“In case you missed it”: significant recent developments in criminal case law

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High Court decisions

***Perara-Cathcart v The Queen* [2017] HCA 9 – jury directions – discreditable conduct evidence – application of proviso – 1 March 2017**

Mr Perara-Cathcart ("the appellant") was charged with rape and threaten to kill. Following a trial by jury he was convicted of both offences. On appeal, he contended that the trial judge's admission of a passage from his record of interview with the police as "discreditable conduct evidence", in which the appellant admitted to possessing cannabis that had been found during a search of his home, was an error of law. Also, he contended that the trial judge failed sufficiently to direct the jury as to the permissible and impermissible uses of this evidence.

The Full Court of the Supreme Court of South Australia held unanimously that evidence of the appellant's possession of cannabis was admissible. By majority, the appeal in relation to the directions was dismissed, although the majority of judges concluded that the directions did not comply with s. 34R(1) of the *Evidence Act 1929* (SA). Only one of the majority judges concluded that he was satisfied that no substantial miscarriage of justice had actually occurred; the other majority justice did not express a conclusion.

The appellant appealed to the High Court on the ground that the order dismissing the appeal could not be sustained by s. 353 of the *Criminal Law Consolidation Act 1935* (SA).

The High Court would have allowed the appeal, except that the Crown contended that the trial judge's directions to the jury did meet the requirements of s. 34R(1) of the *Evidence Act* and, therefore, the appeal was rightly dismissed by the Full Court.

The High Court (Kiefel, Bell and Keane JJ, Gordon J agreeing separately, Gagelar and Nettle JJ dissenting in separate judgments) upheld the Crown's contention.

Section 34R required that upon the admission of discreditable conduct evidence the judge must identify and explain the purpose for which the evidence may, and may not, be used. *Inter alia*, the judge instructed the jury that "There is no shortage of evidence in this case to suggest that [the appellant] was a drug user and some evidence, although contested, that he was a drug dealer. Those particular topics have a relevance... but I warn you against the misuse of that evidence. It would be quite wrong of you to say 'Well, [the appellant] is a drug dealer, he must be guilty of these offences...'"

In short, their Honours held that having regard to the real issues in the case, the trial judge's direction against impermissible use was sufficient. Further directions as to permissible use of the evidence – which needed to be sufficient to ensure that the jury understood that they

could properly use the appellant's admission for the purpose of determining whether the case for the prosecution was reliable – also did not require elaborate explanation.

Re Culleton [No 2] [2017] HCA 4 - annulment – whether retrospective operation on conviction – 3 February 2017

Senator Culleton was elected to the Western Australian Senate in July 2016. In March 2016, in his absence, he was convicted of larceny in the Local Court of NSW. On the same date, a warrant was issued for his arrest. The warrant was executed in August 2016. The Local Court then granted an annulment of the conviction pursuant to s. 8 of the *Crimes (Appeal and Review) Act 2001* (NSW). In October 2016 the Senator pleaded guilty and the Court proceeded to dismiss the charge without conviction.

Under s. 44(ii) of the *Constitution*, a person who has been convicted and is under sentence, or **subject to be sentenced**, for any offence punishable by imprisonment for one year or longer is incapable of being chosen or of sitting as a senator. (Larceny under s. 117 of the *Crimes Act 1900* (NSW), when prosecuted in the Local Court, has a maximum penalty of imprisonment for two years.)

The issue in the High Court was whether the Senator was disqualified from being elected.

The Court (Kiefel, Bell, Gageler and Keane JJ, Nettle J agreeing in a minority judgment) held that the Senator was disqualified because, as at July 2016 (the election date) the conviction was legally in effect. Section 10(1) of the *Crimes (Appeal and Review) Act* (NSW), which provides that "[o]n being annulled, a conviction… ceases to have effect" does not treat the conviction as if it had never occurred. Rather, this case is an example of where a conviction ought not to stand, not that there never was in fact a conviction.

RP v The Queen [2016] HCA 53 – doli incapax – evidence to displace presumption – 21 December 2016

RP appealed against his convictions for sexual offences against his younger brother, committed when RP was 11 to 12 years old. The High Court (Kiefel, Bell, Keane and Gordon JJ; Gageler J agreeing separately) quashed the convictions and entered verdicts of acquittal.

Doli incapax is a rebuttable presumption at law that a child is incapable of bearing criminal responsibility for his or her acts. It is for the Crown to rebut the presumption. It cannot be rebutted by merely drawing an inference from the offence. The prosecution must point to evidence from which an inference can be drawn, to the criminal standard, that the child knew that it was morally wrong to engage in the conduct.

RP had intellectual limitations. Clear evidence was needed to demonstrate that he possessed the requisite understanding. The prosecution relied upon the circumstances of the offences to establish that he understood the moral wrongness of his acts at the time – there was no evidence about the environment in which he was raised or from which any conclusions could be drawn as to his moral development.

Gageler J, referring to evidence of RP's intellectual limitations derived from assessments and reports relating to RP at age 17 and 18, considered that there was a gap between those reports and RP's cognitive development at the time of the offences. The question of whether RP had the capacity to understand, at the time of the offences, that his conduct was seriously wrong by normal adult standards was unanswered.

***NH; Jakaj; Zefi and Stakaj v The Director of Public Prosecutions* [2016] HCA 33 – error by foreperson – presumption verdict is correct – inherent jurisdiction of the Supreme Court – impeaching jury verdict – 31 August 2016**

In a murder trial, the foreperson reported in court, in the presence of other jury members, that the jury found the appellants not guilty of murder but guilty of manslaughter. Later that day, the foreperson reported to a court officer that he had mistakenly told the Court that at least 10 of the jury had agreed on a verdict of not guilty of murder.

After they were informed, Stakaj and NH appealed their convictions. The Director of Public Prosecutions (SA) ("DPP") filed applications seeking that the Supreme Court exercise its inherent jurisdiction, and certain statutory powers, to quash all verdicts and order retrials. The majority of the Full Court of the Supreme Court of SA granted the DPP's application.

The appellants' appeal to the High Court was on the ground the Full Court erred in holding that it had jurisdiction to determine the DPP's application, and in quashing the jury verdict of "not guilty" for the murder charge.

The High Court (French CJ, Kiefel and Bell JJ; Nettle and Gordon JJ agreeing separately) allowed the appeal.

The Full Court would not reach the question whether there was non-compliance with the statutory requirements for a majority verdict unless it had the power to look behind the verdicts delivered by the foreperson. Those verdicts were delivered in open court in the sight and hearing of the other jurors, without any dissent or action by them, and were therefore presumed to be correctly communicated to the Court. While still assembled, the jury could have corrected the verdicts.

However, post-discharge, the only arguable source of power to alter or set aside the verdicts, without recalling the jury, was the Court's inherent power in its original jurisdiction. The "inherent jurisdiction" is a power or collection of powers that comes with the status of the Supreme Court of a State as a superior court of record, described generically as "the inherent power necessary to the effective exercise of the jurisdiction granted". It is not a "separate head of jurisdiction".

The inherent power of a Supreme Court is limited by the general principle of the finality of litigation. The inherent power to correct an order is very limited. Subject to statutory powers, the proceeding is at an end and beyond the recall of the Court. The slip rule permits correction so that the record represents what the Court pronounced or intended to pronounce. However, in this case the judgments of acquittal and conviction were made by the trial judge acting upon the verdicts of the jury and the slip rule was not engaged.

The foreperson and other jurors gave affidavits about what had happened. However, there is a very long-standing rule that evidence of a jury's decision-making processes cannot be received to impeach their verdict. This supports the principles that a verdict declared by the foreperson in the sight and hearing of the other jurors and without their dissent is taken to be their true verdict.

***The Queen v Baden-Clay* [2016] HCA 35 – circumstantial case – unreasonable verdict – 31 August 2016**

Following a trial before a jury, Mr Baden-Clay was found guilty of murdering his wife. He said he had gone to sleep in bed one night while his wife was watching television and in the morning she was missing. Her body was found 11 days later with no evidence of any fatal, or potentially fatal, injury.

The Crown case was circumstantial, engaging the principles that the jury could not return a verdict of guilty unless the circumstances were such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused, and that it was necessary not only that his guilt should be a rational inference but that it should be the only rational inference that the circumstances would enable them to draw.

The Court of Appeal (Qld) held that the verdict of murder was unreasonable, set it aside and substituted a verdict of manslaughter, on a hypothesis that there was a physical confrontation in which Mr Baden-Clay delivered a blow which killed his wife without intending to cause serious harm and, in a state of panic and knowing that he had unlawfully killed her, he took her body to the creek where it was found. The High Court (French CJ, Kiefel, Bell,

Keane and Gordon JJ) allowed the Crown's appeal, ordering that the verdict of guilty of murder be restored.

The High Court was quite critical of the Court of Appeal, saying that while the evidence given by Mr Baden-Clay narrowed the range of hypotheses reasonably available, he did not give evidence which might have raised the hypothesis on which the Court of Appeal acted and, further, the evidence he gave was capable of excluding that hypothesis. The Court of Appeal's conclusion was not based on evidence but on mere speculation or conjecture. It was not put to the jury (for tactical reasons), was directly contrary to the way in which the defence was conducted and Mr Baden-Clay's evidence, and was expressly rejected by his counsel.

Mr Baden-Clay gave evidence which the jury plainly disbelieved. However, that did not mean there was no evidence at all in relation to the hypothesis – this was not a case in which *Weissensteiner* principles required consideration (that where an accused with knowledge of the facts is silent, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused: *Weissensteiner v The Queen* (1993) 178 CLR 217 at 227-228).

The Court of Appeal appeared to have reasoned that because Mr Baden-Clay's evidence was disbelieved, it could reasonably be disregarded altogether as having no bearing at all on the availability of hypotheses consistent with innocence. His evidence was important, even if it was disbelieved, because it was open to the jury to consider that the hypothesis identified by the Court of Appeal was not a reasonable inference from the evidence when the only witness who could have given evidence to support the hypothesis gave evidence which necessarily excluded it as a possibility (ie., that he had not accidentally killed his wife in a confrontation).

It is fundamental to our system of criminal justice in relation to allegations of serious crimes, that the jury is the tribunal to decide issues of fact. It has abiding importance representing the community. Setting aside a jury's verdict on the ground that it is "unreasonable" is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over an appellate court which has not seen or heard witnesses.

A court of criminal appeal is not to substitute trial by appeal court for trial by jury. The ultimate question for the appeal court in an appeal of this kind is whether the court thinks that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

NSW appellate decisions

***McIlwraith v R* [2017] NSWCCA 13 – intimidation under s. 13 *Crimes (Domestic and Personal Violence) Act 2007* – whether offence of specific intent – 22 February 2017**

The victim came home to find Mr McIlwraith on his property holding a tomahawk. The victim ran into a laundry and closed the door, then heard glass smash and felt the handle of the door being pressed down. When police attended, the applicant was lying in the victim's bedroom, intoxicated.

The applicant was charged with offences of breaking and entering and stealing property. He pleaded guilty to one of the eight counts on the indictment and after trial was convicted of an additional count of aggravated break and enter and commit serious indictable offence contrary to s. 112(2) of the *Crimes Act 1900* (NSW). The "serious indictable offence" was intimidation under s. 13(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

Part 11A of the *Crimes Act* provides for the circumstances in which intoxication – self-induced, and not self-induced – may be taken into account, including in determining whether the accused had the intention to cause the specific result necessary for an offence of specific intent. The trial judge (the trial was judge alone) found that the offence of intimidation under s. 13(1) was not an offence of "specific intent". That meant that her Honour did not consider Mr McIlwraith's drug-affected state in determining his guilt: see s. 428B of the *Crimes Act.*

The Court (Basten JA; Johnson and Button JJ agreeing) held that the trial judge erred in finding that the offence under s. 13(1) was not one of specific intent. In isolation, s. 13(1) – stalk or intimidate with the intention of causing fear of physical or mental harm – is clearly an offence of specific intent. Section 13(3) – providing that a person *intends* to cause fear if he or she *knows* that the conduct is likely to cause fear – expands the scope of the offence. While ordinarily there is a difference between "intention" and "knowledge", s. 13(3) operates in a manner analogous to that by which the mental element in murder can be satisfied by reckless indifference to human life. In the context of Part 11A, it is coherent to treat as an offence of specific intent, one which can be proved by *knowledge* of specific matters in the same way as one where the state of mind involves a specific intention. In short, s. 13(1) remains an offence of specific intent, despite the fact that intent can be proved by proof of particular knowledge if s. 13(3) is engaged.

However, the trial judge also held that if she were wrong, her finding would be the same (that the applicant had formed the requisite intent). Therefore, the appeal was dismissed.

The Prothonotary of the Supreme Court of New South Wales v Battye **[2017] NSWSC 48 – wilful contempt – breach of District Court order – 10 February 2017**

The defendant was a solicitor, who pleaded guilty to a charge of contempt for transferring shares to a third party in breach of court orders.

Justice Schmidt sentenced him to 375 hours of community service. In contempt proceedings, the requirements of the *Crimes (Sentencing Procedure) Act 1999* (NSW) must be observed including s. 3 (purposes of sentencing), matters of personal and general deterrence, aggravating and mitigating matters, and discount for a guilty plea.

The defendant's contempt was wilful and contumacious, not merely technical or the result of a mistake. The fact he was a solicitor left open no doubt that he understood the contempt involved in his pursuit of personal interests. The interference which it caused to the proper administration of justice was substantial. The seriousness precluded exercise of the Court's discretion granted by s. 10 of the *Crimes (Sentencing Procedure) Act 1999*.

Boensch v Commissioner of Fines Administration **[2017] NSWCA 13 – annulment of a fine – refusal to annul – 9 February 2017**

Mr Boensch was issued with a traffic infringement notice for riding his motorcycle in excess of 30kph above the speed limit. He did not pay the fine and said he lost the notice.

A penalty notice enforcement order was made under ss. 41 and 42 of the *Fines Act 1996*. Under s. 49(1)(a)(ii) of the *Fines Act* the Commissioner must annul an order if satisfied the person was hindered from taking action in relation to the penalty notice. Mr Boensch applied unsuccessfully for an annulment by the Commissioner. His Local Court and District Court appeals were also unsuccessful.

Mr Boensch sought judicial review in the Court of Appeal, on the grounds that the judge misapplied the applicable statutory test, erred in determining that a person not stopped from carrying out employment could not be "hindered from taking action", and should have concluded on the evidence that Mr Boensch was hindered from taking action.

The Court (Basten JA; McColl and Simpson JJA agreeing) dismissed the summons. None of the grounds of appeal identified jurisdictional error. As to the first ground, the judge applied the correct statutory test. As to the second and third grounds, Mr Boensch did not identify any form of jurisdictional error. He was not entitled to rely on error of law on the face of the record (see s. 176 *District Court Act 1973*) and in any event, no error was revealed. In relation to both of those grounds, the Court could only make an annulment order if

affirmatively satisfied as to one of the matters identified in s. 49. Mr Boensch bore the burden of satisfying the Court as to the relevant criterion. A failure to satisfy that burden of proof does not, of itself, demonstrate error of law. Something more is required.

***DPP v Wallman* [2017] NSWSC 40 – mental health – jurisdictional error – orders for assessment at mental health facility – 8 February 2017**

Mr Wallman was charged with offences related to him having a knife in a public place. He breached his bail conditions. When he was brought before a Deputy Registrar of the Local Court he was displaying signs of mental illness. The Deputy Registrar ordered that he be detained in a mental health facility, under s. 33(1D) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) ("*Forensic Provisions Act*"). He was there assessed as being not mentally ill, but as being "mentally disordered" and he was detained (presumably under the *Mental Health Act 2007* (NSW)).

Subsequently, a magistrate made an order in chambers under s. 33(1)(a) of the *Forensic Provisions Act* that Mr Wallman be detained in a mental health facility for assessment, by way of dealing with the original charges. Later in court, the magistrate held that the matter was finalised on account of that order.

The DPP successfully sought judicial review and Fagan J issued a writ of mandamus. The magistrate's order involved two fundamental jurisdictional errors. First, a jurisdictional requirement to the making of an order under s. 33(1) is that it "appears to the magistrate that the defendant is a mentally ill person". His Honour relied on a psychiatric assessment which contained the express opinion that the defendant did not satisfy the criteria for mental illness under the *Mental Health Act*. The second error occurred when the magistrate dealt with the charges in chambers in the absence of both parties and without a hearing.

***Director of Public Prosecutions v Evans* [2017] NSWSC 33 – assaulting and resisting police - self-defence – 7 February 2017**

Mr Evans was found not guilty of assaulting an officer and resisting an officer in the execution of his duty. The officer had been asked by a fire officer to remove Mr Evans from a verandah, where he was attempting to hose his house, which was on fire. When the officer tried to pull Mr Evans away there was an altercation. The magistrate considered that Mr Evans had a defence of self-defence open to him in the circumstances.

Davies J allowed the DPP's appeal and remitted the matter to the Local Court. The magistrate was correct in holding that the officer was acting in the execution of his duty, and implicit in that notion was that his actions were reasonable and necessary. The magistrate

then needed to deal with the central factual dispute, namely, whether Mr Evans assaulted the officer. Until that was determined, no issue of self-defence could arise.

The magistrate did not make findings of fact about what actually happened. This was an error of law.

Further, the magistrate raised the issue of self-defence, but Mr Evans' case was inconsistent with self-defence. Nothing in his evidence, or cross-examination, suggested anything other than he had not struck the officer except by accidentally falling on him. He denied hitting the officer.

Further, self-defence did not arise because the destruction or damage of the property had to be *unlawful*, and the unlawfulness had to be able to be attributed to a police officer: s. 418(2)(c), *Crimes Act 1900* (NSW). There was no evidence that any destruction or damage of the property by the fire was unlawful, but even if it was it was not in any way related to the officer. Section 418 was never engaged in the case.

While an attempt by a police officer to remove Mr Evans from the danger presented to his safety by his continuing efforts to protect his property from fire was within the execution of his duty, subsequent physical force to do so was independent of the execution of his duty, there being no basis to arrest Mr Evans and because retaliation was within the statutory defence in s. 418 of the *Crimes Act*.

Commissioner of the Australian Federal Police v Cacu [2017] NSWCA 5 - compulsory examination stay – *Lee* and *X7* principles – 3 February 2017

The Commissioner of the Australian Federal Police successfully sought orders, *ex parte*, under the *Proceeds of Crime Act* 2002 (Cth) ("*POC Act*") requiring Mr Cacu to give a sworn statement setting out his property interests and liabilities, and to submit to an examination. The following day, he was arrested and charged with offences including, relevantly, dealing with money or property believed to be the proceeds of crime. He applied to stay the *POC Act* orders until after his criminal proceedings were determined.

The Supreme Court (M Adams J) granted the stay and the Commissioner appealed.

The Court of Appeal (Meagher JA, Sackville and Gleeson JJA agreeing, Gleeson JA with additional comments) dismissed the appeal. The information was required to be given notwithstanding that it might incriminate Mr Cacu. Subject to certain exceptions, it was not admissible in the criminal proceedings against him (s. 39A(2)). It was not however the subject of any restriction on disclosure to or use by the authority responsible for prosecuting the dealing offence. On the contrary, the legislation permitted that information to be

disclosed and used for the purpose of assisting in the investigation or prosecution of that offence.

The question for the primary judge was whether, in the absence of a stay, Mr Cacu was at risk of prejudice in the conduct of his defence in the criminal trial. That risk has two aspects. The first arises if the information which an accused is compelled to divulge may be used against him or her by the prosecuting authority. This was a potential erosion of the fundamental common law principle that the prosecution bears the onus of proof. When seeking the *ex parte* orders, the Commissioner could have sought an order prohibiting disclosure of any information (assuming such power existed), but did not.

The second, more controversial, potential prejudice, is that referred to by Hayne and Bell JJ in *X7* at [124] which is said to arise notwithstanding that the accused's answers given at a compulsory examination are kept secret:

> "The accused... would have to decide the course to be followed in light of (the prosecution's) material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination … what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge."

While an approved examiner under the *POC Act* has power to make directions preventing or restricting disclosure to the "public" of an examination, that did not extend to prohibiting disclosure to prosecuting authorities.

Nguyen v R [2017] NSWCCA 4 – voice identification – whether within exclusionary opinion rule – 2 February 2017

Ms Nguyen was convicted of four counts of supplying a prohibited drug (ice). The supplies were alleged to have occurred over a week in May 2012. Evidence included intercepted telephone calls. At trial, a police officer gave evidence that the female voice on the telephone intercepts was Ms Nguyen. The officer had listened many times to the intercepts, and to the record of interview with Ms Nguyen. He claimed to identify the applicant's voice by reference to a combination of three matters: the way in which she spoke, voice characteristics, and common references. Characteristics were of a loud female voice, a very distinct inflection, and lapsing into Vietnamese. Common references included repeated use of the phrase "down west" (eg., "just come down west").

The majority of the CCA (RA Hulme and Schmidt JJ) refused leave to appeal (Basten JA would have granted leave but dismissed the appeal). The officer's evidence was relevant and admissible under s. 79 of the *Evidence Act 1995* (NSW). The officer had spent far longer familiarising himself with the voices on the tapes than the jury could be expected to. The test of admissibility of the officer's evidence as an *ad hoc* expert under s. 79 was whether this comparative exercise was different in degree from what the jury could do. The answer to that question was "yes" (at [91] and [105]).

***Flaherty v R; R v Flaherty* [2016] NSWCCA 188 – application of *Kentwell v The Queen* (2014) 252 CLR 601 – 24 August 2016**

Mr Flaherty, a Catholic priest, pleaded guilty to three counts of indecent assault and was convicted, following trial, of two further counts of the same offence, all against victims aged between 11 and 15 years. The offences were committed between 1972 and 1981. He was sentenced to an aggregate sentence of two years three weeks with a non-parole period of six months.

The Court (Simpson JA, Hoeben CJ at CL agreeing, Price J agreeing in relation to the Crown appeal but dissenting as to the result) allowed Mr Flaherty's appeal against sentence, not on the errors he asserted but on the basis of a number of sentencing errors exposed by the Crown. The statements in *Kentwell v The Queen* (2014) 252 CLR 601 apply to sentencing affected by error of principle, by whomever the error is exposed. Once error is established it is not the role of the appellate Court to assess the effect of the error on the outcome. It would be a distortion of justice otherwise, it having been identified that the accused was not sentenced according to law.

In criminal matters the Crown occupies a special position. It is not a party-party litigant, but a litigant having an obligation of fairness, and an obligation of candour to the Court. Where it identifies error, it is obliged to draw that error to the attention of the Court or to the offender, even if that opens the potential for a reduction in sentence (or, in the case of error in conviction, the potential for a re-trial or acquittal). It is the fact that the criminal process has miscarried that is of importance; that miscarriage must be corrected. The integrity of the criminal justice system is sustained by the Crown accepting these obligations. The longer term interests of the Crown lie in maintaining that integrity: at [96].

***R v Qaumi (No 41)* [2016] NSWSC 857; *R v Qaumi (No 56)* [2016] NSWSC 1130 – juries – repeated smiling and staring at particular accused – apprehension of bias – 18 August 2016**

Five accused were being tried jointly for crimes arising from gang-related shootings. The Crown applied for the discharge of a juror, on the basis that she was observed to be smiling towards some of the accused, and that she may have disobeyed confidentiality directions. That application was dismissed.

Subsequently Hamill J, the trial judge, observed an interchange of smiles between the juror and one accused, just four days after the first judgment was delivered, and then on a number of occasions subsequently. The juror's smiling and staring appeared to be solely directed to the Qaumi brothers.

Section 53B of the *Jury Act 1977* (NSW) relevantly provides that the court may discharge a juror if it appears that the juror may not be able to give impartial consideration to the case because of the juror's familiarity with the parties, or any reasonable apprehension of bias, conflict of interest or any similar reason. Alternatively, a juror may be discharged if it appears for any other reason affecting their ability to perform their functions, that they should not continue.

His Honour found that the juror's conduct was persistent and furtive, for at least two months, and placed the accused Mr Kalal – who was running a defence of duress and would seek to rely on threats allegedly emanating from the Qaumi brothers – in an unenviable position. If it were found that the juror's interaction with the Qaumi brothers was such as to diminish Mr Kalal's prospects of receiving a fair trial and having his defence of duress considered seriously by the particular juror, there was a strong argument that there was a risk that it would give rise to a substantial miscarriage of justice.

The phrase "evidence before the court" in s. 53B(b) is capable of encompassing observations made by the judicial officer, although this was not free of controversy given that s. 53B(b) requires statements from the juror or "evidence before the Court".

In any event, s. 53B(d) was also engaged, because the juror's conduct may have affected her ability to perform the functions of a juror.

Although it was not necessary to determine, it was possible to view the juror's conduct overall as "misconduct" for the purposes of s. 53A, which would require mandatory discharge. The fact that a juror smiles during a trial, even in the direction of an accused or alleged victim, will not ordinarily give rise to a finding of misconduct; but here, the juror's conduct was continual and specifically directed to three of the accused, and was furtive.

***R v AC (No 3)* [2016] NSWSC 209 – bail – show cause requirement – 8 March 2016**

AC pleaded guilty to being an accessory before the fact to murder and a firearm offence. She had offered to give evidence against her co-accused, in a pending trial. The Crown made a detention application: s. 50, *Bail Act 2013* (NSW).

Accessory to murder is a "show cause" offence, therefore, bail must be refused unless the accused shows cause why their continued detention is not justified: s. 16A, s. 16B(1)(a).

The Supreme Court (Hamill J) refused the detention application, notwithstanding that her offences were at the upper echelon of objective seriousness and that a plea of guilty is germane to the question of whether cause ought be shown as to why an offender's continuing detention is unjustified, since the presumption of innocence has been rebutted.

The precise content of the show cause requirement will vary depending on the seriousness of the offence and the basis upon which an accused is caught by the provisions of ss. 16A and 16B. The seriousness of the offence, the plea of guilty and the inevitability of a lengthy gaol sentence meant that the show cause requirement represented an extremely high hurdle.

The case, however, was most unusual. AC took steps to ensure that the sentencing proceedings occurred quickly, which was only possible while she was on bail if she was to see the psychiatrist she had engaged. She had arranged alternative senior counsel when her representation was not available. If bail were refused, the co-accuseds' trial would be delayed. Section 16A is broad enough for these factors to play some part.

Also, AC had complied with onerous bail conditions for two years and her mother had offered $1.4 million surety. AC's offer of assistance demonstrated she had extricated herself completely, and at some personal risk, from the relevant criminal group. It also meant that she may be in physical danger while on remand.