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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

DPP v Charlie Dalgliesh (a Pseudonym) (HCA) - criminal law - sentencing - incest - identification and relevance of current sentencing practices - error of principle - sentence manifestly inadequate - appeal allowed & matter remitted for determination of leniency appeal

Sivaraja v R; Sivathas v R (NSWCCA) - criminal law - grievous bodily harm - whether the evidence raised the issue of self-defence - where applicants were the original aggressors and did not give evidence - self-defence not raised - whether the verdicts were unreasonable - conviction quashed - verdict on alterative count entered

Voronov v Regina (NSWCCA) - criminal law - Commonwealth fraud offences - applicant absconded before being sentenced - judge did not find “special circumstances” & imposed a NPP of about 75% - judge erred in applying NSW sentencing provision - applicant resentenced

Moussa v R (NSWCCA) - criminal law - manslaughter - appellant convicted of manslaughter of accomplice - accomplice caused the fire resulting in his own death - appellant wrongly convicted - Il v *The Queen* [2017] HCA 27 applied - appeal allowed

Uzzell v Police (SASC) - criminal law - costs - magistrate permitted complaint to be withdrawn and refused appellant costs - whether order interlocutory or final - whether right of appeal - injustice - proper procedure to recover costs considered - appeal allowed

Parkinson v Alexander (No 2) (ACTSC) - criminal law - conviction set aside - whether there should be a new trial or an acquittal entered - authorities identified - factors relevant to

discretion considered - new trial ordered

Summaries With Link (Five Minute Read)

DPP v Charlie Dalgliesh (a Psuedonym) [2017] HCA 41
High Court of Australia
Kiefel CJ, Bell, Gageler, Keane & Gordon JJ
Criminal law - sentencing - incest - the respondent was convicted of several counts of sexual assault upon two sisters aged between 9 and 16 years - one sister had a mild intellectual disability and attention deficit hyperactivity disorder - the respondent was in a de facto relationship with the girls' mother - the respondent had pleaded guilty to (inter alia) one count of incest (s44(2) *Crimes Act 1958* (Vic)) - the respondent was sentenced on this count to 3 years 6 months, with a total sentence in respect all counts of 5 years 6 months - the Director appealed the leniency of the sentence and the Victorian Court of Appeal dismissed the appeal, holding that the sentence was within the range indicated by current sentencing practices - the CA also concluded that the range was so low that it "reveal[ed] error in principle" in that it was not proportionate to the objective gravity of the offending or of the moral culpability of the offender - the Director appealed to the High Court - held: (i) Kiefel CJ, Bell & Keane JJ, allowing the appeal and remitting the matter to the CA for determination of the appeal against sentence - s5(2) *Sentencing Act 1991* (Vic) provides that in sentencing an offender a court must have regard to current sentencing practices - the considerations that a sentencing judge is obliged by s5(2) to have regard to cannot be applied mechanically - the sentence that is just in all the circumstances is a matter of instinctive synthesis (*Wong v The Queen* (2001) 207 CLR 584, [75]; *Markarian v The Queen* (2005) 228 CLR 357, [37]) - the process of instinctive synthesis allows a measure of discretion to the sentencing judge and there is no single sentence that is just in all the circumstances - it is well understood that a sentence may be so clearly unjust, because it is either manifestly inadequate or manifestly excessive, that it may be inferred that the sentencing discretion has miscarried - here, the question before the CA was whether the sentence was manifestly inadequate - before the CA the Director had submitted that the sentence was manifestly inadequate as the respondent had engaged in unprotected penile-vaginal intercourse with a 13 year old girl who had become pregnant - in addition, the respondent had breached the trust he owed to his young and vulnerable step-daughter - the Director submitted that the offending fell within the mid-range of seriousness and that it was aggravated by the pregnancy - the CA calibrated a range of sentences available in this case by using two decisions, *BGJ* (*DPP (Vic) BGJ* (2007) 171 A Crim R 74) and *RSJ* (*RSJ v The Queen* [2012] VSCA 148) - this approach was unorthodox because the imposition of a just sentence is not to be approached mechanically and the CA misunderstood what is involved in identifying an offence in the "worst category" - *R v Kilic* ((2016) 91 ALJR 131, [18]-[19]) approved of - an offence of incest characterised as falling within the worst category would warrant a sentence approaching the maximum sentence prescribed by Parliament - the adequacy of the sentence imposed in this case could not be judged by reference to the decisions in *BGJ* and *RSJ* -

s5(2)(b) of the *Sentencing Act* informs the process of instinctive synthesis as a statutory expression of concern that a reasonable consistency in sentencing should be maintained as an aspect of the rule of law *(DPP (Vic) v OJA* (2007) 172 A Crim R 181, [30]-[31]; *R v Pham* (2015) 256 CLR 550, [29]) - the CA was correct to conclude that current sentencing practices did not reflect the objective gravity of the offending and that this amounted to error of principle - this error was sufficient to justify appellant intervention on the ground of manifest inadequacy - having come to the conclusion that current sentencing practices were so manifestly disproportionate to the gravity of the offending and moral culpability of the offender as to bespeak of error of principle, there was no good reason for the CA not to correct the error - given the CA's conclusion that a sentence significantly higher than 7 years imprisonment for the count was plainly warranted having regard to the gravity of the offence, the maximum penalty, the respondent's moral culpability and the impact of the offence on the complainant, the Court should have allowed the Director's appeal - s5(2) did not require the Court to refrain from doing so - appeal allowed and matter remitted to CA for determination of the appeal against sentence. [Editor's note: Gageler & Gordon JJ agreeing with Kiefel CJ, Bell & Keane JJ.]
Charlie Dalgliesh

Sivaraja v R; Sivathas v R [2017] NSWCCA 236
Court of Criminal Appeal of New South Wales
Meagher JA, R A Hulme & Beech-Jones JJ
Criminal law - self-defence - the applicants were found guilty of wounding with intent to cause grievous bodily harm (s33(1)(a) *Crimes Act 1900* (NSW)) and sentenced to 3 years , NPP 2 years - the applicants appealed their convictions on the ground, inter alia, that the trial judge erred in refusing to leave self-defence to the jury - the offences arose out of a series of events involving a number of co-accused's - at trial, the evidence was that the applicants were either the original aggressors, or at least in a position where each could have withdrawn from the confrontations - neither gave evidence - held: (i) whether the events constituted one transaction - the jury was not required to isolate each of the wounds inflicted and determine whether they were, individually, accompanied by an intention to cause grievous bodily harm - there was a joint criminal enterprise in existence from the commencement of and throughout, the events and the objective of the enterprise was to inflict grievous bodily harm upon the victim - each party to that joint criminal enterprise was liable regardless of whether he, or a fellow participant actually inflicted the wound(s) - it would have been artificial to break up the violent incident which occurred quickly, into discrete components and to ask whether an intention to cause grievous bodily harm attended one or more of the components (see *Sharp v R* [2012] NSWCCA 134); (ii) raising self-defence (ss418, 419 *Crimes Act 1900*) - the operation of ss418 & 419 is set out in *R v Kataryznski* ([2002] NSWSC 613, [22]-[23]) - the jury is required to ask 2 questions (see [122]) - this analysis has been endorsed by the Court (*Oblach v R* (2005) 65 NSWLR 75, 50]-[54]; *Elias v R* [2006] NSWCCA 365, [22]-[23]) - before the Crown assumes the burden of disproving self-defence beyond reasonable doubt, the defence must be "raised" (*Colosimo v DPP* (NSW) [2006] NSWCA 293, [19] (*Colosimo*) in considering whether the evidence is capable of

supporting a reasonable doubt as to whether the prosecution has excluded self-defence, the evidence is to be taken at its highest in favour of the accused without the judge making any assessment of whether it should be accepted (*Braysich v The Queen* (2011) 243 CLR 434, [36]; *Viro v The Queen* (1978) 141 CLR 88, 17) - *Colosimo* addresses the circumstance in which a person who was the original aggressor raises the issue of self-defence ([19]) - here, the evidence did not raise the issue of self-defence; (iii) unreasonable verdict - principles identified [148] - *The Queen v Baden-Clay* ((2016) 258 CLR 308, [65]-[66]) referred to - here, the jury had a considerable advantage in seeing and hearing the witnesses - the inconsistencies in their evidence were fully exposed in cross examination - a *Murray* (*R v Murray* (1987) 11 NSWLR 12, 19) and *Markuleski* (R v Markileski (2001) 52 NSWLR 82) direction were given to the jury - however, contrary to the Crown's assertion, there was reason to doubt that a metal pole was used in the attack - if the attackers were armed with a knife, a bat and possible a metal pole, the fact that more serious injury was not caused provides a reason to doubt the existence of an intention to cause grievous bodily harm - accordingly, there ought to have been a reasonable doubt about the intention of the offence - applying s7(2*) Criminal Appeal Act 1912* (NSW), verdict on the count of wounding with intent to cause grievous bodily harm quashed and verdict on alternative count of use offensive weapon with intent to commit assault substituted (s 33B(2) *Crimes Act 1900*).
Sivaraja; Sivathas

Voronov v Regina [2017] NSWCCA 241
Court of Criminal Appeal of New South Wales
Bathurst CJ, Hoeben CJ at CL, McCallum J
Criminal law - NP & severity - applicant sentenced in his absence - applicant and mother charged with 2 joint Commonwealth fraud offences (s29D *Crimes Act 1914* (Cth) & s135.1(15) *Criminal Code 1995* (Cth)), being the failure to collect & pay GST and to declare income - applicant and mother found guilty - mother sentenced to 6 years 6 months - sentencing judge imposed on the mother a NPP of 4 years after saying that a NPP of 60% was "no longer the norm" - applicant absconded before sentence was passed and was sentenced in his absence - applicant was sentenced to 6 years 6 months, NPP 5 years - after mother was sentenced the High Court handed down its decision in *Hili v The Queen* ((2010) 242 CLR 520) - in sentencing the applicant, the judge referred to "special circumstances" and the applicant sought leave to appeal the severity of his sentence, submitting that the judge had erroneously referred to s44(2**)** of the NSW *Crimes (Sentencing Procedure) Act 1999* **-** held: *Hili v The Queen* holds that there is and should be no judicially determined "norm" or starting point for the percentage of a term of imprisonment that a federal offender should actually serve - the discretion reposed in the Court in accordance with the terms of the federal statute is not qualified by any superimposed judicial gloss - the language in which the judge expressed herself could not be ignored (see *Elshani v R* [2015] NSWCCA 254) - it was quite possible that the judge no longer had the Commonwealth provisions at the forefront of her mind when she came to sentence the applicant - the most telling fact was the judge's reference to "special circumstances", which strongly indicated an inadvertent conflation of the two regimes, a conclusion confirmed by the fact that

the NPP set was about 75% of the total effective sentence (which was the default position to be applied in the absence of a finding under the State regime of “special circumstances”) - error identified and appeal allowed - applicant was resentenced - NPP of 4 years imposed. [Editor’s note: Bathurst CJ & Hoeben CJ at CL agreeing with McCallum J.]
Voronov

Moussa v R [2017] NSWCCA 237
Court of Criminal Appeal of New South Wales
Ward JA, Fagan & N Adams JJ
Criminal law - manslaughter - joint criminal lability - appellant was indicted on 2 counts: (i) intentionally damaging property by fire in company with Paul Ribbons (s195(1A)(b) *Crimes Act 1900* (NSW)); (ii) manslaughter of Paul Ribbons (s18(1)(b) *Crimes Act 1900*) - the appellant and Ribbons had been jointly engaged in setting fire to a house which was the subject of a property dispute - the appellant had been the lookout, while Ribbons had been inside the house when an accelerant was ignited and the house set alight - Ribbons died as a result of burns sustained in the fire, while the appellant was rendered severely disabled - the appellant was sentenced to 2 years on each count, to be served concurrently, wholly suspended - the appellant appealed his conviction for manslaughter, arguing the conviction was untenable because the act of which he was convicted was the act of the deceased killing himself - held: s18(1)(a) *Crimes Act 1900* sets out the elements of murder and provides that every other punishable homicide “shall be taken to be manslaughter” - the judgment of the High Court in *II v The Queen* ([2017] HA 27) examined - the plurality decision given by Kiefel CJ, Keane & Edelman JJ ([1]-[4]) applied - the offences of murder and manslaughter in s18 require that one person kill *another* person - s18 is not engaged if a person kills himself or herself intentionally - appeal allowed & conviction for manslaughter quashed. [Editor’s note: Fagan & N Adams JJ agreeing with Ward JA.]
Moussa

Uzzell v Police [2017] SASC 143
Supreme Court of South Australia
Kelly J
Criminal law - costs - interlocutory appeal - appellant was charged on information with 2 offences (threatening to cause harm (s19(2) *Criminal Law Consolidation Act 1935* (SA)) & aggravated assault (s20(3) *Criminal Law Consolidation Act 1935*) - at hearing, the magistrate expressed the view that the police officer who was the alleged victim may have committed an offence himself and the prosecutor applied for and was granted, leave to withdraw the counts - the appellant’s solicitor then applied for costs, an application the magistrate refused - on appeal, it was conceded that the magistrate erred in dismissing the application by taking into account allegations against the appellant which had not been determined - the issue before the Court was whether an appeal lay to the Supreme Court against the magistrate’s refusal to award costs - held: the power to accept the withdrawal of a charge is found in s69 *Summary Procedure Act 1921* (SA) - s189 of that Act vests in the court a general discretion to award costs for, or against a party to proceedings - Rule 51 of the *Magistrates Court Rules 1992* (SA)

provides for the awarding of costs - this Rule does not create any type of action, but is a rule relating to the practice of the court when it exercises the discretion conferred on it by s189 - s42 of the *Magistrates Court Act 1991* governs the procedure by which a party may appeal to the Supreme Court - s41(1a) provides that an appeal does not lie against an interlocutory judgment, except in certain circumstances - the issue here was whether the magistrate's order refusing costs was to be properly characterised as a final or interlocutory order - there is divergent authority in this Court on this question (*McKellif v Police* [2001] SASC 269; *Sullivan v Police* [2000] SASC 171; *Grey v City of Charles Sturt* [1999] SASC 224) - referring to *Sullivan*, the Court preferred the view of Mullighan J that a costs order made at the conclusion of the proceedings is properly characterised as part of the final order, as opposed to a costs order made during the continuation of the proceedings before any final order has been made - however, that did not determine the issue here which concerned the meaning of "conclusion of the proceedings" in the circumstances that arose here - in McKellif, Perry J took the view that withdrawal of a complaint operated much like a *nolle prosequi* - the legislative scheme of the *Summary Procedure Act* draws a clear distinction between matters which proceed to final conclusion by way of conviction or dismissal and those which effectively end by the permitted withdrawal of a complaint on such terms as the court thinks fit - s71 provides that a certificate of dismissal after the court dismisses a complaint operates as a bar to subsequent complaint for the same matters against the same party - here, by the withdrawal of the complaint, the appellant had been deprived of a right of appeal - the court found that a real injustice had been caused and that there were special reasons within s42(1a)(c) *Magistrates Court Act 1991* to give the appellant leave to appeal - the magistrates' order refusing costs was set aside, appellant to have the costs of the trial in the sum of $ 2,200. [Editor's note: The court commented that in similar circumstances it would be prudent for an accused to first seek dismissal of the complaint under s69 and s71 *Summary Procedure Act 1921* when it is intended to make a costs application immediately thereafter.]
Uzzell

Parkinson v Alexander (No2) [2017] ACTSC 290
Supreme Court of the Australian Capital Territory
Refshauge J
Criminal law - remittal - the appellant had successfully appealed her conviction of an offence arising out of accusations she made to police & the issue before the Court was whether the charge should be remitted to the magistrates court, or an acquittal entered - held: the Court has a discretion as to whether, in the interests of justice, a new trial should be ordered (*DPP (Nauru) v Fowler* (1984) 154 CLR 627, 630) - where there is evidence to support the charge, an appellant court should order a new trial unless the interests of justice require the entry of an acquittal (*Spies v The Queen* (2000) 201 CLR 603, [104]) - King v The Queen ((1986) 161 CLR 423) referred to - the Court was bound by what the plurality said in *Spies v The Queen* - *Eastman v DPP(ACT)(No2)* ((2016) 9 ACTLR 178, [265]) referred to - a new trial is not an opportunity for the prosecution to "patch up" a defective case, or to present a case significantly different to that presented at the first trial (cf *R v Thomas (No 3*) (2006) 14 VR 512, [12]-[16];

Gilham v The Queen [2012] NWCA 131, [686]) - ordinarily it is a trial court which is to determine guilt or innocence and an appellant court should not usurp the functions of the prosecutorial authorities - it is also important to take account of the public interest in the prosecution and punishment of offenders (*R v Taufahema* (2007) 228 CLR 232, [49]) - *Dyers v The Queen* ((2002) 210 CLR 285, [82]-[83]) sets out the range of discretionary matters that must be considered - the relevant ones are listed at [33] and then considered - retrial ordered. [Editor's note: For decision upholding appeal see *Parkinson v Alexander* [2017] ACTSC 201.]
Parkinson v Alexander (No2)

Shakespeare

BY HENRY WADSWORTH LONGFELLOW

A vision as of crowded city streets,
With human life in endless overflow;
Thunder of thoroughfares; trumpets that blow
To battle; clamor, in obscure retreats, Of sailors landed from their anchored fleets;
Tolling of bells in turrets, and below
Voices of children, and bright flowers that throw
O'er garden-walls their intermingled sweets!
This vision comes to me when I unfold
The volume of the Poet paramount,
Whom all the Muses loved, not one alone; — Into his hands they put the lyre of gold,
And, crowned with sacred laurel at their fount,
Placed him as Musagetes on their throne.

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

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