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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

Berton v R (NSWCCA) - criminal law - drug offences - joint criminal enterprise - applicant guilty of cultivating commercial quantity of cannabis plants by 'enhanced indoor means' - appeal dismissed

Rohan v R (NSWCCA) - criminal law - discovery - subpoenas - 'sexual assault communications privilege' - no error in refusal to issue subpoenas - appeal dismissed

Paul Campbell v R (NSWCCA) - criminal law - sentence appeal - 13 year old found guilty of sexual offences against person under 10 and person under 16 - appeal allowed - proceedings remitted

Nwachukwu v The Queen (VSCA) - criminal law - drug offences - no error in judge's answer to jury's question concerning 'continuous surveillance' - leave to appeal refused

R v CCA (QCA) - criminal law - drug offences - sentence appeal - further evidence admitted concerning applicant's rape while in custody and its impacts - Court varied sentence by bringing forward parole eligibility date by four months - appeal allowed

Summaries With Link (Five Minute Read)

[Berton v R \[2018\] NSWCCA 81](#)

Court of Criminal Appeal of New South Wales

Hoeben CJ; Rothman & Button JJ

Criminal law - drug offences - joint criminal enterprise - applicant found guilty of cultivating commercial quantity of cannabis plants by 'enhanced indoor means' - Crown had alleged applicant and another (Mr Brand) made agreement to cultivate the plants, whereby applicant would provide premises and finance and Mr Brand would grow the plants - applicant appealed against conviction on ground verdict was unreasonable and unsupportable by evidence - whether sufficient evidence for joint criminal enterprise - whether open to jury to find applicant engaged in joint criminal enterprise to cultivate the plants, by providing premises and finances, even without 'actively' taking part in plants' 'growing and tending', - s23(2)(a) *Drug Misuse and Trafficking Act 1985* (NSW) - held: it was open to jury to find applicant guilty beyond reasonable doubt - appeal dismissed.

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Rohan v R [2018] NSWCCA 89

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; Walton & R A Hulme JJA

Criminal law - discovery - sexual offences - 'sexual assault communications privilege' - applicant sought pursuant to s298(1) *Criminal Procedure Act 1986* (NSW) (Criminal Procedure Act) to issue subpoenas in proceedings - 'sexual assault communications privilege' - primary judge refused leave to issue the subpoenas - whether failure to consider provisions of s299B Criminal Procedure Act to compel documents' production for Court's inspection - whether primary judge erroneously took into account that subpoenas were 'fishing exercise' - whether failure to take into account Crown's acceptance of legitimate forensic purpose - whether erroneous finding that admitting 'protected confidences' did not outweigh preservation of confidentiality - whether failure to give adequate reasons concerning legitimate forensic purpose - whether erroneous finding that documents did not have 'substantial probative value' - held: primary judge should have considered application of s299B Criminal Procedure Act, however no error in refusal to issue subpoenas - appeal dismissed

[View Decision](#)

Paul Campbell v R [2018] NSWCCA 87

Court of Criminal Appeal of New South Wales

Bathurst CJ; Schmidt & Hamill JJ

Criminal law

Criminal law - sexual offences - applicant was 13 year old child who pleaded guilty to two offences of sexual intercourse with child under 10 and one offence of indecent assault on a person under 16 - applicant sought to appeal against 16 month aggregate sentence with 8 month aggregate non-parole period - held: respondent conceded sentencing proceedings miscarried because, by taking into account an offence which carried life imprisonment, sentencing judge had taken a course prohibited by s33(4)(b) *Crimes (Sentencing Procedure) Act 1999* (NSW) - sentencing judge also erred in assessment of offence's seriousness, in

finding applicant 'used his position as a trusted family member' to commit offences, in finding 'wrong in sentencing principle' Crown's concession that sentence 'other than full-time custody was within range', and in failing to consider alternatives to full-time custody - appeal allowed - proceedings remitted.

[View Decision](#)

Nwachukwu v The Queen [2018] VSCA 117

Court of Appeal of Victoria

Tate, Beach & Kyrou JJA

Criminal law - drug offences - applicant convicted of attempting to possess marketable quantity of methylamphetamine - applicant sought to appeal - applicant contended there had been a substantial miscarriage of justice arising from judge's answer to a question which jury asked - question concerned whether there had been 'continuous surveillance' of certain address for period up until applicant's arrest - applicant contended judge erroneous failed to tell jury that there wasn't continuous surveillance, and that judge's failure to give this answer had 'foreclosed' from jury's consideration 'an important part of the defence case' - judge had answered the question by reminding jury of evidence concerning surveillance of the address - held: no error in judge's answer to question - leave to appeal refused.

[Nwachukwu](#)

R v CCA [2018] QCA 82

Court of Appeal of Queensland

Gotterson & Philippides JJA; Mullins J

Criminal law - drug offences - applicant pleaded guilty to four offences including trafficking in dangerous drugs (count 1) - other offences comprised two offences of unlawful possession of dangerous drug (counts 2 and 3), and possession of 'equipment and vehicles' used 'in connection with the trafficking' (count 4) - applicant sentenced to six years in prison for count 1, concurrent sentences of two years for counts 2 and 3 and one year for Count 4 - applicant sought to appeal on basis sentence was manifestly excessive - applicant also sought to adduce further evidence of rape he suffered in custody, the 'immediate physical impacts' of the rape, and the reasons why he had not disclosed the rape - held: Court satisfied that the further evidence should be admitted - rape and its immediate physical impacts were 'moderating sentencing factors' - Court varied sentence by bringing parole eligibility date forward by four months - appeal allowed.

[CCA](#)

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Moments of Vision

By: Thomas Hardy

That mirror
Which makes of men a transparency,
Who holds that mirror
And bids us such a breast-bared spectacle to see
Of you and me?

That mirror
Whose magic penetrates like a dart,
Who lifts that mirror
And throws our mind back on us, and our heart,
Until we start?

That mirror
Works well in these night hours of ache;
Why in that mirror
Are tincts we never see ourselves once take
When the world is awake?

That mirror
Can test each mortal when unaware;
Yea, that strange mirror
May catch his last thoughts, whole life foul or fair,
Reflecting it—where?

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

Thomas Hardy - Wikipedia

en.wikipedia.org

Thomas Hardy OM (2 June 1840 – 11 January 1928) was an English novelist and poet. A Victorian realist in the tradition of George Eliot, he was influenced both in his novels and in his poetry by Romanticism, especially William Wordsworth.

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