an appeal *must* be allowed pursuant to s 276(1)(a) if the verdict of guilty is unreasonable or cannot be supported having regard to the evidence (ie the guilty verdict "was not open": at [32])
>
> - no single universally applicable description can be given for what is a "substantial miscarriage of justice" for the purposes of s 276(1)(b) and (c): at [26]
>
> - the appeal *must* be allowed (ie there must be a substantial miscarriage of justice) where the cause of complaint arising under s 276(1)(b) or (c) involved a "serious departure from the prescribed processes for trial": at [26], [33]
>
> - where evidence has wrongly been admitted or wrongly been excluded at trial, the appeal *must* be allowed (ie there must be a substantial miscarriage of justice) *unless* a verdict of acquittal was *not open* (ie "it was not open to the jury to entertain a doubt as to guilt": at [32])
>
> - whatever the cause of complaint arising under s 276(1)(b) or (c), it is *possible* (ie relevant but not determinative) that there was *not* a substantial miscarriage of justice if "a verdict of acquittal was not open" on the evidence

> properly admissible at trial (ie the evidence "required" a guilty verdict: at [28]; "the appellant must have been convicted if the error had not been made": at [29]; a verdict of guilty was "inevitable": at [30])
>
> - as a practical matter, few, if any, appeals governed by s 276 will turn upon which party bears the onus of proof : at [23]

If this summary is accurate, it is arguable that an appellant is actually better off under the Victorian model than the common form provision. In particular, the appeal court is *not* directed to consider whether or not the court is itself persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the appellant's guilt. Indeed, the appeal court is not even required to consider whether there is a "significant chance" that the verdict would have been different if the identified miscarriage had not occurred (or whether the appellant lost a chance of acquittal that was "fairly open", or a "real" chance of acquittal) but rather whether a verdict of acquittal was "not open".

Of course, one may reasonably suspect that the High Court will ultimately explain the "not open" test in similar language to that traditionally used in respect of the common form proviso, in order to avoid allowing technical appeals without substantive merit. Further, the High Court may ultimately hold that essentially the same position as applies under s 276 also holds under the common form appeal provisions.

As regards the possible significance of the fact that s 276 imposes the onus on the appellant to persuade the appeal court that there has been "a substantial miscarriage of justice", rather than on the prosecution to persuade the appeal court that there was "no substantial miscarriage of justice", it was noted above that the plurality in *Baini* stated at [23] that, "[a]s a practical matter, few, if any, appeals governed by s 276 will turn upon which party bears the onus of proof". The plurality explained that it was "not to be supposed that notions of there being no case to answer at trial for want of proof of an element of an offence intrude into the determination of an appeal". Nor was "it to be supposed that the respondent (whether a Director of Public Prosecutions or some other prosecuting authority) would not place all relevant arguments before the Court of Appeal".

SENTENCE APPEALS

Green v The Queen; Quinn v The Queen [2011] HCA 49

The plurality judgment of French CJ, Kiefel and Crennan JJ summarized the way in which the parity principle applied in appeals by an offender seeking a reduced sentence. Subject to applicable sentencing legislation, a sentence that would otherwise be appropriate may be reduced on the ground of "marked" disparity to a level which, had there been no disparity, would be regarded as erroneously lenient (that is, manifestly inadequate), although it must not be reduced to a level that would be "an affront to the proper administration of justice". The plurality added at [33]: "Whether or not the discretion to reduce a sentence to an inadequate level is available, marked and unjustified disparity may be mitigated by reduction of the sentence appealed against to a level which, although lower, is still within the range of appropriate sentences". This suggests that, while there is no requirement to reduce the sentence to

a level that is manifestly inadequate, it should be reduced towards the bottom of the range of appropriate sentences.

CROWN APPEALS AGAINST SENTENCE

Green v The Queen; Quinn v The Queen [2011] HCA 49

This case involved a Crown appeal against sentence where the issue arose how the appeal court should take into account a lenient sentence imposed on another person involved in the criminal enterprise to cultivate cannabis. That other person had been convicted of a lesser offence with a lower maximum penalty and no standard parole period but, in sentencing the two respondents, the sentencing judge had applied the principle of parity to achieve what he regarded an appropriate sentence for the respondents. The question on a Crown appeal seeking to increase the sentences of the two respondents was how that principle might be taken into account if the other offender's sentence was unchallenged.

The plurality of French CJ, Kiefel and Crennan JJ noted, unlike appeals by offenders, the primary purpose of Crown appeals against sentence is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons." Further, notwithstanding erroneous inadequacy of sentence, the appeal court has a "residual discretion" to decline to allow the appeal and thereby interfere with the sentence appealed from. Relevant considerations in the exercise of that discretion would include the extent of the guidance that will provided to sentencing courts if the appeal is allowed, whether allowing the appeal will occasion injustice, the extent to which injustice ma be mitigated in the exercise of the re-sentencing discretion, and the conduct of the Crown. In considering whether allowing the appeal would occasion injustice, relevant factors would include delay in the appeal process and parity ("consequential disparity relative to an unchallenged sentence imposed on a co-offender").

Further, a Court of Criminal Appeal should give considerable weight to the parity principle in deciding whether to dismiss the Crown appeal even if the sentence imposed at first instance on the offender is manifestly inadequate, because the extent of the guidance afforded to lower courts would be questionable where a sentence is raised only to an "adequate" level. Thus, it may be appropriate to dismiss the appeal in the exercise of the residual discretion if any more severe sentence than that imposed at first instance would be "infected by an anomalous disparity which is an artifact of the Crown's selective invocation of the Court's jurisdiction", particularly if the prosecution has not made submissions attacking the sufficiency of the sentence imposed on the co-offender.

Bui v Director of Public Prosecutions (Cth) (2012) 86 ALJR 208; [2012] HCA 1

The High Court stated that common law sentencing principles are relevant to the sentencing of Commonwealth offenders, pursuant to s 16A of the Crimes Act 1914 (Cth). However, s 16A does not incorporate the principle of double jeopardy in relation to Crown sentence appeals because this would be inconsistent with the requirement in s 16A(1) that the severity of the sentence should be appropriate to the

circumstances of the case, and there is no indication in s 16A(2) that different sentencing considerations apply at first instance compared to appeals.

Further, the court held that the reference to "mental condition" in s 16A(2)(m) refers to actual mental condition; not presumed mental condition. To this end, the court overruled the decision of Director of Public Prosecutions (Cth) v De La Rosa (2010) 205 A Crim R 1; [2010] NSWCCA 194 so far as it relates to federal sentencing. In Bui, it was held that the Victorian provision which abolishes the double jeopardy principle, so far as presumed distress and anxiety is concerned (Criminal Procedure Act 2009 (Vic), s 290(3)), is not made relevant to Commonwealth offenders pursuant to s 80 of the Crimes Act 1914 (Cth) because the principle of double jeopardy is not accommodated in s 16A.

HIGH COURT APPEALS

Yates v The Queen [2013] HCA 8

The High Court Rules require that an application for special leave to appeal from a judgment of a Court of Criminal Appeal must be filed within 28 days of the judgment. In this case, the application was made 25 years out of time. Nevertheless, the High Court dispensed with compliance with the time limit for filing the application for special leave to appeal and granted the application, then allowed the appeal. As the plurality judgment (French CJ, Hayne, Crennan and Bell JJ) stated, "[n]otwithstanding the great delay in bringing the application, the interests of the administration of justice require that special leave to appeal be granted". The appeal was allowed because the applicant had been held indefinitely in prison for all those years in circumstances where the order for indefinite detention should not have been made in the first place.