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Weekly Criminal Law Review

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

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Executive Summary

The Queen v Aaron James Holliday (HCA) - criminal law - incitement to procure - whether offence under the *Criminal Code 2002* (ACT) - construction of Code considered - no offence - prosecution appeal dismissed

R v SG (NSWCCA) - criminal law - exclusion of evidence - relevance - sexual assault - eyewitness testimony excluded by trial judge - interlocutory appeal by Crown - whether exclusion substantially weakened Crown case - whether evidence relevant - order excluding evidence set aside

Lyons v R (NSWCCA) - criminal law - child pornography offences - applicant with compulsive internet pornography disorder - assessment of objective seriousness - application of totality principle - sentencing factors identified - failure to provide reasons - error identified - resentenced

Bell v Regina (NSWCCA) - criminal law-judge alone trial - appeal - sexual assaults - unreasonable verdict ground - necessity for court to examine the evidence - necessity to consider the course of the trial - role of judge examined - verdicts unreasonable or not supported by the evidence - appeal allowed, verdicts of acquittal entered

Viavattene v R (NSWSC) - criminal law - bail - expedition refused - Prothonotary refusal considered on Motion to Review - no error identified - no basis for permitting applicant to "jump the que" - application dismissed

Joseph v Worthington (VSC) - criminal law - judicial review - failure to pay Long Service Leave entitlements - summary offence - whether offence a continuing offence - procedure for judicial review - no error identified - proceedings dismissed with costs

Pun v The Queen (VSCA) - criminal law - plea bargain - obligation of parties to ensure sentence hearing is conducted according to law-possibility of abuse of process arising from negotiated plea - breach of *De Simoni* principle - indictment inconsistent - appeal allowed, applicant resentenced

DPP (Cth) v Masange and Kachunga (VSCA) - criminal law - residual discretion - prosecutor's duty - Commonwealth as model litigant-whether prosecutor's failure to assist court required dismissal of the appeals - whether the parole of one appellant affected the resentencing of both

Kalala v The Queen (VSCA) - criminal law-incitement to murder - domestic violence - sentence of 9 years imposed-whether sentence manifestly excessive - sentence within range - sentences for incitement to murder should be increased to reflect the objective gravity of the offending - appeal dismissed

R v Lansdowne (QCA) - criminal law - drug offences - conviction appeal - whether intercepted communication material properly admitted - whether material improperly disclosed propensity and bad character - whether verdicts unsafe - no error identified - appeal dismissed

Summaries With Link (Five Minute Read)

The Queen v Aaron James Holliday [2017] HCA 35
High Court of Australia
Kiefel CJ, Bell, Gageler, Nettle & Gordon JJ
Criminal law - incitement - the prosecution alleged that the appellant, while in custody pending sentencing for sex offences, offered another inmate, Powell, a reward if Powell would organise people to kidnap 2 witnesses, force them to adopted a statement prepared by the appellant which was designed to exculpate him of the sex offences and for Powell to then kill them - Powell did not go through with the plan and reported the appellant, who was then charged with a number of offences - two of the offences (counts 4 & 5) charged that the appellant "committed the offence of incitement in that he urged [Mr Powell] to kidnap each witness contrary to" s 47 (incitement) *Criminal Code 2002* (ACT) (*Code*) and s 38 (kidnapping) *Crimes Act 1900* (ACT) - the appellant was convicted on these counts and appealed - the Court of appeal set aside the verdicts and entered verdicts of not guilty and the Crown then appealed by Special Leave to the High Court - s 47(1) *Code* provides that a person commits the offence of incitement if that person "urges the commission of an offence" - s 45(1) *Code* provides that a person is "taken to

have committed an offence" if the person procures the commission of the offence by someone else - the issue on appeal was whether the appellant could be convicted of urging the commission of the offence of kidnapping, contrary to s 47 *Code*, by urging Powell to procure a third person to kidnap the witnesses - 2 questions were identified: (1) whether inciting the procurement of a substantive offence (kidnapping) is an offence under the *Code*; (2) whether s 45(2)a) and 45 (3) of the *Code* are "limitation[s] or qualifying provision[s]" within the meaning of s 47(5) *Code* - held: (1) there is no offence in the *Code* of incitement to procure - the second question did not arise for consideration; (2) the statutory framework of the *Code* - part 2.4 extends criminal responsibility in one of two distinct ways: a person may commit a discrete offence by doing certain things by refence to a substantive offence or a person is "taken to have committed " a substantive offence if certain conditions are met in relation to that offence - s 47(1) extends criminal responsibility by providing that a person commits the discrete offence of "incitement" if that person "urges the commission of an offence" - the physical element of s 47(1) is conduct - the fault element that applies to conduct under the *Code* is intention - a person will commit the offence of incitement only if the person intends that the offence incited be committed, but it is not necessary that the offence incited be completed and impossibility is not a defence - a person can be found guilty of incitement if they either urge a particular person to commit an offence or urge the commission of an offence generally - in either case, once the urging is done, the offence of incitement is complete - s 45 *Code* (offence of aiding and abetting, counselling or procuring the commission of an offence by someone else) has no operation until the substantive offence has been completed and once that substantive offence has been completed s 45 does not create a discrete offence of aiding, abetting, counselling or procuring - instead, by s 45 the person is charged with the substantive offence - the principal question in the appeal was whether the *Code* provides that person A is guilty of committing the offence of incitement if they urge person B to procure person C to commit an offence - procurement however is addressed in s 45 and that section does not create a discrete offence, so that there is no offence under s 45 to which s 47 can attach - the legislative history of the *Code* examined - the history reveals that the failure to include such an offence was unlikely to be inadvertent - there is no offence under the *Code* of incitement to incite and procurement (s45) is not a discrete offence - the legislative intention is not to capture conduct that amounts to either incitement to incite or incitement to procure; appeal dismissed. [Editor's note: Gageler & Nettle JJ agreeing with Kiefel CJ, Bell & Gordon JJ.]
Aaron James Holliday

R v SG [2017] NSWCCA 202
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, McCallum & Bellew JJ
Criminal law-exclusion of evidence - interlocutory appeal - the respondent pleaded not guilty to an indictment in the District Court containing 8 counts alleging assaults and acts of indecency upon FG (ss 61, 61I, 61L *Crimes Act 1900* (NSW) - at the time of the alleged offending the respondent was married to FG - there were 2 children of the marriage, SG and GG - SG was aged 10 at the time of the alleged incidents and was lying beside FG in her bed - the Crown

case was that the respondent had come into the bedroom and upon finding FG asleep, had climbed on top of her, held her down and forced her to have penile/vaginal intercourse (counts 1,2,3 on the Indictment) - SG was interviewed by police and the respondent objected to evidence being adduced from the 2 children - the trial judge excluded the children's evidence and the Crown appealed pursuant to s 5F(3A) *Criminal Appeal Act 1912* (NSW) (*Criminal Appeal Act*) - held: (1) whether the trial judge erred in ruling that SG's evidence was not relevant - referring to ss 55 & 56 *Evidence Act 1995* (NSW) - "could" in s 55 means "it is possible that it may" - s 55 is to be given a wide interpretation (*Nye v State of NSW* [2002] NSWSC 1270, [13]) - the width of the section is reflected in the fact that the effect of the evidence on the assessment of the relevant probability may be direct or indirect (*Zaknic Pty Limited v Svelte Corp Pty Limited* (1995) 140 ALR 701) - see *IMM v The Queen* (2016) 257 CLR 300, [38] (*IMM*) - relevance is to be determined on the basis that the evidence will be accepted (*IMM* [39]-[40]) - one of the facts in issue was whether the respondent climbed on top of FG, however the trial judge did not consider the nature of the Crown case on counts 1, 2 & 3 and did not identify the facts in issue - both of those steeps were essential to a determination of the relevance of SG's evidence - the trial judge also had regard to the reliability of the evidence - that approach constituted error (see *IMM*) - this appeal ground was made out; (2) whether the trial judge erred in finding that the probative value of the evidence was outweighed by the danger of unfair prejudice - a determination of whether evidence should be excluded pursuant to s 137 *Evidence Act 1995* requires 2 separate assessments, followed by a final determination - the first assessment is that of the probative value of the evidence - the second is an assessment of the danger of unfair prejudice that might be caused to the respondent by its admission - once those determinations have been made the trial judge must determine whether the identified danger outweighs the probative value of the evidence - if it does, then the trial judge is obliged to exclude it (*R v Burton* [2013] NSWCCA 335, [134] - unfair prejudice may be constituted by a danger that a jury may make improper use of the evidence (see *R v Dickman* [2017] HCA 24, [48]) - here, the trial judge did not make an assessment of the probative value of the evidence - this failure constituted error - taken at its highest, the evidence of SG was an eyewitness account of events capable of corroborating specific aspects of FG's allegations - its probative value was high - there was no danger of unfair prejudice to the respondent - the evidence was relevant and should not be excluded; (3) jurisdiction (s5F(3A) *Criminal Appeal Act)* - the jurisdiction of the Court to hear and determine the appeal was enlivened (s5F(3A)) - the evidence of SG, being an eyewitness account of the alleged offending which was the subject of counts 1, 2 & 3, was capable of corroborating parts of the evidence of the victim of that offending - it was the only corroborative evidence available - in those circumstances, it exclusion clearly substantially weakened the prosecution's case against the respondent and therefore the requirements of s 5F(3A) *Criminal Appeal Act* - were met; (4) remittal - no useful purpose would be served by remitting the matter for further argument in the District Court as the matter had been fully argued before the Court - appeal allowed, order excluding the evidence of SG set aside. [Editor's note: Hoeben CJ at CL & McCallum agreeing with Bellew J.]
SG

Lyons v R [2017] NSWCCA 204

Court of Criminal Appeal of New South Wales

Simpson JA, Harrison & Davies JJ

Criminal law-child pornography - totality - applicant pleaded guilty to 6 counts of using a carriage service for child pornography (State offence - s 91H(2) *Crimes Act 1900* (NSW); Commonwealth offences - ss 474.19(1), 474.24A *Criminal Code Act 1995* (CTH)) - the applicant, who was assessed as having a compulsive internet pornography disorder, was sentenced to a total period of 9 years, NPP 6 years - the applicant appealed against the severity of the sentences, arguing that the sentencing judge erred is his assessment of the objective seriousness of the offending and in applying the principle of totality - held: (1) determination of objective seriousness - referring to *Sponberg v R* ([2017] NSWCCA 120, [26]), while this matter was dealt with in the course of a busy list, the sentencing judge reserved for some 3 weeks and a reading of the sentencing Remarks as a whole did not enable the court to reach any conclusion as to how His Honour assessed the objective seriousness of each offence - error identified and appeal ground upheld; (2) totality principle - nowhere did the sentencing judge give any clue as to the basis upon which he accumulated the sentences for each of the first 5 sequences by a period of 12 months, nor why he wholly subsumed the sentence for sequence 5 in the sentence for sequence 10 - the possession count was significantly distinct from the various Commonweal offences involving transmission - although the offending was serious because of the number and nature of the images, it took place over a relatively short period of time and was committed by someone with a diagnosed sexual disorder that involved addiction to pornography - in those circumstances the sentence was , from a totality perspective, a severe one, both as to its non-parole period and the overall sentence - here, it was not possible to discern from the factual material the basis of the accumulation and without explanation, the only conclusion could be that error was demonstrated - that error is in the final category in *House v The King ((1936) 55 CLR 499)* - error was also demonstrated by the judge's failure to give reasons for the basis for the accumulation - appeal ground upheld; (3) re-sentence - propositions consistently applied by Australian courts in sentencing for child pornography offences identified [76] - see *R v De Leeuw* ([2015] NSWCCA 183 (*De Leeuw*)) - an offender's subjective circumstances must not be allowed to overshadow the objective gravity of the crimes - see *De Leeuw* at [70(h)] - see also *Mineham v R* ((2010) 201 A Crim R 243, [94]) - *R v Porte* ([2015] NSWCCA 174, [152]-[153]) sets out a comparative table of cases recently dealt with by the NSW CCA and the Court of Appeal of Victoria - the cases involved charges of possession (s91H(2) *Crimes Act 1900)* and accessing transmission offences (s474.19 *Criminal Code Act 1995*) and the aggravated transmission offence (s 474.24A *Criminal Code Act 1995*) - table reproduced at [80] - most of these decision involved greater number of images than in the present case, the period they were accessed was far longer and the images were at the upper end of objective seriousness - as objective seriousness is an assessment of where the case lies on the "spectrum" that extends from the least serious instances of the offence to the worsts category of offending *(R v Kilic* (2016) 91 ALJR 131, [19]) it is necessary to have regard to comparative cases - relevant sentencing matters concern the number of images, the length of time the material was possessed, accessed or transmitted, the nature and content of the material

ordinarily assessed on the CETS or Oliver scales - here, there was no suggestion that the material was assessed, or made available for profit - the objective seriousness of the offences was considered to range from the bottom through the low to mid-range - the applicant was remorseful, with prosects of rehabilitation and the need for specific deterrence was reduced - general deterrence, however, remained an important sentencing consideration - 25% discount allowed; appeal allowed and applicant resentenced to 6 years 3 months, NPP 4 years, 6 months. [Editor's note: Simpson JA & Harrison J agreeing with Davies J.]
Lyons

Bell v Regina [2017] NSWCCA 207
Court of Criminal Appeal of New South Wales
Bathurst CJ, McCallum & Adams JJ
Criminal law-judge alone trial - appeal - the applicant was assaulted while on remand waiting trial - the assault left the applicant cognitively impaired and his trial proceeded by judge alone - he was convicted of 3 sexual offences against the complainant arising from a single incident - the applicant and the complainant, who suffered from scoliosis, had been in a relationship for some time and it was a regular feature of their relationship that he would give her massages to ease her pain - sometimes the massages led to sexual intercourse - the applicant sought leave to appeal his convictions, arguing that the verdicts were unreasonable - held : (1) unreasonable verdicts : consideration of the evidence - this ground invokes s 6(1) *Criminal Appeal Act 1912* (NSW) - in *Filippou v the Queen* ((2015) 256 CLR 47, [6], [80] (*Filippou*)) the High Court considered the nature of an appeal on this ground after a judge alone trial - the judge's "finding" is to be understood to refer to the ultimate finding of guilt or otherwise, as opposed to the findings of fact leading to the ultimate finding (see s 133(1) *Criminal Procedure Act 1986* (NSW)) - the High Court held that the combined effect of the two sections is that a judge's finding of guilt "is not to be disturbed [under s 6(1) of the *Criminal Appeal Act*] unless there is no or insufficient evidence to support the finding, or the evidence was all the one way, or the finding is otherwise unreasonable, or unless there has been a misdirection leading to a miscarriage of justice" (*Filippou [12], [82]-[83]*) - *Filippou* makes it plain that those principles also govern an appeal invoking the first limb of s 6(1) from a finding of guilt after a trial by judge alone - in a trial by judge alone, the judgment of the trial judge must include the principles of law applied by the judge and the findings of fact on which the judge relied (s 133(2) *Criminal Procedure Act 1986)* - to the extent that the appeal takes issue with the correctness of the trial judge's intermediate findings of fact, the appeal court must have regard to the reasons stated by the trial judge - here, the Court's independent assessment of the evidence left each member of the Court in doubt as to the applicant's guilt - there were so many inconsistencies and anomalies in the evidence as to point unequivocally to the conclusion that the verdict was unreasonable, or could not be supported by the evidence - the Court's examination of the evidence is set out in detail at [32] - [159]; (2) the course of the trial - in undertaking the essential task of making an independent assessment of the evidence, the Court was inevitably required to have regard to the course of the trial - the Court identified a number of features of the trail dynamics that reinforced the Court's view that the verdicts were unreasonable - these

features included interruptions by the trial judge during addresses and questioning by counsel, interruptions preventing counsel providing information to the court and exchanges between counsel and the trial judge - these matters taken cumulatively would have, if raised as separate grounds of appeal, inevitably led to a new trial as what occurred amounted to a substantial miscarriage of justice - of themselves they may not have led to an acquittal, however they heightened the Courts doubt about the verdicts; appeal allowed, verdicts quashed & verdicts of acquittal entered.
Bell

Viavattene v R [2017] NSWSC 1142
Supreme Court of New South Wales
Button J
Criminal law-bail - applicant, who was unrepresented, sought expedition of his bail application - the Prothonotary refused his application and he sought review of that decision - held: after examining the grounds and evidence - application refused - no error identified - no basis for permitting the applicant to "jump the que" that applies to every other incarcerated person.
Viavattene

Joseph v Worthington [2017] VSC 501
Supreme Court of Victoria
Derham AsJ
Criminal law-judicial review - failure to pay Long Service Leave entitlements - plaintiff sought judicial review of a County Court (CC) decision dismissing his appeal against a conviction in the Magistrates Court - application by originating motion pursuant to O56 *Supreme Court (General Civil Procedure) Rules 2016* (Vic) - the relief sought was in the nature of *certiorari* to quash the orders made by the County Court judge, a declaration that sub-s 72(2) *Long Services Leave Act 1992* (Vic) (*LSLA*) was not a continuing offence and was subject to s 7 *Criminal Procedure Act 2009* (Vic) (*CPA*) and remittal of the matter to the CC - s 7 provides that proceedings for a summary offence must be commenced within 12 months - the plaintiff submitted that the CC erred in finding the offence to be a continuing one and that this constituted an error on the face of the record and a jurisdictional error and that the CC, accordingly, lacked jurisdiction to determine the charge - held: (1) summary offence - it was common ground that a contravention of sub-s 72(2) *LSLA* was a summary offence - s 6 *CPA* provides that proceedings for summary offences are commenced by filing a charge-sheet - s 7 *CPA* sets a12 months' time limit for the commencement o summary proceedings; (2) judicial review - the plaintiff's appeal to the County Court was under Part 6.1 *CPA* - that appeal having been heard by the CC in its appellate jurisdiction, there is no further right of appeal - the common law jurisdiction of the Supreme Court to review decisions of inferior courts is subject to the procedures set out in O 56 of the Rules - the jurisdiction is supervisory and does not entitle the Supreme Court to canvas maters that it would on appeal - in a judicial review, the Supreme Court is concerned with the legality of what was done by the court or tribunal below and is not concerned with the merits of the decision under review (*Craig v South Australia* (1995) 184 CLR 163, 135 - 6); (3) statutory

construction principles - referring to *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* ((1981) 147 CLR 297)), "the object of a court is to ascertain, and give effect to, the will of Parliament" - the discovery of the legislative intent is an objective process ascertained by interpreting the statute - the reach and operation of the law is determined by refence to the language, purpose and scope of the law, viewed as a whole within its context, as well as by reference to considerations of consistency and fairness (*Momcilovic v The Queen* (2011) 245 CLR 1; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Review* (2009) 239 CLR 27, [47]); (4) continuing offence - authorities referred to and considered (*R v Industrial Appeals Court*;*Ex parte Barellie's Bakeries Pty Ltd* [1965] VicRep 79*; R v Industrial Appeals Court; ex parte Circle Realty Pty Ltd* [1980] VicRep 44) - additional authorities considered [65]-[69] - it was common ground that the question whether sub-s 72(2) *LSLA* created a continuing offence had not previously been judicially considered and that there are no relevant "extrinsic materials" to be considered - the arguments were finely balanced - considering the text of the provisions, taking into account historical considerations, the offence created by the subsection , once committed, is extensible and continues day by day from that time until payment required is made - it is a continuing offence - there was no error - proceedings dismissed with costs.
Jospeh

Pun v The Queen [2017] VSCA 219
Court of Appeal of Victoria
Redlich, McLeish JJA & Croucher AJA
Criminal law- *De Simoni* - plea bargaining - severity appeal - applicant was charged with obtaining financial advantage by deception and negligently dealing with the proceeds of crime - on sentence an agreed statement of facts was relied upon and on the negligently dealing charges he was sentenced on the basis that he knew the funds he withdrew were the proceeds of crime (knowingly and dishonesty dealing) - this constituted error and required the applicant to be resentenced - the Court considered that the sentencing judge had been placed in an invidious position because of the way the indictment had been framed and because of how the plea was conducted - held:(1) plea bargaining - the sentencing judge mistakenly sentenced the applicant on the basis of the agreed statement of facts which stated that he knew that he funds he withdrew were the proceeds of crime, so that he was sentenced for a more serious offence than that charged in breach of the rule in R v De Simoni ((1981) 147 CLR 383; see also s 191(2)(b) *Evidence Act 2008* (Vic)) - plea bargaining is peculiar to our adversarial system, unregulated by statute and wholly depend upon prosecutorial discretion - while the *Public Prosecutions Act 1994* (Vci) and *Victims' Charter Act 2006* (Vic) do touch upon the process, they neither define nor address it in any detailed or systematic fashion - a negotiated outcome may and often does result in a plea to a less serious offence than could be established by the facts available to the prosecution - referring to the DPP's Policy on Resolution, here, while the indictment reflected a less serious form of the applicant's criminality, it was not necessary to consider whether the lesser charges were appropriate - as that matter was one exclusively for the Director and his decisions are not susceptible to judicial review - however, that did not mean

that it was proper for an indictment to contain charges that are logically inconsistent - the sentencing judge should not have been asked to sentence upon chargers that were logically inconsistent - while a court is not powerless to deal with such a situation, there are considerable constraints within which a sentencing judge must work - here, the judge could not exercise control over the charges selected by the Director unless it was necessary to do so to prevent an abuse of process or to ensure a fair process (*R v McCready* (1985) 20 A crim R 32; *R v Brown* (1989) 17 NSWLR 472; *Maxwell v The Queen* (1996) 184 CLR 501; *DPP (SA) v B* (1998) 194 CLR 566)) - as the issue of the fundamentally illogicality between the charges in the indictment was not explored on appeal, it was inappropriate to finally resolve the question of whether it involved an abuse of process; (2) the sentencing - once the Director accepted a plea on the bias that the applicant was only negligent as to whether the funds he withdrew were the proceeds of crime, the sentencing judge should not have had facts placed before her which disclosed that the offender had committed a more serious offence - while a judge may take a different view of the facts to the way they are presented on the plea, the judge may not sentence for conduct which would constitute a more serious offence than that charged - here, the judge was in effect invited to sentence on a view of the facts which should have been the subject of a discreet and more serious charge and neither defence counsel nor the prosecution drew the judge's attention to the matter - the case illustrated graphically why it is incumbent upon the parties to ensure, where a negotiated outcome results in a plea to a less serious offence than could be established by the facts available to the prosecution, that the settled facts presented to the sentencing judge conform with the agreed charges - as the judge does not know what the negotiated outcome resolved she should have asked the parties to resolve the inconsistency when they failed to take that step - here, the plea bargain and the manner in which the plea was conducted did not enable the judge to sentence the applicant according to law and the judge fell into error by acting upon the facts and indictment as presented to him; appeal allowed, applicant resentenced. [Editor's note: Redlich & McLeish JJA agreeing with Croucher AJA.]

Pun

DPP (Cth) v Masange and Kachunga [2017] VSCA 204

Court of Appeal of Victoria

Maxwell P, Redlich JA & Beale AJA

Criminal law-Residual discretion - leniency appeal - drug offences - the Commonwealth prosecutor gave the sentencing judge little assistance in identifying "what sentences have been imposed in other (more or less) comparable cases" - one appellant had also been released on parole, but the Court was not advised of this until moments before the delivery of judgment in the appeals -

the Court agreed that the sentences imposed on both respondents were manifestly inadequate (outside the range reasonably open to the sentencing judge in the circumstance of the case case) - the court disagreed however on whether the appeals should be dismissed in the exercise of the residual discretion, the majority upholding the appeals - both appellants to be resentenced - held: (1) residual discretion & prosecutor's duty - it is a serious thing to decline to

correct an inadequate sentence solely because of an omission on the part of the prosecutor on the plea (*DPP (Cth) v Thomas & Wu* (2016) 315 FLR 31) - that course is not warranted unless the prosecutor's omission was shown to have caused the error subsequently complained of by the Crown on appeal - there is an important distinction to be drawn between a case where the prosecutor makes a specific omission, or concession, which is productive of error (see *DPP v Holder (a Pseudonym)* (2014) 41 VR 467) and a case such as here, where reliance is placed on the prosecutor's silence - whether a prosecutor's silence should be held to have led the sentencing court into error will depend on the circumstances and in particular upon the subject matter and context of the defence submission (or judicial comment) to which it is said the prosecutor should have responded - here, the court did not consider that the prosecutor's silence amount to an implied concession of any kind and the residual discretion was not therefore engaged - authorities considered (see *DPP v Karazisis; DPP v Bogtstra; DPP v Kontokolotsis* [2010] VSCA 350, [115]; *CMB v AG (NSW)* (2015) 256 CLR 346, [64]; *DPP v Haynes* [2017] VSCA 79; *DPP v Frewstal Pty Ltd* (2015) 47 VR 660) - in *Thomas & Wu* ([178]-[183]) the Court has stated that it is not sufficient in the context of federal drug offences for the Crown to simply hand up a schedule of cases-in order to assist the sentencing judge to avoid appealable error, the prosecutor must speak to such a schedule and articulate the unifying principles revealed by the cases referred to - the relevance to the residual discretion of a failure by the prosecution to fully provide the judge with necessary assistance was set out by the Court in *DPP v Waack* ((2001) 3 VR 194, [31]); (2) Kachunga's release on parole - there are circumstances which will produce an injustice if a Crown appeal is allowed, even where the sentence is erroneously lenient *(R v Kong* (2013) 115 SASR 425, 444-5) - to return this appellant to custody would have worked serious injustice - he had been at liberty for almost 6 months and his partner was pregnant with their first child - properly understood, the exercise of the residual discretion in circumstances such as these is an exercise of mercy (*Markovic v The Queen* (2010) 30 VR 589) - the requirements of justice must sometimes be tempered; (3) Kachunga's sentence remained unchanged; Masange was resentenced and received a lesser sentence of 9 years 6 months, NPP 6 years. [Editor's note: Maxwell P & Redlich JA agreeing with Beale AJA that the sentences were manifestly inadequate; Beale AJA dissenting on the exercise of the residual discretion.]
Masange and Kachunga

Kalala v The Queen [2017] VSCA 223
Court of Appeal of Victoria
Maxwell P, Redlich & Osborn JJA
Criminal law - incitement to murder - severity appeal - the applicant asked an associate to arrange for his de facto wife, NR, to be killed , transferring a sum of money for the purpose - later, while NR was overseas, the applicant telephoned her and asked her to go outside the building where she was, which she did - waiting outside for her were the persons the applicant had secured to kill her - they kidnapped her, but did not kill her as she was a woman - the applicant pleaded guilty to incitement to murder (ss 321G & 321H *Crimes Act 1958* (Vic)) and was sentenced to 9 years, NPP 6 years - the applicant appealed , arguing that the sentence

was manifestly excessive - held: the sentence was not manifestly excessive - 9 years was within a sound exercise of the sentencing discretion - the sentences imposed in previous cases of incitement to murder (ranging from 4 and a half to 8 years) could not impose an upper limit on the sentencing range - the circumstances of the offending were very grave - the sentencing judge was entitled to view the objective gravity and the applicant's moral culpability as requiring a higher sentence than any previously imposed - inciting the murder of a partner is an extreme form of family violence and the prevalence of such violence was rightly taken into account by the sentencing judge - sentences previously imposed in cases of incitement to murder approaching or falling within the upper category of seriousness have not sufficiently reflected the objective gravity of the crime - sentences for such offences must be increased in the future to reflect the degree of criminality involved in inciting another person to kill the victim - the degree of moral culpability will typically be high as the offender will have intended to cause the death of the victim and taken steps to bring it about - the consequence of elevating sentences in the upper range should be that sentences falling in the middle or lower end of the range, will also increase - the present great disparity between sentences imposed for premeditated murder and those imposed for incitement to murder where the offender plans the taking of the victim's life and takes steps to bring it about, is not justifiable - the sentence for incitement to murder should more closely align with sentences for conspiracy to murder - where the intended victim is a partner, or former partner or other family member, the increase in sentencing standards for incitement to murder must be such as will more adequately deter and denounce family violence - appeal dismissed. [Editor's note: Osborn JAS agreeing with Maxwell P & Redlich JA.]
Kalala

R v Lansdowne [2017] QCA 184
Court of Appeal of Queensland
Gotterson & Morrison JJA & Atkinson J
Criminal law-unreasonable verdict - appellant convicted of trafficking in and possession of methylamphetamine (ss 5, 9(d) *Drugs Misuse Act 1986* (Qld)) - on the trafficking charge the appellant was sentenced to 4 years, suspended after 2 years, and on the possession charged he was convicted without sentence - the prosecution case was circumstantial and depended upon intercepted telephone communications and listening material - the appellant appealed his convictions, relying upon several grounds, including error in admitting the intercepted material as it improperly raised propensity or bad character - held: (1) admission of the intercepted material: propensity and bad character - the 25 conversations were relevant in that they offered an evidentiary basis for reasoning by inference from them and other evidence, to a conclusion that the appellant was in possession of and otherwise involved in dealing with illegal drugs and that he did so in a commercial context - the evidence was also probative of the trafficking count as circumstantial evidence (see *R v Chilnicean* [2016] QCA 26, [33]-[44]) - the conversations did not taint the appellant with "guilt by association" - the evidence was not admitted as propensity evidence and in so far as the material revealed the appellant to be a drug user, directions were given which were appropriate an adequate - defence counsel did not seek additional directions - there was a sound forensic reason for not seeking further directions - the admission of the

evidence was not vitiated by error; (2) inconsistent verdicts - the verdicts were reconcilable - ground not made out; (3) unsafe verdict - *R v Baden-Clay* ((2016) 258 CLR 308) referred to - the intercepted material provided evidence, as disclosed by the appellant's own statements, that his possession was not merely for his personal use - ground dismissed; appeal dismissed. [Editor's note: Morrison JA & Atkinson J agreeing with Gotterson JA.]
Lansdowne

Inviting a Friend to Supper

BY BEN JONSON

Tonight, grave sir, both my poor house, and I
Do equally desire your company;
Not that we think us worthy such a guest,
But that your worth will dignify our feast
With those that come, whose grace may make that seem
Something, which else could hope for no esteem.
It is the fair acceptance, sir, creates
The entertainment perfect, not the cates.
Yet shall you have, to rectify your palate,
An olive, capers, or some better salad
Ushering the mutton; with a short-legged hen,
If we can get her, full of eggs, and then
Lemons, and wine for sauce; to these a cony
Is not to be despaired of, for our money;
And, though fowl now be scarce, yet there are clerks,
The sky not falling, think we may have larks.
I'll tell you of more, and lie, so you will come:
Of partridge, pheasant, woodcock, of which some
May yet be there, and godwit, if we can;
Knat, rail, and ruff too. Howsoe'er, my man
Shall read a piece of Virgil, Tacitus,
Livy, or of some better book to us,
Of which we'll speak our minds, amidst our meat;
And I'll profess no verses to repeat.
To this, if ought appear which I not know of,
That will the pastry, not my paper, show of.
Digestive cheese and fruit there sure will be;
But that which most doth take my Muse and me,
Is a pure cup of rich Canary wine,
Which is the Mermaid's now, but shall be mine;
Of which had Horace, or Anacreon tasted,
Their lives, as so their lines, till now had lasted.
Tobacco, nectar, or the Thespian spring,
Are all but Luther's beer to this I sing.
Of this we will sup free, but moderately,
And we will have no Pooley, or Parrot by,
Nor shall our cups make any guilty men;
But, at our parting we will be as when
We innocently met. No simple word
That shall be uttered at our mirthful board,

Shall make us sad next morning or affright
The liberty that we'll enjoy tonight.

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