



Friday, 1 November 2024

Weekly Criminal Law

A Weekly Bulletin listing Decisions
of Superior Courts of Australia covering criminal

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Executive Summary

Marshall v R (NSWCCA) - sentence for break and enter and commit serious indictable offence was manifestly excessive - not backdating sentence to the date the applicant went into custody as he was on parole in respect of an earlier sentence would have the effect of improperly taking the decision on parole in respect of the earlier sentence out the hands of the State Parole Authority

R v Pastor Pastor (QCA) - guilty verdict on count of aiding in the importation of a border-controlled drug was unreasonable, and failure to leave an available defence to the jury caused a miscarriage of justice in respect of a count of attempting to possess a border-controlled drug

HABEAS CANEM

Pig, Dog and Bougainvillea



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Summaries With Link (Five Minute Read)

Marshall v R [2024] NSWCCA 194

Court of Criminal Appeal of New South Wales

Basten AJA, Dhanji, & Faulkner JJ

Sentencing - the applicant pled guilty to an offence of break and enter and commit serious indictable offence - he was sentenced to a total term of 2 years and 3 months imprisonment, with a non-parole period of 1 year and 5 months - the applicant had been in custody since his arrest, but the sentence was only partially backdated, as the applicant was on parole for an earlier sentence when he committed the present offence - the applicant sought leave to appeal against sentence - held: the sentencing judge had had to have regarding to the interplay between an earlier sentence and the sentence to be imposed for the present offence when determining the date upon which the sentence was to commence - however, there was no basis to conclude that the sentencing judge did not appreciate the impact of the sentence he was imposing on the applicant's overall custodial situation - therefore, the sentencing judge did not err by failing to consider principles of totality in the length, structure, and dating of the sentence - this case was unusual as it was no part of the prosecution case that the applicant intended to commit an indictable offence within the premises at the time he broke the window and entered the property - when inside the property he damaged a laundry door - the indictable offence committed within the premises could properly be described as minor - the invasion of the occupants' privacy and personal space was limited - the sentencing judge found that the offence was "entirely spontaneous and unplanned" and committed in circumstances where the applicant was "in effect, seeking a form of shelter, having, on his account, been abandoned by the person whom he accompanied to the area" - had the applicant not had a criminal record for similar offending it is likely that a gaol sentence would not have been imposed - the starting point of imprisonment for 3 years (before the 25% discount for the plea of guilty) was disproportionate to the objective gravity of the offending - the sentence was manifestly excessive - as to the starting date of the sentence, it was for the State Parole Authority to determine whether the parole period of the earlier sentence should be served in custody or in the community - refusing to backdate the sentence for the present offence to the date of arrest would have the effect of taking the decision regarding the earlier sentence out of the Parole Authority's hands - it would also have the effect of adding to the punishment of the present offence - leave to appeal granted, appeal allowed, and applicant resentenced to imprisonment for a fixed term of 15 months, dating from the date of arrest.

[View Decision](#)

R v Pastor Pastor [2024] QCA 194

Court of Appeal of Queensland

Dalton JA, Bradley, & Crowley JJ

Unreasonable verdicts - the appellant was found guilty by a jury of two Commonwealth offences: aiding in the importation of a border-controlled drug in a commercial quantity, and attempting to possess a commercial quantity of a border-controlled drug - the appellant



appealed against conviction on the basis that the verdicts on both counts were unreasonable or could not be supported having regard to the evidence - held: where it is contended that a verdict is unsafe or unsatisfactory, the question the court must ask itself is whether it 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 - there was ample evidence that the appellant did acts which did in fact assist with the importation of a border-controlled drug - however,, here was a hypothesis consistent with innocence available in relation to the question of whether he intended to aid in the commission of an offence of that type - therefore, the verdict on the count of aiding in the importation of a border-controlled drug was unreasonable - the jury's verdict on the count of attempting to possess a border-controlled drug was open on the evidence - however, the appellant had had a defence under s307.5(4) of the *Criminal Code Act 1995* (Cth), which applies if the accused proves that he or she did not know that the border controlled drug was unlawfully imported - even though the appellant's trial counsel had disclaimed reliance on this defence, the trial judge should have raised it - the jury was entitled to accept the appellant's evidence that he knew of no importation, even though they rejected his evidence that he did not know there were drugs in the imported materials - this amounted to a miscarriage of justice - appeal allowed, verdict of acquittal entered on the count of aiding in the importation of a border-controlled drug, and new trial ordered on the count of attempting to possess a border-controlled drug.

[R v Pastor Pastor](#)

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Case of Kobaliya v Russia (EUHRTS) - European Court of Justice found that, in its overly broad definition of 'foreign agents', Russia committed multiple violations of the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

Case of Kobaliya v Russia, No 39446/16

European Court of Human Rights

Pastor Vilanova P, Schukking, Serghides, Roosma, Ktistakis, Mjöll Arnardóttir, & Kovatcheva JJ
Prior to its exclusion from the Council of Europe in 2022, Russia was bound by the *European Convention on Human Rights* and subject to the jurisdiction of the European Court of Human Rights. Here the activity in question occurred between 2012 and 2022 and related to fundamental rights to freedom of expression and assembly as guaranteed by the Convention. Under Russian law, non-governmental organisations (NGOs), media organisations, and individuals who received any foreign support were required to register as 'foreign agents' and conform to restrictions placed on persons so designated. The complainants alleged that the statutory definition was so overly broad as to impinge on rights to freedom of expression and freedom of assembly guaranteed by Articles 10 and 11 of the *European Convention*. The European Court found that the Russian legislation was unlawful because it was overly broad and employed the stigmatising term 'foreign agent' to a very wide universe of parties that could not all be lumped together as 'foreign agents'. Under Russian law, once designated as a foreign agent, substantial regulatory legislation attached curtailing the political rights of the parties so classified. By casting such a wide net, the term 'foreign agent' was used to circumvent basic *European Convention* rights.

[Case of Kobaliya](#)



Poem for Friday

Echo

By Christina Rossetti (1830-1894)

Come to me in the silence of the night;
Come in the speaking silence of a dream;
Come with soft rounded cheeks and eyes as bright
As sunlight on a stream;
Come back in tears,
O memory, hope, love of finished years.

Oh dream how sweet, too sweet, too bitter sweet,
Whose waking should have been in Paradise,
Where souls brimfull of love abide and meet;
Where thirsting longing eyes
Watch the slow door
That opening, letting in, lets out no more.

Yet come to me in dreams, that I may live
My very life again tho' cold in death:
Come back to me in dreams, that I may give
Pulse for pulse, breath for breath:
Speak low, lean low,
As long ago, my love, how long ago.

Christina Georgina Rossetti, born on 5 December, 1830, was one of the foremost poets of her era. Her father, Gabrielle, was an Italian Poet, and later chair of Italian at King's College, in London. Her mother Frances Polidor, an Anglo-Italian, home schooled her children in a climate of intellectual excellence. From 1845 Christina, by then a prolific poet, suffered an illness, that some consider was at least influenced by mental illness. She continued to have bouts of serious illness throughout her life. Rossetti's poetry, included the collections *Goblin Market and other Poems* (1862), *The Prince's Progress* (1866), *A Pageant* (1881), and *The Face of the Deep* (1882). Christina Rossetti died on 29 December, 1894.

Stanford Chamber Chorale, conductor, Stephen M Sano, with Laura Dahl, pianist, sing Norman Dello Joio's **Come to Me, My Love**, a setting of Christina Rossetti's "Echo"

<https://www.youtube.com/watch?v=NyJs5oqyygs>

Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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