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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

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The Queen v Mossman (NTCCA) - criminal law - corruption in public office - leniency appeal - sentencing factors identified - sentence not manifestly inadequate - no parity error - appeal dismissed

IL v The Queen (HCA) - criminal law - joint criminal enterprise - murder - manslaughter - appellant and deceased manufacturing drugs - deceased killed by explosion - appellant charged with murder or manslaughter - s18 *Crimes Act 1900* (NSW) is not engaged in a case of self-killing - attribution in joint enterprise liability considered - appeal allowed

Issa v R (NSWCCA) - criminal law-damage by fire - *De Simoni* - aggravating factors & identification of mental element - whether double counting - aggregate sentence - obligation to identify indicative sentences - whether 'special circumstances' - whether sentence manifestly excessive - no error demonstrated - appeal dismissed

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Zuffo v R (NSWCCA) - criminal law - drug offences - severity appeal - mitigating factors - rehabilitation and risk of re-offending - both factors required to be considered - error disclosed -

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Tamara Hunt (a Pseudonym) v The Queen (VSCA) - criminal law - coincidence evidence - evidence ruled admissible - interlocutory appeal - no error identified - leave refused

R v Robertson (QCA) - criminal law - arson - role of counsel on sentence - severity appeal - procedural fairness - whether sentence manifestly excessive - appeal allowed, applicant resentenced

R v Piao (SASCFC) - criminal law - murder - conviction appeal - hearsay statements - admissibly of out of court statements (s34KA *Evidence Act 1929* (SA)) - judge's interventions during witness examination - whether verdict unreasonable - appeal dismissed

Wilson v Tasmania (TASCCA) - criminal law - conviction appeal - rule in *Browne v Dunn* - effect of breach - whether breach went to credibility or weight - whether judge obliged to direct jury on breach - terms judge entitled to use - authorities considered - appeal dismissed

Summaries With Link (Five Minute Read)

The Queen v Roe [2017] NTCCA 7
Northern Territory Court of Criminal Appeal
Grant CJ, Southwood & Blokland JJ
Criminal law - drug trafficking - leniency appeal - respondent was identified as the primary target of a police operation investigating the supply and distribution of methamphetamine in the Northern Territory - police estimated that the respondent supplied in excess of 200 grams - respondent pleaded guilty to one count of unlawfully taking part in the supply of a commercial quantity of methamphetamine (ss5(1) & (2)(b)(iA) *Misuse of Drugs Act 1990* (NT)) - while the respondent used methamphetamine, there was no causal relationship of any significance between his misuse of the drug and his offending - the respondent was sentenced to 3 years 9 months, suspended on conditions after 1 year 9 months - it was a condition of the suspended sentence that the respondent enter a 12 week residential rehabilitation program immediately upon being released from prison - the Crown appealed the sentence - held: (1) Crown appeals: Crown appeals against sentence should be a rarity, brought only to establish some matter of principle and to afford an opportunity to the Court of Criminal Appeal to perform its proper function, namely, to lay down principles for the guidance of courts sentencing offenders (*Griffith v The Queen* (1977) 137 CLR 293, 310) - the reference to a 'matter of principle' must be understood as encompassing what is necessary to avoid the kind of manifest inadequacy or inconsistency in sentencing standards which constitutes an error in point of principle (*Everett v The Queen* (1994) 181 CLR 295, 300) - see *R v Riley* (2006) 161 A Crim R 414, [19] - prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges (*R v Osenkowski* (1982) 30 SASR 212, 212-213) - the principles enunciated in *House v*

The King (1936) 55 CLR 499 & *Hili v The Queen* (2010) 242 CLR 520 referred to - this court will not intervene where no point of principle arises and will be slow to intervene where there is a countervailing factor which may warrant the exercise of the residual discretion; (2) objective seriousness of the offending - the offending was objectively very serious - methamphetamine is a particularly dangerous and insidious drug which causes considerable harm in the community - such offences are prevalent - the estimated quantity supplied was more than 5 times the commercial quantity - the respondent had expanded his operation, engaging couriers to bring the drug from Melbourne to Darwin and he had become the principal of a drug trafficking business - he did not come from a deprived background and deliberately chose to make a profit - the profit he made was significant - the size of the benefit gained by an offender is a relevant sentencing factor, even if 'benefit' is not an element of the offence (*DPP (Cth) v Gregory* (2011) 34 VR 1, [41]) - the greater the benefit or expected benefit, the higher the offender's moral culpability and the more severe the sentence should ordinarily be - here, the offence was aggravated by being committed in company and by involving substantial planning and organisation; (3) subjective factors: the respondent's misuse of the drug made it difficult to assess his prospects of rehabilitation (*R v Proom* (2003) 85 SASR 120, [50]); (4) sentencing principles for drug offences: the proliferation of drugs is detrimental to the wider community as drug use leads quickly to antisocial and criminal conduct and as a consequence punishment, denunciation and deterrence are the main sentencing objects - the assessment of moral culpability and the objective seriousness of the particular offence requires consideration of a number of factors, including the role of the offender and the level of his or her participation in the offence - see [49] for full list of factors - authorities referred to (*Wong v The Queen* (2001) 207 CLR 584, [64]; *R v MacDonnell* (2002) 128 A Crim R 44, [33]; *DPP v Leach* (2003) 139 A Crim R 64, [3]; *R v Indrikson* [2014] NTCCA 10, [30]) - addiction is not a factor which will necessarily weigh heavily, if at all, in the sentencing process (*R v Koumis* (2008) 18 VR 434, [53]) - here, the sentencing was appropriately undertaken on the basis that the respondent was a drug dealer, rather than a drug addict - the salient features of the offending are set out at [59] - authorities considered [61]-[91] - 3 broad categories of cases involving the supply of commercial quantities of methamphetamine identified [97]-[98]: cases involving one-off transactions by a single individual, where the starting point is 5 to 6 years; individuals conducting a drug trafficking business for a continuing period, where the starting point is 7 to 10 years; offenders involved in drug trafficking syndicates and who are relatively high up in the drug supply chain and stand to make high profits, where the starting point is approximately 50% of the maximum penalty - for offenders falling in the second and third categories, denunciation and deterrence usually significantly outweigh rehabilitation - indeed, in these cases, the prospects of rehabilitation do not carry much weight at all - the respondent's primary motivation was profit and there was no significant basis for finding that he was either remorseful or highly motivated to address his drug use - there was no basis for granting the respondent any significant leniency - the sentence imposed was manifestly disproportionate to the objective seriousness of the offending - there was nothing to warrant the exercise of the residual discretion - appeal allowed and, allowing a discount of 25%, respondent resentenced to 6 years, NPP 3 years [Editor's note: Blokland J dissenting].

Roe

The Queen v Mossman [2017] NTCCA 6
Northern Territory Court of Criminal Appeal
Grant CJ, Southwood & Hiley JJ
Criminal law - corruption in public office - respondent was found guilty of 2 offences of corruptly receiving a benefit (s236 *Criminal Code* (NT)) - the respondent, who was chief of staff of a government minister, had been granted a waiver of service fees and the deferral of payment of air travel tickets by a travel agent to whom he had directed government business - he was sentenced to a wholly suspected aggregate sentence of 12 months - the Crown appealed the sentence, arguing, inter alia, that it was manifestly inadequate - held: principles applying to Crown appeals considered - authorities referred to (*R v Riley* (2006) 161 A Crim R 414, [19]; *R v Osenkowski* (1982) 30 SASR 212, 212-213; *House v the King* (1936) 55 CLR 499; *Hili v The Queen* (2010) 242 CLR 520, [59], [60]) - s236 *Criminal Code* is primarily concerned with transactional morality, fair dealing, the avoidance of conflicts of interest and the abuse of taking advantage of certain kinds of agency - the kinds of relationship protected by the section include relationships of employment or agency - here, the respondent was employed under a contract of employment with the NT government - sentencing factors for the offence are the identity of the corrupted party and the nature and importance of the protected relationship, the objective of the offence, the value of the benefit obtained, the seriousness of any breach of trust, the duration of the offence and whether it was systematic and sophisticated and the amount of harm sustained - here, the respondent was a confidential agent of the Minister and probity and integrity must define any Ministerial office and its activities - the objective seriousness of the offending was significantly tempered by the fact that the respondent only received a nominal benefit on 2 occasions, the offending was over a short period and was not systematic, and it was relatively unsophisticated - there was no evidence that the respondent knew that the travel agent was engaged in greater criminality - the only real issue was whether a suspended sentence was justified, or whether the respondent should have been required to spend some time in prison - it could not be said that the sentence was so disproportionate to the seriousness of the crimes that it was plainly unjust - considering the issue of parity (ground 2 of the appeal) the Court found that the travel agent's offending was more serious - appeal dismissed.

Mossman

IL v The Queen [2017] HCA 27
High Court of Australia
Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ
Criminal law - joint criminal enterprise - murder - manslaughter - the appellant was paid for her involvement in the manufacture of methylamphetamine in premises in Ryde, Sydney - the manufacture involved the use of a gas ring burner, in an inadequately ventilated bathroom, to dissolve raw methylamphetamine in a solvent (acetone) - on 4 January 2013, during the

dissolving process, vapour was ignited by the gas ring flame, causing an explosion and fire - the appellant and the deceased, who was also involved in the illegal manufacturing, were inside the premises at the time - while the deceased's death was caused by the lighting of the gas ring, in circumstances which created an objectively appreciable risk of serious injury, the Crown did not allege and could not prove, that the appellant lit the burner - the deceased may have been killed accidentally - relying on joint criminal enterprise lability, the Crown charged the appellant with (i) Count 1: manufacturing a large commercial quantity of a prohibited drug (methylamphetamine); (ii) Count 2a: murder; and in the alternative (Count 2b) unlawfully causing the death (for murder/manslaughter see s18(1) *Crimes Act 1900* (NSW)) - in addition, the appellant was charged with 4 counts of firearms offences - at the conclusion of the Crown case, the trial judge directed the jury to acquit the appellant of Counts 2a & 2b - the Crown appealed (s107(2) *Crimes (Appeal and Review) Act 2001* (NSW)) and the Court of Criminal Appeal (NSW - CCA) upheld the appeal, quashing the directed verdicts and directing a new trial those counts - the question before the High Court was whether the trial judge was correct to direct the jury to acquit the appellant of murder & manslaughter (Counts 2a & 2b) - held: (Kiefel CJ, Keane & Edelman JJ) the Crown relied upon the category of murder in s18(1)(a) *Crimes Act 1900* commonly referred to as 'felony murder', or 'constructive murder' - alternatively, the Crown alleged that appellant was guilty of manslaughter by an unlawful and dangerous act - there were 3 elements to the Crown case (i) that the act of the appellant was the lighting of the gas ring which caused the death; (ii) that that act was done during the commission by the appellant, or the co-participant, of the crime of manufacture or production of a drug contrary to s24 *Drug Misuse and Trafficking Act 1985* (NSW) (*DMT Act*); (iii) that that crime is punishable by imprisonment for life (s33(3)(a) *DMT Act)* - there was no dispute that elements (ii) & (iii) were satisfied - the Crown, however, could not prove whether it was the appellant or the deceased who lit the ring burner - the Crown submission, relying upon 'joint enterprise lability', that even if it was the deceased who lit the burner, his act could be *attributed* to the appellant, with the result that his act could be the 'act of the accused' for the purpose of murder or manslaughter within s18, was misconceived - the offences of murder and manslaughter in s18 requires that one person kill *another* person - s18 is not engaged if a person kills himself or herself intentionally - nor is it engaged if the person kills himself or herself in the course of committing a crime punishable by imprisonment for life or for 25 years or by an unlawful and dangerous act - where joint enterprise lability applies, it is the *acts* which are attributed, not the liability - nor is it the *actus reus* of a notional offence (*Osland v R* (1998) 197 CLR 316) - the most elementary difficulty with the Crown case was the assumption upon which it was based, namely that s18 applied in a case of self-killing - s18 is not engaged in circumstances where a deceased accomplice kills himself or herself and it was not engaged in this case - appeal allowed, orders of CCA set aside and appeal to CCA dismissed [Editor's note: Kiefel CJ, Keane & Edelman JJ agreeing with Bell & Nettle JJ that the appeal should be allowed on the first ground of appeal, but for different reasons; Gageler & Gordon JJ dissenting].

IL

Issa v R [2017] NSWCCA 188
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, Adamson & Bellew JJ
Criminal law - damage property by fire - severity appeal - applicant, a builder, contracted to carry out renovation work on Ms MDB's business premises - MDB alleged the applicant breached the agreement and commenced civil action against him - the premises of MDB's solicitor and residence were then firebombed - MDB's parent's home, where MDB was living, was also firebombed - the applicant was found guilty of 5 counts of intentionally damaging property by means of fire (s195(1)(b) *Crimes Act 1900* (NSW)), 5 counts of doing an act with intent to pervert the course of justice (s319 *Crimes Act 1900*) - applicant additionally pleaded guilty to recklessly causing bodily harm in company (s35(1) *Crimes Act 1900*) - judge found there were 6 separate episodes of criminality: 5 involved applicant firebombing premises with the intention to pervert the course of justice, and a sixth which involved recklessly causing grievous bodily harm in company - judge allowed a 12.5% discount on the plea of guilty to recklessly cause and sentenced the applicant to an aggregate term of 12 years, NPP 9 years - the applicant appealed the convictions and sentence - held: (1) aggregate sentence: s53A(2)(b) *Crimes (Sentencing Procedure) Act 1999* (NSW) obliges the sentencing court to indicate the sentences it would have imposed had separate sentences been imposed instead of an aggregate sentence - only the length of an 'indicative sentence' and the non-parole period where there is a standard non-parole period for the offence need be indicated (ss44(2c), 54B(4) *Crimes (Sentencing Procedure) Act 1999*) - the only sentence actually passed was the aggregate sentence - the sole complaint here was that the indicated sentence for one count (count 4) was excessive - there was no appeal from an indicative sentence; (2) alleged double counting with fire and pervert justice offences: while the *actus reus* of the fire damage offences was the same as the pervert justice offences, the commission of each offence involved a distinct mental element - there was no double counting as alleged by the applicant; (3) *De Simoni*: the *De Simoni* principle (*The Queen v De Simoni* (1981) 147 CLR 383) is that a sentencing judge cannot take into account as a circumstance of aggravation a factor that would constitute an element of a more serious offence than the one for which the offender stands to be sentenced - the principles qualifies the statutory obligation in s21A(2) (*Crimes (Sentencing Procedure) Act 1999)* to take into account aggravating factors which do not constitute elements of the offence by reason of s21A(4) (*Cassidy v R* [2012] NSWCCA 68, [1]) - here, the sentencing judge took into account 2 matters of aggravation: the offence was committed without regard to public safety and that for counts 5 & 11 the offender would have realised that his conduct was likely to cause a risk of physical danger to occupants - these mental states fell short of the mental elements of an offence under s196 (destroying property with intent to injure a person) or s198 *Crimes Act 1900* (destroying property with intent to endanger life) - *R v Teremoana* (1990) 54 SASR 30 & *Josefski v R* (2010) 217 A Crim R 183 referred to - the judge took into account that the fire damage offences, which took place on residential premises, were aggravated by the offender's disregard for public safety (s21A(2)(i) *Crimes (Sentencing Procedure) Act 1999)* and that counts 5 & 11 were aggravated by the foreseeability of risk of harm to the victims - no error demonstrated; (4) assessment of objective gravity: the assessment of objective seriousness is

pre-eminently a matter for the sentencing judge (*Mulato v R* [2006] NSWCCA 282, [37], [46]) - the question for the Court was whether the assessment made by the judge was open - the offence was aggravated by the use of weapons and the participation of 3 others - there was significant planning and the victims suffered serious injuries - the description of the attack as 'ferocious' was apposite - no error demonstrated; (5) special circumstances: a finding of special circumstances is a matter for the sentencing judge's discretion - even if special circumstances are made out, the sentencing judge is not obliged to reduce the non-parole period and is not obliged to reduce it below the minimum period of incarceration required (*Caristo v R* [2011] NSWCCA 7, [26]-[31]) - no error demonstrated; (6) manifest excess: in order to show that a sentence is manifestly excessive, the applicant must demonstrate that it is unreasonable or plainly unjust (*Dinsdale v The Queen* (2000) 202 CLR 321, [6]) - here, the offences individually and taken together, demonstrated a high order of criminality - no error demonstrated; appeal dismissed [Editor's note: Hoeben CJ at CL & Bellew J agreeing with Adamson J].

Issa

JRJ v R [2017] NSWCCA 182
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, Fullerton & Garling JJ
Criminal law - sexual intercourse with child - conviction appeal - the applicant had been married to the complainant's mother, but they had separated - the mother had then commenced a new relationship and the complainant was born - due to financial constraints, the mother, the complainant and her sister, began living with the applicant - the applicant was arraigned on 2 counts of aggravated sexual intercourse with the complainant, a child under 10 (s66A(2) *Crimes Act 1900* (NSW)) - the complainant was aged 8 at the time of the alleged offending - at trial, the applicant gave evidence denying the allegations - the complainant's evidence was pre-recorded and she gave evidence that she had recorded the second alleged incident on her iPad, but had later deleted the recording - she also gave evidence that on the second occasion she did not immediately feel her vagina being penetrated - the trial judge gave the jury a Murray direction (*R v Murray* (1987) 11 NSWLR 12), a delay and complaint direction, a limited good character direction and a *Markuleski* direction (*R v Markuleski* (2001) 52 NSWLR 82) - the applicant was convicted on the second count and acquitted on the first and sentenced to 6 years, NPP 4 years - the appellant appealed, arguing that the jury's verdict was unreasonable - held: in *CR v R* [2017] NSWCCA 29, [77]-[80] the Court summarised the principles that apply when considering whether a verdict is unreasonable - accepting that the jury's verdict of acquittal on count 1 does not mean that the jury necessarily disbelieved the complainant, the acquittal goes no further than to establish that the jury had a reasonable doubt that the offence occurred - as *Markuleski* demonstrates, that reasonable doubt could be used by the jury when assessing the complainant's evidence in relation to count 2 - here, the circumstances and the evidence relied upon to establish count 1 placed doubt on the occurrence of count 2 - it was unbelievable that the complainant, as an 8 year old, would not have felt the level of penetration

which she describes as soon as it occurred and that her evidence to the contrary was not only surprising but incredible - the complainant's evidence about her use of the iPad was also criticised - accordingly, the court's independent assessment of the sufficiency and quality of the evidence left it with a reasonable doubt that the offending in count 2 occurred - the use of the iPad and the lack of awareness of the penetration were fundamental parts of the complainant's description of count 2 and when those elements are removed, reasonable doubt must have existed as to whether the offending in count 2 actually occurred - appeal allowed, conviction quashed, verdict of acquittal entered [Editor's note: Garling J agreeing with Hoeben CJ at CL, Fullerton dissenting].

JRJ

Zuffo V R [2017] NSWCCA 187
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, Price & Adamson JJ
Criminal law - severity - applicant pleaded guilty to one count of supplying not less than a commercial quantity of a prohibited drug (MDMA: s25(2) *Drug Misuse and Trafficking Act 1985* (NSW) *(DMT Act*)) and one count of supplying on an on-going basis (s25A(1) *DMT Act*) - the judge found that the ongoing supply count was a serious matter, but less than mid-range in objective seriousness, while the first count was somewhat less than mid-range - effective sentence of 5 years 3 months, NPP 2 years 9 months, imposed after 10% allowed for the utilitarian value of the plea - special circumstances were found and the applicant sought leave to appeal the sentences, arguing (inter alia) that the judge erred in his consideration of the applicant's prospects of rehabilitation and his risk of reoffending - held: (1) rehabilitation and risk of reoffending: a sentencing court is obliged to take into account, by way of mitigation, the fact that an offender is unlikely to reoffend and has good prospects of rehabilitation (s21A *Crimes (Sentencing Procedure) Act 1999* (NSW)) - although commonly linked, these concepts are not the same (*R v Pogson* (2012) 82 NSWLR 60) - both the assessment of an offender's future offending behaviour and his prospects of rehabilitation were questions of fact to be determined by the sentencing judge - each required a prediction of future conduct (*Stoeski v R* [2014] NSWCCA 161, [38]) - the Court will not normally find an error of principle from exchanges between a judge and counsel in the course of submissions (*R v Pham* [2005] NSWCCA 94; *RCW v R (No 2)* [2014] NSWCCA 190, [76]) - here, the degree of latitude afforded to the scrutiny of sentencing judgments delivered *ex tempore* was not available as the sentence was a reserved judgment - the judge erred in not making an assessment of the likelihood of the offender re-offending (s21A(3)(g) *Crimes (Sentencing Procedure) Act 1999*) - ground upheld; (2) re-sentenced: these were serious offences - the applicant presented a strong subjective case and had substantially rehabilitated himself and was unlikely to re-offend - general deterrence remained an important sentencing consideration - appeal allowed - resentenced to 5 years 3 months, NPP 2 years 9 months [Editor's note: Hoeben CJ at CL & Adamson J agreeing with Price J].

Zuffo

Tamara Hunt (a Pseudonym) v The Queen [2017] VSCA 196
Court of Appeal of Victoria
Whelan & Coghlan JJA
Criminal law - coincidence evidence - interlocutory appeal - during the period February 2014 to May 2015, there were 31 fires in or near Tatura - between October 2014 and January 2015 there were a further 5 fires in the area - the police found the applicant in her car at the scene of one fire and subsequently used a tracking device on her car to monitor her movements - the applicant was indicted on 36 charges of intentionally causing a bushfire - the prosecution filed a coincidence and tendency notice (ss98(1) & 97(1) *Evidence Act 2008* (Vic)) - the coincidence notice relied on some 8 similarities arising out of the 36 fires - the trial judge ruled the evidence admissible, going to the issue of both whether the fires were deliberately lit and who was responsible for lighting them - the judge certified that the evidence 'if ruled inadmissible, would eliminate or substantially weaken the prosecution case' (s295(3) *Criminal Procedure Act 2009* (Vic) (*CPA*)) - the applicant sought leave to appeal the interlocutory ruling (s295(2) *CPA)* - held: no reason to conclude that the judge was in error - leave refused [Editor's note: Whelan JA agreeing with Coghlan JA].

Tamara Hunt

R v Robertson [2017] QCA 164
Court of Appeal of Queensland
Morrison & Philippides JJA, Atkinson J
Criminal law - severity - applicant had rented a house with her partner - after they separated, the applicant had returned to the house and caused damage to it - applicant pleaded guilty to a number of offences including attempted arson, trespass, entering premises and stealing, and fraud - applicant was sentenced to 2 years 6 months with a number of concurrent sentences, NPP 6 months - applicant relied upon a number of appeal grounds - held:(1) exchanges between the judge and counsel: an appeal court should take a cautious approach when considering exchanges between a judge and counsel during submissions (*R v Hyatt* [2011] QCA 55, [13]) - here, the judge dealt comprehensively with the issues and concluded that the proper characterisation of the applicant's behaviour was that she attempted to set fire to the landlord's house, not intending to destroy it, but reckless as to the consequences of her dangerous, irrational behaviour - that, together with the other offending, was properly described by the judge as very serious behaviour - the judge was not in error in characterising the applicant's criminality; (2) procedural fairness: the judge's approach was entirely orthodox - a sentencing judge is not obliged to set out each and every alternative available to that judge on sentencing a defendant who appears before the judge - counsel who appear before judges on sentences are expected to know the provisions of Queensland's sentencing law and to make relevant submissions - unless the judge is considering imposing a sentence that may be considered unusual, or an additional penalty which is unusual, there is no obligation upon a

sentencing judge to advise counsel of the sentence that may be imposed and to seek specific submissions on that (*R v Wilson* [2016] QCA 301, [79]) - the submission that the judge denied the applicant procedural fairness was without merit; (3) prison as a last resort: the applicant's behaviour was committed at the end of a relationship, in the context of domestic violence - it was irrational and committed out of revenge and the property damaged belonged to a third party - it was a correct exercise of the sentencing judge's discretion to consider that an actual term of imprisonment was necessary to punish such behaviour and to deter the applicant and others from engaging in dangerous, vengeful behaviour - ground dismissed; (4) manifest excess: sentence decisions for arson, attempted arson and related offences considered (cf *R v Johnson* [2005] QCA 265; *R v Barling* [1999] QCA 16; *R v Gwilliams* [2008] QCA 40) - the present case had a number of exacerbating factors - it was not pre-planned and no materials were taken to the premises for setting fire to the property however - appeal allowed - applicant resentenced to 2 years, otherwise sentences confirmed [Editor's note: Morrison JA agreeing with Atkinson J, Philippides dissenting].

Robertson

R v Piao [2017] SASCFC 94
Full Court of the Supreme Court of South Australia
Kelly, Nicholson & Hinton JJ
Criminal law - murder - conviction appeal - appellant was the last client of Ting Fang, a prostitute working temporarily in Adelaide, who was found dead in a hotel room - Fang had sustained head injuries and her throat had been cut - the appellant was seen on CCTV entering the hotel room and then running from the hotel - the prosecution relied upon phone records and 'post offence' conduct as consciousness of guilt - appellant was convicted of murder - the case against him was circumstantial and on appeal he argued, inter alia, that the trial judge erred in admitting a WeChat text message (s 34KA *Evidence Act 1929* (SA) - hearsay evidence) and caused a miscarriage of justice by interventions during re-examination of a witness - held: (1) judge's interventions: an examination of the course of evidence disclosed that the state of the call charge records and the apparent anomalies within in them was fully ventilated before the jury - the appellant's complaint that the judge improperly left an alternative basis for conviction to the jury which was not relied upon by the parties was misconceived - the circumstances here were very different to the circumstances in *Robinson v The Queen* (2006) 162 A Crim R 88) - here, the prosecution always maintained that here were anomalies within the records - it was the judge's responsibility to give the jury such assistance as was required in assessing the whole of the circumstantial evidence - the judge gave clear and accurate directions - no miscarriage of justice was occasioned; (2) admission of the WeChat text messages - the issue was whether the text messages were admissible pursuant to s34KA - a forensic examination of the deceased's phone showed that she had sent a number of text messages - the prosecution sought to use this evidence to establish what was happening in the hotel room in the hours prior to her death and that no other bookings were made for the deceased during that time - the appellant submitted that s34KA only applied to formal out of court statements from a witness

and that the text messages contained inadmissible hearsay material - there were 2 flaws in the appellant's argument: (i) the section on its face is not restricted to proceedings involving serious and organised crime; the intention of Parliament must be discerned from the actual text and that text makes it plain that 'prescribed proceedings' means and includes proceedings for a criminal offence in addition to proceedings under the *Serious and Organised Crime (Control) Act 2008* (SA); (ii) there is nothing in the text to suggest that its operation should be restricted to situations where a formal out of court statement is available - *R v Koenig* (2013) 229 A Crim R 108 applied - further, statements such as 'the accused told me he wanted to add a further hour' were not hearsay statements - the trial judge gave the jury clear and detailed directions as to how they could use the text messages - those directions were apt to dispel any confusion on the part of the jury - the evidence was properly admitted; (3) whether verdict was unreasonable - having completed an independent review of the evidence, the court concluded that the verdict was not unsatisfactory; appeal dismissed [Editor's note: Nicholson & Hinton JJ agreeing with Kelly J].

Piao

Wilson v Tasmania [2017] TASCCA 11
Tasmanian Court of Criminal Appeal
Pearce J, Marshall & Porter AJJ
Criminal law - conviction appeal - directions - the complainant, who had consumed a significant amount of alcohol and was falling over, accepted a lift in the appellant's car - the complainant alleged that the appellant forced her to engage in sexual acts with him after he made threats of killing her - appellant was charged with 2 acts of rape: oral and vaginal intercourse - the appellant asserted that the sexual conduct was consensual - appellant was convicted and appealed, arguing that the trial judge had erred by misdirecting the jury on the application of the rule in *Browne v Dunn* (1893) 6 R 67 (HL) held: (1) the 'direction' : whether the judge's comments constituted a direction - adopting the approach taken by Redlich JA in *R v Rajakaruna (No 2)* (2006) 15 VR 592, what the trial judge said could be properly described as a direction that as a matter of law, the jury could use the failure to put the issue as diminishing the weight of the submission; (2) the rule in *Browne v Dunn*: the real question is whether that direction caused a miscarriage of justice, a miscarriage occurring if an accused has lost a chance of an acquittal fairly open - referring to *Khamis v The Queen* [2010] NSWCCA 179, [42], [46]; *RWB v The Queen* (2010) 202 A Crim R 209, [101]; *R v Abdallah* (2001) 121 A Crim R 46; *R v Birks* (1990) 19 NSWLR 677; *R v Banic* [2004] NSWCCA 322 - for an appellate court to intervene, the risk of miscarriage must be real and not fanciful - it is not enough to show that a particular direction would have been desirable - it must be shown to have been necessary in order to avoid the risk of a miscarriage of justice (*BRS v The Queen* (1997) 191 CLR 275, 330; *R v Heinze* (2005) 153 A Crim R 138, [27] - with the exception of *Khamis,* each of the decisions cited by the appellant involved a situation in which a breach of the rule in *Browne v Dunn* was said to affect the credibility of the accused - in each, there was an inconsistency or discrepancy between conduct or statements by the accused's counsel and evidence given by or on behalf

of the accused - there is a recognised distinction between a case where the breach is said to affect only the weight or cogency of an argument based on the matter not put and a situation where the breach is said to affect the credibility of the accused or witness (*R v Marrow* (2009) 26 VR 526, [59]-[62]) - here, the breach was only said to have affected the weight of an argument put in defence counsel's closing address - the appellant did not give, or adduce, any evidence - the matters that were not put to the complainant related to a motive for her to lie about having consensual sex with the appellant - in criminal proceedings, the rule has to be applied with considerable care (*MJW v the Queen* (2005) 222 ALJR 436, [18], [40]; *R v Foley* [2001] 1 Qd R 209, 291, 292) - where a breach is said only to affect weight, the jury may be told that the failure bears upon the weight it attaches to the allegation of the fact that was not pursued or the argument which rests upon that fact (*R v Marrow* (2009) 26 VR 526, [60]) - *R v Ferguson* (2009) 24 VR 51, [277]-[278] referred to - ordinarily, if there is a failure by defence counsel to expressly put a suggestion to a witness, it does not follow that an argument based upon the suggestion cannot be put to a jury (*MJW v The Queen* (2005) 222 ALJR 436, [20]; *R v Rajakaruna (No 2)* (2006) 15 VR 592, [48]; *CMG v The Queen* (2013) 234 A Crim R 455, [71]-[72]) - a trial judge is not entitled, by reason of non-compliance of the rule, to withdraw the issue of fact from the jury (*R v Costi* (1987) 48 SASR 269, 271) - a trial judge may comment strongly on a failure to comply with the rule and to the consequences of non-compliance and the trial judge may give comments in strong terms about the weight the jury gives an argument where the facts were not raised with the witness (*Rajakaruna* (No 2) [48]; *Morrow* [61]; *CMG* [72]) - *CMG* provides a useful guide to the tolerable limits on the strength of a trial judge's comments - in the context of the whole of the summing-up, what the trial judge said was not misleading and could not be said to have occasioned a miscarriage of justice - appeal dismissed [Editor's note: Pearce J & Marshall AJ agreeing with Porter AJ].

Wilson

The Garden
By Andrew Marvell

How vainly men themselves amaze
To win the palm, the oak, or bays,
And their uncessant labours see
Crown'd from some single herb or tree,
Whose short and narrow verged shade
Does prudently their toils upbraid;
While all flow'rs and all trees do close
To weave the garlands of repose.

Fair Quiet, have I found thee here,
And Innocence, thy sister dear!
Mistaken long, I sought you then
In busy companies of men;
Your sacred plants, if here below,
Only among the plants will grow.
Society is all but rude,
To this delicious solitude.

No white nor red was ever seen
So am'rous as this lovely green.
Fond lovers, cruel as their flame,
Cut in these trees their mistress' name;
Little, alas, they know or heed
How far these beauties hers exceed!
Fair trees! wheres'e'er your barks I wound,
No name shall but your own be found.

When we have run our passion's heat,
Love hither makes his best retreat.
The gods, that mortal beauty chase,
Still in a tree did end their race:
Apollo hunted Daphne so,
Only that she might laurel grow;
And Pan did after Syrinx speed,
Not as a nymph, but for a reed.

What wond'rous life in this I lead!
Ripe apples drop about my head;
The luscious clusters of the vine
Upon my mouth do crush their wine;

The nectarine and curious peach
Into my hands themselves do reach;
Stumbling on melons as I pass,
Ensnar'd with flow'rs, I fall on grass.

Meanwhile the mind, from pleasure less,
Withdraws into its happiness;
The mind, that ocean where each kind
Does straight its own resemblance find,
Yet it creates, transcending these,
Far other worlds, and other seas;
Annihilating all that's made
To a green thought in a green shade.

Here at the fountain's sliding foot,
Or at some fruit tree's mossy root,
Casting the body's vest aside,
My soul into the boughs does glide;
There like a bird it sits and sings,
Then whets, and combs its silver wings;
And, till prepar'd for longer flight,
Waves in its plumes the various light.

Such was that happy garden-state,
While man there walk'd without a mate;
After a place so pure and sweet,
What other help could yet be meet!
But 'twas beyond a mortal's share
To wander solitary there:
Two paradises 'twere in one
To live in paradise alone.

How well the skillful gard'ner drew
Of flow'rs and herbs this dial new,
Where from above the milder sun
Does through a fragrant zodiac run;
And as it works, th' industrious bee
Computes its time as well as we.
How could such sweet and wholesome hours
Be reckon'd but with herbs and flow'rs!

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