

# Selected NSW Court of Criminal Appeal Sentencing Decisions

## Section 21A(2) Aggravating, mitigating and other factors in sentencing

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### \* s 21A(2)(b) offence involved the actual or threatened use of violence

#### **Dougan v R** [2006] NSWCCA 34

Armed robbery: s 97(2) **Crimes Act** -Threatened use of violence during commission of this offence can be taken into account as an aggravating factor. A factor being an element of an offence does not mean it is to be treated the same in all offences of that type: at [27].

#### **Hamze v R** [2006] NSWCCA 36

Where, for an offence of robbery, there is actual violence in addition to the threat of violence, the actual violence can be taken into account as an aggravating factor as it is not a necessary ingredient of the offence.

#### **Makrynikos v R** [2006] NSWCCA 170

The aggravating factor refers to violence to a person, rather than to property.

### \* s 21A(2)(c) offence involved the actual or threatened use of a weapon

#### **R v Chisari** [2006] NSWCCA 19

Crown appeal - Wounding with intent to inflict grievous bodily harm: s 33 **Crimes Act**.

Error in holding that the use of a weapon could not be taken into account as an aggravating factor.

#### **Hamze v R** [2006] NSWCCA 36

The use or threatened use of a weapon is not necessary for an offence of robbery whilst armed with a dangerous weapon and could therefore be taken into account as an aggravating factor.

### **\*s 21A(2)(d) offender has a record of previous convictions**

#### **Aslett v R** [2006] NSWCCA 360 Murder

Error in taking into account prior and current offences in imposing a life sentence.  
Application of the principles in **R v McNaughton** [2006] NSWCCA 242.

#### **Doolan v Regina** [2006] NSWCCA 29

Error in regarding the applicant's prior criminal record as an aggravating factor. Record did not show "a continuing attitude of disobedience of the law" or "the moral culpability of the offender" as per **Veen v The Queen (No 2)** (1988) 164 CLR 465. Error in taking into account, as an aggravating feature, the effects of a crime that are already anticipated in the offence. Sentencing judge fell into the error identified in **Tadrosse** [2005] NSWCCA 145; the victim was vulnerable, but only in a generalized sense.

#### **Ford v Regina** [2006] NSWCCA 9

Error in treating as an aggravating feature the fact that there were multiple victims for each offence (arising out of the one incident) and for making the sentences concurrent at [14]. The sentencing judge created the appearance of double counting in finding that the offender abandoned responsibility and displayed a disregard for public safety at [19].

#### **Heron v Regina** [2006] NSWCCA 215

(i) Error in omitting to consider matters referred to in **R v Way** (2004) 60 NSWLR 168 at [118]  
(ii) in setting provisional non-parole period. (ii) Sentencing judge's assessment of crime as beyond the mid range of offences overstated objective seriousness of offence. (iii) Sentencing judge erred in referring to the applicant's criminal record as an aggravating factor pursuant to s 21A(2)(d). (iv) Error in failing to reflect special circumstances in sentencing judge's "final formulations of the sentence." at [31]. (v) Error in finding that the injury suffered was "not 'significantly more deleterious' than required to make out the elements of the offence." at [47]. What may have occurred had first aid not been provided an irrelevant consideration when applying s 21A(2)(g). at [48]-[49].

#### **R v McNaughton** [2006] NSWCCA 242

"A record of previous convictions cannot be taken into account in an assessment of the objective seriousness of an offence because to do so would infringe the principle of proportionality. The only relevance of such a record is whether it discloses that more weight is to be given to retribution, personal deterrence and the protection of

the community than would be the case if such a record did not exist”. at [32] in **Darrigo v Regina** [2007] NSWCCA 9.

**\*s 21A(2)(e), offence was committed in company**

**Imnetu v R** [2006] NSWCCA 203

Murder - The commission of the murder in company using a degree of planning were not elements of the offence and could be taken into account as aggravating factors.

**\* s 21A(2)(g) injury, emotional harm, loss or damage caused by offence was substantial**

**R v Cunningham** [2006] NSWCCA 176

Error in taking into account the fact that the effect on the victim of sexual assault offences was substantial.

**\* s 21A(2)(h) offence was motivated by hatred, prejudice etc**

**Aslett v R** [2006] NSWCCA 360

The offenders targeted the victims because they believed that as Asians they were more likely to have valuables at home. This however “... was quite a different motivation from crimes committed out of race hatred or prejudice”: at [124].

**\* s 21A(2)(i) offence was committed without regard for public safety**

**R v Chisari** [2006] NSWCCA 19

This aggravating factor is directed towards danger caused to the public, not to the victim of the offence.

**Elyard v R** [2006] NSWCCA 43

Dangerous driving under s 52A **Crimes Act** is inherently committed without regard for public safety. It cannot be taken into account as an aggravating factor unless “unusually heinous behaviour.” at [10].

**\* s 21A(2)(l) victim was vulnerable, by reason of age, disability or occupation**

**Shannon v R** [2006] NSWCCA 39

Child sexual assault - The vulnerability of a victim can be taken into account as an aggravating factor in sentencing without offending s 21A(2).

**\* s 21A(2)(m) offence involved multiple victims or a series of criminal acts**

**R v Hamid** [2006] NSWCCA 302 Crown appeal – offences involving violence

Original sentence failed to reflect the overall criminality of a series of domestic violence offences committed against three victims over eight years. Relevance of mental illness on sentence affected by moral culpability, general deterrence, whether imprisonment would be more onerous for the offender and the degree of danger posed by release of the offender into the community.

**\* s 21A(2)(n) offence was part of a planned or organised criminal activity**

**R v Yildiz** [2006] NSWCCA 97 Drug supply

Error in regarding the degree of planning as an aggravating factor.

**\* s 21A(3)(f) offender was a person of good character**

**Lozanovski v R** [2006] NSWCCA 143

Sexual assault - In determining whether an offender is of prior good character, the sentencing judge must not consider the offences for which the offender is being sentenced, even if those offences have occurred over a period of time. Confirmation of approach in **R v Moon** (2000) 117 A Crim R 497 approved in **R v MJR** (2002) 54 NSWLR 368; [2002] NSWCCA 129 as to the approach to sentencing for historical offences.

**Other matters**

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**\* Adjournments — s 11**

**MRN v R** [2006] NSWCCA 155

If a sentence of full-time custody is called for because of the objective gravity of the criminal conduct, this should be explained to an offender who has been granted bail for rehabilitation purposes.

**\* Children**

**Tapueluelu v R [2006] NSWCCA 113**

The admission of evidence concerning the applicant's prior Children's Court record was not prohibited by s 15 of the **Children (Criminal Proceedings) Act**. The sentencing judge was entitled to hold that the offence of robbery in company was aggravated by the co-offender's actual possession of an offensive weapon.

**\* Discount for plea and assistance**

**R v Sukkar [2006] NSWCCA 92**

Crown appeal. Discount of 45 per cent for plea and assistance excessive.

**\* Maximum penalty**

**R v Ronen [2006] NSWCCA 123**

Sentencing judge correctly took into account the legislature's changed view of the seriousness of the criminal conduct as reflected in the reduction of the maximum penalty.

**\* Pre-sentence custody**

**Brown v R; Reid v R [2006] NSWCCA 144**

Slight allowance, if any, for completion of MERIT program.

**Bushara v R [2006] NSWCCA 8**

Manner of taking into account pre-sentence custody when sentencing for multiple offences. Participation in Drug Court program not a form of pre-sentence custody.

**Callaghan v R [2006] NSWCCA 58**

Exercise of discretion to backdate sentence.

**Deron v R [2006] NSWCCA 73**

A sentencing judge has the discretion to backdate the sentence or deduct the relevant pre-sentence custody so long as the time is taken into account.

**Harrison v R** [2006] NSWCCA 185

Necessary to explicitly state how pre-sentence custody has been taken into account.

**McCabe v R** [2006] NSWCCA 220

Approach for taking pre-sentence custody into account.

**Skondin v R** [2006] NSWCCA 59

Approach for calculating pre-sentence custody where offence committed whilst on parole, though parole was not revoked by the NSW Parole Board.

**\* Mental health**

**R v Swan** [2006] NSWCCA 47

Failure to take into account the offender's intellectual disability when determining the head sentence for an offence under s 98 **Crimes Act**.

**AN (No 2) v R** [2006] NSWCCA 218

Imposition of limiting terms.

**\* Suspended sentences**

**Barrett v DPP** [2006] NSWCCA 210

No appeal lies against the revocation of a suspended sentence (obiter)<sup>1</sup>.

**Brown v R; Reid v R** [2006] NSWCCA 144

Exercise of discretion to suspend sentences. Application of **R v Zamagias** [2002] NSWCCA 17.

**Wise v R** [2006] NSWCCA 264

The judge who determined the breach proceedings mistakenly believed that as the bond had been breached on which the suspended sentence depended, he had the power to re-sentence on call-up.

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<sup>1</sup> The amendments made to the **Crimes (Sentencing Procedure) Act 1999 (NSW)** by the **Crimes and Courts Legislation Amendment Act 2006 (NSW)** now provide for an appeal against a revocation of a suspended sentence.

### \* **Extra-curial punishment**

**Alameddine v R** [2006] NSWCCA 317

Explosion in drug laboratory caused burns to 50 per cent of offender's body. Self-inflicted injury suffered during crime can be taken into account in mitigation.

### **Standard Non-Parole Period Offences**

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#### \* **Crimes Act Offences**

##### **s 18 Murder**

**Apps v R** [2006] NSWCCA 290

Intention to kill is not the only circumstance relevant to the assessment of objective seriousness. Failure to consider relevance of mental state and mental illness.

##### **s 27 Wound with intent to murder**

**R v Zegura** [2006] NSWCCA 230

Crown appeal. Failure to give adequate reasons in compliance with s 54B(4) **Crimes (Sentencing Procedure) Act 1999** when departing from standard non-parole period.

##### **s 33 Malicious wounding with intent to inflict grievous bodily harm**

**Heron v R** [2006] NSWCCA 215

Judge overstated objective seriousness by failing to take account of the spontaneous reaction to provocation. Error in taking account of matters referred to in **R v Way** (2004) 60 NSWLR 168.

**ss 33, 35(2), 94, 98, 195(a)**

**Singh v Department [sic] of Public Prosecutions (NSW)** [2006] NSWCCA 333

Sentence appeal based on trial judge's failure to find special circumstances under s 44(2) **Crimes (Sentencing Procedure) Act** and the omission to reduce the non-parole period. However, trial judge "took into account matters identified as potentially giving rise to a claim of special circumstances": at [74]. His Honour accepted that he had the power to alter the ratio between the non-parole period and the balance of term, though declined to exercise it. Therefore no error demonstrated and no basis for interfering with the sentence imposed: at [74].

**s 61I Sexual intercourse without consent**

**Dean v R** [2006] NSWCCA 341

Taking into account an impermissible matter in aggravation will be irrelevant where there is no departure from the standard non-parole period.

**s 61J(1); s 61P Attempted aggravated sexual assault**

**DAC v R** [2006] NSWCCA 265

A standard non-parole period does not apply to attempted offences with the exception of inchoate offences.

**s 66A Sexual intercourse with child under 10**

**MLP v R** [2006] NSWCCA 271

Child sexual assault and characterisation of mid-range of objective seriousness. Subjective features erroneously taken into account.

**s 112(2) Aggravated break and enter**

**Lovell v R; Dominey v R** [2006] NSWCCA 222

Offender's motivation a relevant consideration when assessing objective seriousness, but pleas of guilty and their timing were extraneous issues to this assessment.

**s 112(2), 105A Aggravated break, enter and assault occasioning actual bodily harm**

**R v Tory & Tory** [2006] NSWCCA 18

Crown appeal — Assessment of objective criminality of offence. Obligation to provide reasons for departing from standard non-parole period even if a plea of guilty.

**s 25(2) Drug Misuse and Trafficking Act 1985 Supply prohibited drug**

**Vu v R** [2006] NSWCCA 188

Approach to be taken where there is a guilty plea to a standard non-parole period offence.

**\* Agreed statement of facts**

**FV v R** [2006] NSWCCA 237

Complainant's statement did not contradict or qualify the agreed statement of facts.

**\* Charge agreements**

**Ahmad v R** [2006] NSWCCA 177

A plea agreement as to the appropriate sentence is not binding on the sentencing judge, as it is for the sentencing judge alone to decide the sentence to be imposed.

**\* Fact finding on sentence**

**Perrin v R** [2006] NSWCCA 64

A sentencing judge is confined to evidence tendered against the offender and is not at liberty to use evidence adduced at trial of co-offenders.

**\* Imposition of fines and application of totality principle**

**EPA v Barnes** [2006] NSWCCA 246

Correct procedure when assessing amount of fines to be imposed. Partial accumulation and concurrence not available when imposing fines for separate offences, in contrast to imposition of custodial sentences.

**\* Sentence hearing and incompetence of counsel**

**Munro v R** [2006] NSWCCA 350

Sentencing judge correctly placed little weight on hearsay evidence of offender's violent upbringing and alcohol problems. Defence counsel's failure to adequately enquire into the offender's background.

**\* Principle of totality**

**R v MMK** [2006] NSWCCA 272

A sentence that is to be served wholly concurrently may be erroneously inadequate if it does not reflect the totality of the criminality.

**\* Departure from non-parole period**

**Mulato v R** [2006] NSWCCA 282

Departure from the standard non-parole and obligation to give reasons for so doing. Role of judge in determining objective seriousness of the offence.