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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

Katsis v R (NSWCCA) - criminal law - vulnerable victim - aggravating factor - historical murder and rape - sentencing principles identified and applied - no error - appeal dismissed

Yaqub v R (NSWCCA) - criminal law - incompetent counsel - failure to advise - conviction appeal following plea of guilty - principles to be applied - offence of importing marketable quantity of drugs (opium) - whether for personal use - lawyer advised jury unlikely to accept applicant's version due to quantity - no miscarriage - appeal dismissed

May v The State of Western Australia (WASCA) - criminal law - identification evidence - appellant identified from single photograph - evidence admissible - *Domican* warning not given to jury - error - failure to object - appeal - proviso applied - appeal dismissed

Summaries With Link (Five Minute Read)

Katsis v R [2018] NSWCCA 9
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, Schmidt & Campbell JJ
Criminal law - murder - applicant was tired and sentenced in 2015 for a murder and rape committed in 1988 - the victim was an elderly lady who lived alone - she was unable to properly care for herself and the autopsy showed that she had been violently assaulted, raped and strangled - in 2014 a buccal swab was taken from the applicant when he commenced a sentence of imprisonment and a DNA profile match was made, identifying the applicant - the applicant was sentenced to 20 years, NPP 15 years and sought leave to appeal the sentences on several grounds, including that the sentencing judge erred in applying the correct sentencing principles and in taking into account as an aggravating factor that the victim was vulnerable (s21A(2)(1) *Crimes (Sentencing Procedure) Act 1999* (NSW)) - held: (i) whether the victim was "vulnerable" (s21A(2)(1)) - the examples given in the section are not exhaustive but illustrative (*Longworth v R* [2017] NSWCCA 119) - what is required is that a particular class of person with a particular vulnerability deriving from the person's membership of that class is identified, rather than focusing upon the particular circumstances of the particular victim - regrettably, in our urban society there is a class of persons into which category the deceased came - that class of persons has the following characteristics: she is elderly, lives alone, does not associate with other persons, has no community support and does not look after herself - because of that social isolation, such person are often frail and undernourished and can properly be regarded a members of a class who are vulnerable - no submissions to the contrary were made by defence counsel at sentence - ground dismissed; (ii) sentencing principles for historical offences - here, the sentencing judge was unable to discern a clear sentencing pattern for the crimes of murder associated with sexual offences for the 1980s - *Magnuson v R* ([2013] NSWCCA 50) confirms the traditional approach of imposing sentences for historical offences where a sentencing pattern is unable to be discerned: "the judge should commence the sentencing in the usual way…by reference to the maximum penalty, and the place in the range of objective gravity occupied by the offence…" - the fundamental principles is that the sentence imposed must adequality reflect the criminality of the offender whenever the offences were committed - see *RL v R* [2015] NSWCCA 106; *MPB v R* (2013) 234 A Crim R 536; *CT v R* [2017] NSWCCA 15 - at the relevant time the penalty for murder was a mandatory life sentence and the objective gravity of the offending was significant - while offender was one week away from his 18th birthday at the time of the offending, he was precluded from relying upon his youth to its full extent - the delay in prosecution was not attributable to any inaction by the authorities - the sentence imposed was not outside the range for such a serious offence even taking into account his age - the concurrency involved a considerable degree of leniency - the sentencing judge applied the principles in *Magnuson v R, RL v R* and *MPB v R* - ground dismissed; (iii) other grounds dismissed - leave to appeal granted, appeal dismissed. [Editor's note: Schmidt & Campbell JJ agreeing with Hoeben CJ at CL.]
Katsis

Yaqub v R [2018] NSWCCA 14
Court of Criminal Appeal of New South Wales
Basten JA, R A Hulme J, Hidden AJ
Criminal law - conviction appeal - the applicant was charged with an offence of importing a marketable quantity (962.3 grams) of opium (s307.2(1) *Criminal Code 1995* (Cth) (*Criminal Code*)) - the applicant advised his lawyer that the opium, which was located in his luggage when he arrived in Sydney, was for his personal use and medicine for his other, which she put in her tea - his lawyer advised him that a jury was unlikely to believe that 962.3 grams was for personal use, but that the choice of whether to enter a plea of guilty was a matter for the applicant - the applicant entered a plea of guilty and was sentenced to 4 years, NPP 2 years and sought leave to appeal his conviction - s307.2(4) *Criminal Code* provides for a defence of "personal use" - held: *Senior v R* ([2017] NSWCCA 220, [24]-[27]); *Green, Al v R* ([2017] NSWCCA 282, [10]-[12]); *R v Kouroumalos* ([2000] NSWCCA 453, [19]);*Meissner v The Queen* ((1995) 184 CLR 132) set out the principles to be applied in an appeal against conviction that follows a of guilty - see *R v Lars (aka Larsson)* ((1994) 73 A Crim R 91, 109-111) & *R v Liberti* ((19991) 55 A Crim R 120, 122) for observations on withdrawal of a plea of guilty or appeals against conviction following a plea of guilty - here, the applicant's lawyer, an experienced and specialist criminal practitioner, was aware of s307.2(4) and was adamant that at the applicant advised him that "he made money from " the opium - there was no dispute that he made contemporaneous notes of his conferences with the applicant - his evidence was to be accepted - the applicant could not have established a defence under the section without giving evidence and he could not give false evidence - the applicant received a reduced sentence (25% discount for plea) - there was no miscarriage of justice - there was an element of pragmatism associated with the plea of guilty in that the applicant appeared to have been significantly influenced by the correct advice that he would receive a reduced sentence - leave to appeal granted, appeal dismissed. [Editor's note: Basten JA & Hidden AJ agreeing with R A Hulme J.]
Yaqub

May v The State of Western Australia [2018] WASCA 24
Supreme Court of Western Australia - Court of Appeal
Buss P, Mazza JA & Chaney J
Criminal law - identification - conviction appeal - a burglary occurred in a house and when the police investigated they located CCTV footage from a nearby Comfort Inn which showed a man running down the driveway of the Inn - a police officer took still photographs of the CCTV footage with his mobile phone and showed one of the still photos to the householder - the householder identified the person in the still as the man he had seen leaving his house at the time of the burglary - the appellant admitted that he was the person shown in the still photo, but denied the offence, claiming that he was innocently running laps in the area ta the time - the householder described the person he had seen as Aboriginal, of average height, wearing a brown T-shirt with yellow or brown stirpes - the appellant was convicted and appealed, submitting, *inter alia,* that the trial judge erred by failing to exclude the identification evidence, or

alternatively, in failing to properly direct the jury on the use of identification evidence - held: (i) failure to object & appeal - the significance of whether objection is taken to the admission of evidence the subject of a ground of appeal is explained in *LBC v The State of Western Australia (*[2011] WASCA 201, [69]) - where objection is not made at trial, there can be no wrong decision on a question of law and an appeal can only be allowed if he appellant establishes that the admission of the evidence occasioned a miscarriage of justice - this is not easily established as generally an accused is bound by the way defence counsel conducted the trial - to establish a miscarriage of justice by reason of evidence which was admitted without objection, the appellant must demonstrate that the evidence was inadmissible; that the failure to object was not a forensic decision and that the admission caused material prejudice to the appellant - here, no objection was made to the admission of the identification evidence; (ii) a miscarriage of justice? - it was conceded that the identification evidence was relevant - a judge has a discretion to exclude admissible evidence where its admission would be unfair to an accused such that the prejudicial effect exceeds its probative value - the dangers of identification evidence referred to (*Alexander v The Queen* (1981) 145 CLR 395) - here it was entirely legitimate for the police officer to present the householder with an image taken from the CCTV footage in order to inquire if the peon depicted in the image (and the CCTV footage) was the offender - the evidence was admissible and should not have been excluded in the exercise of the judge's discretion [60] - ground dismissed; (iii) identification directions - referring to the displacement effect, the trial judge's directions did not fully comply with those mandated by the High Court in *Domican v The Queen* ((1992) 173 CLR 555, 561-2) - the judge did not direct the jury about the risk that the identification was born from the implied suggestion created by the police officer's presentation of a single photograph with the questions "if that was the guy" - this ground was conceded - ground upheld: (iv) was the verdict unreasonable ? - authorities and principles identified and considered (*M v The Queen* (1994) 181 CLR 487, 492; *MFA v The Queen* (2002) 213 CLR 606, [58]; *Morris v The Queen* (1987) 163 CLR 454, 473; *SKA v The Queen* (2011) 243 CLR 400, [14]; *Libke v The Queen* (2007) 230 CLR 559, [113]; *R v Baden-Clay* (2016) 258 CLR 308, [46]-[47]) - the Court's examination of the trial record did not give rise to a reasonable doubt as to the appellant's guilt - ground not made out & leave refused on that ground; (v) proviso (s30(4) *Criminal Appeals Act 2004* (WA)) - the principles to be applied identified in *Ritchie v The State of Western Australia* ([2016] EASCA 134, [118], [119]) approved - after examining the trial record, the trial judge's failure to adequately direct the jury on the identification of the offender from a single photograph shown to him did not deny the appellant a chance of acquittal that was fairly open to him - proviso applied - appeal dismissed.

Cooper

That Bright Chimeric Beast
By: Countee Cullen

That bright chimeric beast
Conceived yet never born,
Save in the poet's breast,
The white-flanked unicorn,
Never may be shaken
From his solitude;
Never may be taken
In any earthly wood.
That bird forever feathered,
Of its new self the sire,
After aeons weathered,
Reincarnate by fire,
Falcon may not nor eagle
Swerve from his eyrie,
Nor any crumb inveigle
Down to an earthly tree.

That fish of the dread regime
Invented to become
The fable and the dream
Of the Lord's aquarium,
Leviathan, the jointed
Harpoon was never wrought
By which the Lord's anointed
Will suffer to be caught.

Bird of the deathless breast,
Fish of the frantic fin,
That bright chimeric beast
Flashing the argent skin, –
If beasts like these you'd harry,
Plumb then the poet's dream;
Make it your aviary,
Make it your wood and stream.

There only shall the swish
Be heard of the regal fish;
There like a golden knife
Dart the feet of the unicorn,

And there, death brought to life,
The dead bird be reborn.

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

Countee Cullen - Wikipedia
en.wikipedia.org
Early life Childhood. Countee Cullen was born on May 30, 1903, but due to a lack of records of his early childhood, it has been difficult to pinpoint his city of birth.

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