



Friday, 3 May 2024

Weekly Criminal Law

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

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Executive Summary

Smith v R (NSWCCA) - sentencing judge had failed to afford procedural fairness by rejecting a psychiatrist's report to which the prosecution had made no objection without telling the parties the basis on which she proposed to do so

HABEAS CANEM

Panting pooches



Summaries With Link (Five Minute Read)

Smith v R [2024] NSWCCA 59

Court of Criminal Appeal of New South Wales

Adamson JA, Basten AJA, and Wilson J

Sentencing - applicant was sentenced in the District Court on two counts of aggravated break and enter and commit a serious indictable offence, namely larceny in company, contrary to s112(2) of the *Crimes Act 1900* (NSW) - the maximum penalty was 20 years imprisonment and the standard non-parole period was five years - he was sentenced to an aggregate sentence of four years and six months with a non-parole period of two years and nine months - he sought leave to appeal on the ground of denial of procedural fairness, in that the sentencing judge rejected the unchallenged evidence of a consultant psychiatrist, to the effect that there was a causal connection between the applicant's psychiatric disorders and cognitive impairment and the offending - the psychiatrist's report had been admitted without objection and he had not been required for cross-examination - held: had the psychiatrist's opinion been accepted, the level of moral culpability for the offending would have been reduced, as would the significance of the sentencing policy of general deterrence - if this could have resulted in a lower sentence, and the failure to give the applicant an opportunity to support the psychiatrist's opinions was procedurally unfair, the result must be to invalidate the sentence, even if, in exercising its function of resentencing, the Court of Criminal Appeal might impose the same sentence - an arguable case that there has been a failure to accord procedural fairness is sufficient to warrant a grant of leave to appeal - in circumstances where there had been no objection to the tender of the report, and the prosecutor had not sought to cross-examine the psychiatrist, but had indicated on two occasions that he did not wish to be heard with respect to the subjective material favouring the applicant, it should be inferred that there was no dispute as to the psychiatrist's opinions and, in particular, the opinion as to the causal link between the applicant's psychiatric and cognitive impairments and the offending - if the sentencing judge were proposing to take a different view, she was bound to advise the parties of that possibility - it was not clear that the psychiatrist's opinion would have been different had he known of the applicant's continued use of drugs whilst in custody, and the sentencing judge did not explain why she thought that fact case doubt on the psychiatrist's opinion - the Court was as well placed as the District Court to exercise the resentencing function - leave to appeal granted, appeal allowed, and applicant resentenced to imprisonment for 4 years with a non-parole period of 2 years and 9 months.

[View Decision](#)

Benchmark

INTERNATIONAL LAW

Executive Summary and (One Minute Read)

R v Secretary of State for the Home Department (UKSC) - Failed asylum seeker who committed criminal acts within the UK and who thwarted his deportation was lawfully refused government benefits and was not denied his rights under the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

R v Secretary of State for the Home Department [2024] UKSC 13

Supreme Court of the United Kingdom

Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens, and Lady Simler

AM was a national of Belarus. He arrived in the UK in 1998 and claimed asylum. In 2000, he was denied asylum status and removed to Belarus. He was denied entry to Belarus and returned to the UK because he provided Belarus officials with false information that caused the officials to believe that he was not a citizen. Upon his return to the UK, he committed various criminal offences and was classified as a foreign criminal by British authorities. The Government desired to extradite AM to Belarus, but he resisted these attempts. Further, the British authorities refused to grant AM Leave to Remain, which would entitle him to full government benefits. Instead, AM is in 'limbo' status under which (1) he may not seek employment in the UK, (2) he is not entitled to National Health Service benefits, excepting emergency care, (3) he may not open a bank account, (4) he may not enter into a tenancy agreement, and (5) he receives very limited social welfare benefits, at the same level of failed asylum seekers awaiting deportation. Instead, he received a payment card for food, clothing, and toiletries at a subsistence level and government accommodation. As AM may not return to Belarus, he claimed that the British Government's action of placing him in a legal 'limbo' amounted to a denial of his rights under Article 8 of the *European Convention of Human Rights*, and that the Government had to grant him Leave to Remain status that would enable him to obtain full public benefits. Article 8 provides that 'everyone has the right to respect for his private and family life' and that 'there shall be no interference by a public authority in the exercise of this right except as in accordance with law and is necessary in a democratic society in the interests of national security, public safety' - administrative tribunals and then the Court of Appeal agreed with AM, and ordered the Home Secretary to grant AM Leave to Remain status. On review, in a unanimous decision, the Supreme Court reversed the Court of Appeal and held that the Home Secretary did not violate AM's Article 8 rights by placing him in 'limbo' status. The Supreme Court found that AM's attempts to thwart his deportation were highly material factors in evaluating whether the Home Secretary's actions were proportional. The Court added that the



public interest in maintaining effective immigration controls and containing welfare expenditures were relevant considerations. There was also a public interest in maintaining British employment opportunities for those lawfully in the UK. The Court said that, given AM's serious criminal offences, his deportation was in the public interest, and his efforts to undermine that through fraudulent activity were also valid considerations. While AM was entitled to Article 8 protections, the Supreme Court concluded that his extended limbo status was a proportionate means of achieving the lawful aims of the British Government.

[R v Secretary of State for the Home Department](#)



Poem for Friday

Song of Hope

By: Thomas Hardy (1840-1928)

O sweet To-morrow! –
After to-day
There will away
This sense of sorrow.
Then let us borrow
Hope, for a gleaming
Soon will be streaming,
Dimmed by no gray –
No gray!

While the winds wing us
Sighs from The Gone,
Nearer to dawn
Minute-beats bring us;
When there will sing us
Larks of a glory
Waiting our story
Further anon –
Anon!

Thomas Hardy, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd*, (1874) and *Tess of the d'Urbervilles*, (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Nobel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds



today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, <https://www.hardysociety.org/>.

Song of Hope by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern <https://www.youtube.com/watch?v=Q1qo8sWTi6M>

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