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Weekly Criminal Law

Editor - Richard Thomas of Counsel

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

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Executive Summary

Xiao v R (NSWCCA) - criminal law - insider trading - severity appeal - sentencing for Federal offences & discount for early plea - utilitarian value - objective seriousness - factors - nature of appeal considered - hardship - appeal allowed - resentenced

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Summaries With Link (Five Minute Read)

Xiao v R [2018] NSWCCA 4

Court of Criminal Appeal of New South Wales

Bathurst CJ, Beazley P, Hoeben CJ at CL, Bellew J

Criminal law - severity appeal - insider trading - applicant was a senior executive employed by a group of Chinese corporations - he conspired with Zhu to engage in insider trading and was charged with procuring another to acquire financial products while possessing insider information and with entering into an agreement to commit an offence (ss1043A(1)(d) & 1311(1) *Corporations Act 2001* (Cth)) - the applicant pleaded guilty to both offences prior to committal and was sentenced to an effective term of 8 years 3 months, NPP 5 years 6 months - the applicant sought leave to appeal his sentence, submitting, *inter alia* that the sentencing judge erred in assessing the objective seriousness of his offending and in declining to take into account the utilitarian benefit of the plea - held: (1) matters to have regard to when sentencing for Federal offences (ss16A & B *Crimes Act 1914* (Cth)) - except to the extent stated in ss16A and 16B, general common law principles and not peculiarly local or State statutory principles of sentence are applicable - the common law principles give content to the statutory expression in s16A "of a severity appropriate in all the circumstances of the offence" and some of the expressions used in s16A(2) (see *Johnson v The Queen* (2004) 78 ALJR 616, [15]; *Hili v the Queen*; *Jones v The Queen* (2010) 242 CLR 520, [25]); (2) nature of the appeal - the Court was not required to determine whether the decision of *R v O'Donoghue* ((1988) 34 A rim R 397, per Hunt J at 401) and the cases following it, was wrongly decided as there was evidence to support the judges findings and the inferences drawn from the agreed facts - accordingly and in accordance with the preponderance of authority, the Court adopted the approach applied in *O'Donoghue* in dealing with the factual challenges raised in the appeal; (3) discount for early plea - after extensively examining relevant decisions of the various jurisdictions and the legislative history of the provisions, the Court concluded that the utilitarian value of a plea can be taken into account on sentence - in providing for the fact of a plea to be taken into account, the legislature intended the encouragement of guilty pleas not only to provide evidence of remorse or contrition, but to assist in the administration of justice - to the extent that *Tyler v The Queen* ((2007) 173 A Crim R 458) and the cases which followed it provide to the contrary, they should not be followed - courts should be encouraged to identify the specific reduction (discount allowed (see *R v Place* (2002) 81 SASR 395, [81]-[83]; *Cameron v The Queen* (2002) 209 CLR 339, [71]) - however there is no obligation on the judge to do so and the failure to do so will not of itself amount to error - this ground was not made out; (4) hardship - the sentencing judge appeared to have failed to take into account the fact that the applicant's immediate family was in China and that he had not been able to see or speak with them for two years - this constituted error; appeal allowed and applicant resentenced, total effective sentence of 7 years imposed after 15% discount applied, NPP 4 years 6 months.

[Xiao](#)



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A Musical Instrument

By: Elizabeth Barrett Browning

I.

WHAT was he doing, the great god Pan,
Down in the reeds by the river ?
Spreading ruin and scattering ban,
Splashing and paddling with hoofs of a goat,
And breaking the golden lilies afloat
With the dragon-fly on the river.

II.

He tore out a reed, the great god Pan,
From the deep cool bed of the river :
The limpid water turbidly ran,
And the broken lilies a-dying lay,
And the dragon-fly had fled away,
Ere he brought it out of the river.

III.

High on the shore sate the great god Pan,
While turbidly flowed the river ;
And hacked and hewed as a great god can,
With his hard bleak steel at the patient reed,
Till there was not a sign of a leaf indeed
To prove it fresh from the river.

IV.

He cut it short, did the great god Pan,
(How tall it stood in the river !)
Then drew the pith, like the heart of a man,
Steadily from the outside ring,
And notched the poor dry empty thing
In holes, as he sate by the river.

V.

This is the way,' laughed the great god Pan,
Laughed while he sate by the river,)
The only way, since gods began
To make sweet music, they could succeed.'
Then, dropping his mouth to a hole in the reed,
He blew in power by the river.



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VI.

Sweet, sweet, sweet, O Pan !
Piercing sweet by the river !
Blinding sweet, O great god Pan !
The sun on the hill forgot to die,
And the lilies revived, and the dragon-fly
Came back to dream on the river.

VII.

Yet half a beast is the great god Pan,
To laugh as he sits by the river,
Making a poet out of a man :
The true gods sigh for the cost and pain, —
For the reed which grows nevermore again
As a reed with the reeds in the river.

https://en.wikipedia.org/wiki/Elizabeth_Barrett_Browning

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