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Weekly Criminal Law

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

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Executive Summary

Kibby v R (NSWCCA) - two digital sexual assault charges, applicant acquitted on one and jury could not agree on the other - at retrial, police officer gave evidence complainant told him of two sexual assaults - miscarriage of justice, proviso did not apply, conviction quashed, and new trial ordered

McGregor v R (NSWCCA) - the maximum percentage deductions that s16AAA(3) allows to be made to minimum sentences s16AAA requires for various child sexual offences refer to percentages of the actual starting point determined by the sentencing judge, not percentages of the minimum sentences required by s16AAA - NSW courts sentencing for federal offences can apply aggregate sentencing under the *Crimes (Sentencing Procedure) Act 1999* (NSW)

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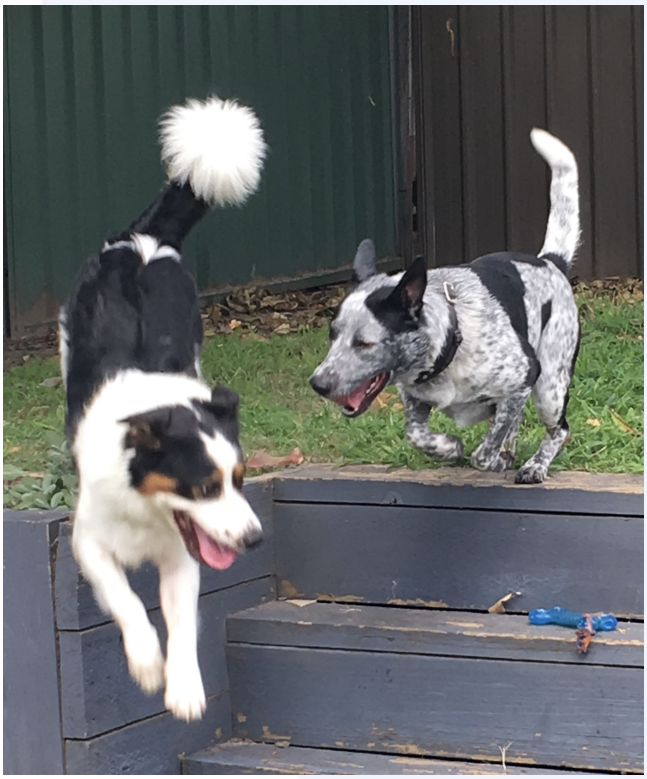

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Summaries With Link (Five Minute Read)

Kibby v R [2024] NSWCCA 207
Court of Criminal Appeal of New South Wales
Daves, Hamill, & Rigg JJ
Miscarriage of justice - Kibby had worked as a wardsman at a private hospital for 15 years - a 73 year old female patient alleged he committed two digital sexual assaults while helping her shower“ he was charged with two counts of aggravated sexual intercourse without consent - a jury found him not guilty on one count, and could not reach a verdict on the other - at a retrial, the complainant's evidence was given by a recording of her evidence at the previous trial, edited to remove references to the allegation on which Kibby had been acquitted - Kibby's evidence was given by way of the prosecutor and a DPP officer acting out the evidence, also edited in the same way - three other witnesses gave evidence, and did not refer to the allegation on which Kibby had been acquitted - a police officer, who the prosecutor had instructed not to refer to the allegation on which Kibby had been acquitted, gave evidence the complainant had told him two sexual assaults had occurred - the trial judge refused to discharge the jury, but directed the jury to ignore the officer's evidence - the jury found Kibby guilty - Kibby sought leave to appeal against conviction - held: the appeal was against conviction, not the decision not to discharge the jury - the trial Judge's reasons for not discharging the jury had to be considered in determining whether the trial miscarried, but an error in those reasons would not of itself establish a miscarriage of justice - the question was whether, in the circumstances, the irregularity resulted in a miscarriage of justice for the purpose of s6(1) of the *Criminal Appeal Act 1912* (NSW) - this required the irregularity was a failure to observe the requirements of the criminal process in a fundamental respect, or of a nature and degree that could realistically have affected the verdict of guilt returned by the jury - the direction the trial judge gave was not capable of curing the prejudice when the jury had been told, wrongly and at the outset, that the edits to the complainant's video evidence had not been made to "hide anything" from them - the trial judge had wrongly proceeded on the premise that he only had to discharge the jury if a miscarriage of justice was inevitable - there was little doubt some members of the jury would have worked out what was going on and there would have been discussion in the jury room - part of the direction to the jury, that the officer may have been mistaken, was obviously untrue - the proviso now requires an appellate court to make its own independent assessment of the evidence and determine whether, making due allowance for its 'natural limitations', the accused was proved guilty beyond reasonable doubt - where proof of guilt was wholly dependent on acceptance of a complainant's evidence, and a misdirection may have affected that acceptance, an appellate court cannot accord the guilty verdict the weight it otherwise might - the Court was unable to conclude no substantial miscarriage of justice actually occurred, and the proviso was not applied - there were powerful arguments in favour of ordering an acquittal, rather than another trial, but the Court ultimately considered the question of a new trial should be left to the DPP - leave to appeal granted, appeal allowed, conviction quashed, new trial ordered, and conditional bail granted.
View Decision

McGregor v R [2024] NSWCCA 200
Court of Criminal Appeal of New South Wales
Bell CJ, Kirk JA, Harrison CJ at CL, Davies, & Sweeney JJ
Sentencing for federal offences - McGregor pled guilty to four federal offences relating to child sexual abuse and asked that a further federal offence be taken into account - he was sentenced to an aggregate term of imprisonment of 11 years and 6 months with a non-parole period of 8 years - he sought leave to appeal against sentence on the sole ground that the sentencing judge had misconstrued s16AAC(2) and (3) of the *Crimes Act 1914* (Cth) and had thereby used a wrong formula when applying the discount for the plea of guilty and assistance to authorities - held: s16AAA sets minimum sentences for child sexual abuse related offences, including the offence in Count 1 to which McGregor had pled guilty - the minimum sentence for the Count 1 offence was 7 years imprisonment - s16AAC(2) provides that a court may reduce a sentence below the minimum because of a guilty plea or cooperation with authorities - s16AAC(3) provides the court can reduce the sentence by up 25% of the s16AAA minimum sentence for either a guilty plea or cooperation, and up to 50% of the s16AAA minimum sentence for both - the sentencing judge took a starting point of 8 years, and applied a discount of 25% of the minimum sentence for the guilty plea and a discount of 5% of the minimum sentence for cooperation regarding Count 3, and applied the total discount of 30% to the indicative sentences on all four counts, including Count 1 - the sentencing judge was confronted with two possible constructions of s16AAC(3) in the context of applying the 30% discount to Count 1, both supported in the case law: (1) the maximum discounts identified in s16AAA(3) cap the size of the discount to 50% of the of the 7 year minimum sentence required by s16AAA (the construction the sentencing judge adopted); or (2) the sentencing judge could apply her assessed discount of 30% to the starting point she took of 8 years - McGregor contended the second approach was correct, which the Crown conceded - the words 'the court may reduce the sentence ¦ by an amount that is up to 50% of the period specified in column 2 of the applicable item in the relevant table' in s16AAC(3) were ambiguous - the first construction involved changing the sentencing process by imposing a strict limit on the discount available for a guilty plea or cooperation, by reference, not to the sentence that would otherwise have been imposed, but rather to the minimum sentence - this was not harmonious with the text, and would be an arbitrary and capricious departure from general sentencing practice - the second construction avoided the unfairness as the discount would vary from case to case, whereas the discount under the first construction would not - the explanatory memorandum emphasised the continuing importance of encouraging guilty pleas and cooperation with authorities - the Attorney-General in his second reading speech stated that judges would retain discretion to deviate from the minimum terms, directing attention to the sentence actually imposed by judges - the sentencing judge had erred in concluding that s16AAC(3) required her to calculate the discount by reference to a percentage of the minimum penalty - the Court rejected the Crown's arguments that aggregate sentencing under s53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) cannot be applied to federal offences, and that s16AAA and s16AAB are inconsistent with the NSW aggregate sentencing regime - leave to appeal granted, appeal

allowed, sentence quashed, and applicant resentenced to an aggregate term of imprisonment of 10 years and 9 months with a non-parole period of 7 years and 6 months.
View Decision

Executive Summary and (One Minute Read)

Robert F Kennedy, Jr v Joseph R Biden, Jr (USCA5CT) - In an action for equitable relief, plaintiffs' claims failed as a result of lack of standing to sue because it was speculative that the wrong complained of was ongoing and therefore redressable

Summaries With Link (Five Minute Read)

Robert F Kennedy, Jr v Joseph R Biden, Jr, No 24-30252
United States Court of Appeals
Higginbotham, Stewart, & Haynes JJ
Robert F Kennedy Jr and others complained that, due to unlawful pressure exercised by federal officials, Meta and YouTube censored or de-platformed Kennedy regarding COVID-related content in 2021. The plaintiffs sought and were granted a preliminary injunction by the District Court. The government appealed. In an earlier decision, *Murthy v Missouri* 144 S Ct 1972 (2024), the Supreme Court held that, to establish standing to sue, plaintiffs must demonstrate a substantial risk that they will suffer injury that is (1) traceable to a government defendant, and (2) redressable by an injunction. The Court of Appeals found that, while Kennedy had evidence that the initial censorship was traceable to government officials, he was unable to show that that the continued censorship could be attributed to government actions. The Court found that there was not any evidence that could attribute continued suppression to government activity as opposed to internal platform moderation procedures. Consequently, standing failed on the redressability issue; namely, that Kennedy was unable to show that an injunction directed against the government would, in fact, redress the injury of which he complained. In accordance with the recent Supreme Court precedent, standing to sue was not established and the orders of the District Court granting a preliminary injunction were reversed.
Robert F Kennedy, Jr

Poem for Friday

How Do I Love Thee? (Sonnet 43, from Sonnets from the Portuguese)

By Elizabeth Barrett Browning (1806-1861)

How do I love thee? Let me count the ways.
I love thee to the depth and breadth and height
My soul can reach, when feeling out of sight
For the ends of being and ideal grace.
I love thee to the level of every day's
Most quiet need, by sun and candle-light.
I love thee freely, as men strive for right.
I love thee purely, as they turn from praise.
I love thee with the passion put to use
In my old griefs, and with my childhood's faith.
I love thee with a love I seemed to lose
With my lost saints. I love thee with the breath,
Smiles, tears, of all my life; and, if God choose,
I shall but love thee better after death.

Elizabeth Barrett Browning, English poet was born on 6 March 1806, in County Durham, the eldest of 12 children, 11 of whom survived into adulthood. She was ill from her mid teens. She was influential in campaigning for the abolition of slavery and the introduction of child labour protection legislation. Her grandfather had been a slave owner in sugar plantations in Jamaica. She was a contemporary of, and met Coleridge, Tennyson, Carlyle, Wordsworth and Mitford. She met Robert Browning in 1845, and after a secret marriage, they moved to Italy in 1846. Whiting, describes her as "the most philosophical poet" living a life as "a Gospel of applied Christianity". Barrett Browning died on 29 June 1861 at the age of 55, in Florence Italy.

How Do I Love Thee? sung by Femmes de Chanson, (2012)
How Do I Love Thee? (Nathan Christensen) - Femmes de Chanson - 2012 (youtube.com)

How Do I Love Thee read by Dame Judi Dench
How Do I Love Thee? (Sonnet 43) by Elizabeth Barrett Browning (read by Dame Judi Dench) (youtube.com)

Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading

theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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