

Friday, 8 June 2018

## Weekly Criminal Law

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

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### Executive Summary

**Lever (a pseudonym) v R** (NSWCCA) - criminal law - sexual offences - applicant convicted of aggravated sexual assault - appeal against conviction dismissed - leave to appeal against sentence refused

**Chen v R** (NSWCCA) - criminal law - drug offences - knowingly taking part in supply of more than commercial quantity of prohibited drug - admissibility of interpreter's evidence - jury directions - appeal against conviction dismissed

**Flood-Smith v R** (NSWCCA) - criminal law - recklessly causing grievous bodily harm - admissibility of admissions - jury directions - verdict not unreasonable appeal dismissed

**Meyer (a Pseudonym) v The Queen** (VSCA) - criminal law - sexual offences - applicant convicted of sexual offences - 'cumulative effect' of errors deprived applicant of fair trial - new trial ordered in respect of certain charges

**Madul v The Queen** (VSCA) - criminal law - theft - aggravated burglary - attempted armed robbery - reasonably open to jury to be satisfied beyond reasonable doubt of applicant's identity - leave to appeal against convictions refused

### Summaries With Link (Five Minute Read)

# Benchmark

## **Lever (a pseudonym) v R [2018] NSWCCA 107**

Court of Criminal Appeal of New South Wales

Basten JA; Johnson & Campbell JJ

Criminal law - sexual offences - applicant convicted of eight counts of aggravated sexual assault in relation to stepdaughter - applicant sentenced to aggregate term for the offences with non-parole period of 8 years and balance of term of further 5 years - applicant sought to appeal against conviction and sentence - applicant contended trial judge erroneously refused access to clinical records which stepdaughter's doctor held, erroneously refused to admit evidence concerning 'surrounding circumstances' of complaint to stepdaughter's doctor, and failed to state her reasons for the refusals of leave - applicant also contended that directions to jury were erroneous resulting in miscarriage, and that verdicts were unreasonable and could not be supported with regard to evidence and counts which applicant was acquitted on - s165B *Evidence Act 1995* (NSW) - *Criminal Procedure Act 1986* (NSW) - held: leave to appeal granted on grounds of appeal concerning unreasonable verdicts and refusals of leave - leave to appeal against sentence refused - appeal dismissed.

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## **Chen v R [2018] NSWCCA 106**

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; Schmidt & Campbell JJ

Criminal law - drug offences - evidence - appellant convicted of knowingly taking part in supply of more than commercial quantity of prohibited drug - on voir dire appellant challenged admissibility of interpreter's evidence of intercepted phone calls, contending lack of expertise, lack of impartiality, and bias - appellant also challenged translations' accuracy - appellant was unsuccessful in challenges to admissibility - appellant appealed - appellant contended trial judge erred in ruling interpreter's evidence admissible, in failing to exclude interpreter's evidence, in failing to withdraw interpreter's evidence, and in failing to 'issue appropriate warnings or directions' - whether non-compliance with 'expert witness code of conduct' rendered evidence inadmissible - ss79, 135 & 137 *Evidence Act 1995* (NSW) - Pt 75 r 3J *Supreme Court Rules 1970* (NSW) - held: grounds of appeal failed - appeal against conviction dismissed.

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## **Flood-Smith v R [2018] NSWCCA 103**

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; Walton & Button JJ

Criminal law - applicant found guilty of recklessly causing grievous bodily harm - applicant sentenced to non-parole period of three years in prison - applicant sought to appeal - applicant contended there had been a miscarriage of justice arising from trial judge's failure to exclude 'ambiguous or equivocal' admissions - alternatively applicant contended there had been miscarriage of justice arising from trial judge's failure to direct jury in relation to when they could act on an admission, and arising from trial advocate's invitation to jury to act on ambiguous or

# Benchmark

equivocal admissions - applicant also contended verdict was unreasonable or could not be supported with regard to evidence - s35(2) *Crimes Act 1900* (NSW) - s5(1)(b) *Criminal Appeal Act 1912* (NSW) - ss90 & 137 *Evidence Act 1995* (NSW) - r4 *Criminal Appeal Rules* - held: leave to appeal granted in respect of ground of appeal contending verdict was unreasonable or could not be supported with regard to evidence - appeal dismissed.

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## **Meyer (a Pseudonym) v The Queen [2018] VSCA 140**

Court of Appeal of Victoria

Maxwell ACJ, Priest & Kaye JJA

Criminal law - applicant convicted of charges of sexual offences against two girls under 16 - applicant sentenced to total effective sentence of six years and six months' in prison with four year non-parole period - applicant sought to appeal against conviction - applicant contended verdicts were unsafe and unsatisfactory - applicant also contended there had been a substantial miscarriage of justice due to prosecutor being permitted to cross-examine applicant's wife, and due to an 'aggregation of errors' - prosecutor's conduct - s276(1)(b) *Criminal Procedure Act 2009* (Vic) - held: Court satisfied that matters identified by applicant constituted errors in applicant's trial - judge erred in granting prosecutor leave to cross-examine applicant's wife - 'cumulative effect' of 'errors and irregularities' deprived applicant of fair trial - substantial miscarriage of justice established - appeal upheld - new trial ordered in respect of certain charges.

[Meyer](#)

## **Madul v The Queen [2018] VSCA 142**

Court of Appeal of Victoria

Osborn, Niall & Ashley JJA

Criminal law - theft - aggravated burglary - attempted armed robbery - applicant sought to appeal against convictions of theft, aggravated burglary and attempted armed robbery - applicant contended verdicts 'unsafe and unsatisfactory' - whether reasonably open to jury to be satisfied beyond reasonable doubt of applicant's identity - whether jury obliged to come to 'different conclusion' - s276 *Criminal Procedure Act 2009* (Vic) - held: Court concluded that it was open to jury to convict applicant on basis of 'combined force of the circumstantial evidence' - jury not obliged to have reasonable doubt concerning offender's identity - leave to appeal refused.

[Madul](#)



# Benchmark

## The Word

**By:** Ella Wheeler Wilcox

Oh, a word is a gem, or a stone, or a song,  
Or a flame, or a two-edged sword;  
Or a rose in bloom, or a sweet perfume,  
Or a drop of gall is a word.

You may choose your word like a connoisseur,  
And polish it up with art,  
But the word that sways, and stirs, and stays,  
Is the word that comes from the heart.

You may work on your word a thousand weeks,  
But it will not glow like one  
That all unsought, leaps forth white hot,  
When the fountains of feeling run.

[https://en.wikipedia.org/wiki/Ella\\_Wheeler\\_Wilcox](https://en.wikipedia.org/wiki/Ella_Wheeler_Wilcox)

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