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Weekly Criminal Law

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

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Executive Summary

Moustafa Mariam v Regina (NSWCCA) - criminal law - firearm offence - possession - nature of weapon - assessment of objective seriousness - pervert the course of justice offence - heavy aggregate sentence imposed - whether sentence manifestly excessive - appeal dismissed

Chaouk v R (NSWCCA) - criminal law - guilty plea to four offences committed during the course of a robbery - appeal against sentence - principle of totality - sentence manifestly excessive - applicant re-sentenced

Scott v R (NSWCCA) - criminal law - appeal against murder conviction - no miscarriage of justice in failing to discharge jury following evidence of bad character and replacement of counsel - verdict was reasonable and open on the evidence - appeal dismissed

Shiel v the Queen (VSCA) - criminal law - obtaining financial advantage by deception - sentencing judge erred in not explaining difference in sentence for continuing criminal enterprise offences versus other offences - appellant re-sentenced

R v Ngwira (QCA) - criminal law - warning under s23(1A), Criminal Code (Qld), correct - reasonably open to the jury to be satisfied that the appellant was guilty - jury in no doubt that each charge had to be considered separately - appeal dismissed

R v Jones (SASCFC) - criminal law - conviction after applicant absconded during trial - application for extension of time to appeal when applicant re-arrested after time to appeal had expired - extension granted, appeal allowed, new trial ordered

Summaries With Link (Five Minute Read)

Moustafa Mariam v Regina [2017] NSWCCA 292
Court of Criminal Appeal of New South Wales
Price, Bellew & Hamill JJ
Criminal law - possession of .45 automatic pistol - pervert the course of justice - severity appeal - a search of the applicant's premises located a .45 automatic pistol and while he was on remand in Silverwater he arranged with another inmate to "take the rap for him" in return for a payment of $40,000 and a Toyota motor vehicle - a statutory declaration was prepared declaring that the pistol belonged to the other inmate - after a trial the applicant was found guilty of the offence of possession of the pistol and of doing an act with intention to pervert the occurs of justice and sentenced to an aggregate term of 6 years, NPP 4 years 6 months - the applicant had a criminal record dating from 2001, but was found to have reasonable prospects of rehabilitation - he had been exposed to alcohol consumption at an early age , but appeared to have taken steps to rehabilitate himself - on sentence, the issue was whether, as the Crown submitted, the applicant had possessed the pistol in connection with drug dealing, or whether it was a case of "mere possession" - - the sentencing judge had found that the offence was mid-range in objective seriousness - held: (i) objective seriousness of possession offence - the Court has consistently held that the assessment of where an offence lies in the range of seriousness is a matter peculiarly in the province of the sentencing judge (*Mulato v R* [2006] NSWCCA 282, [37], [46]) - misgivings have been expressed about this body of authority (*Kaminic v R* [2014] NSWCCA 116, [8-]-[85] - however, the Court remained constrained to accept that, in the absence of High Court authority or a consideration of the issue by a five judge bench of the Court, the approach represents the well-established settled law of NSW - the nature of the weapon was of real significant in demeaning he seriousness of the offence - the weapon was an automatic and was loaded with 10 rounds - the precise circumstances in which the applicant came to possess the weapon were not able to be identified - *Olbrich v The Queen* ((1999) 199 CLR 270, [16]) referred to - the applicant's defence was conducted on the basis that he was never in possession of the pistol - that defence was rejected - there was no error in the judge's conclusion that the offence fell within mid-range; (ii) applicant's criminal history - the judge's approach was completely orthodox - no error identified; (iii) special circumstances - no *House v The King* ((1936) 55 CLR 499) error identified; (iv) whether the sentence was manifestly excessive - it was necessary to demonstrate that the sentence was "manifestly wrong" or "plainly unjust" (*Dinsdale v R* (2000) 202 CLR 321, [22]) - the judge's asset of the objective seriousness of the possession offence was not infected by error - in the circumstances, while the aggregate sentence with its NPP, might have been considered heavy, it was within range and was neither plainly unjust nor manifestly wrong or unreasonable; application to appeal granted, appeal dismissed. [Editor's note: Price & Bellew JJ agreeing with Hamill J.]
Moustafa Mariam

Chaouk v R [2017] NSWCCA 295
Court of Criminal Appeal of New South Wales
Macfarlan JA, Fullerton & Fagan JJ
Criminal law - applicant pled guilty to four offences committed during the course of a robbery with two other men - assault with intent to rob whilst armed with an offensive weapon and at the time of the assault the infliction of grievous bodily harm contrary to s98, Crimes Act 1900 (NSW) - robbery whilst armed with a dangerous weapon contrary to s97(2), Crimes Act 1900 (NSW) - assault with intent to rob whilst armed with a dangerous weapon contrary to s97(2), Crimes Act 1900 (NSW) - discharge firearm with intent to cause grievous bodily harm contrary to s33A(1)(a), Crimes Act 1900 (NSW) - 15% discount to indicative sentences for each offence due to pleas of guilty - special circumstances of youth and the fact that this would be the applicant's first time in custody - sentences partly cumulative - sentenced to aggregate term of 27 years imprisonment with a non-parole period of 20 years - appeal against sentence - held: no general rule to determine whether sentences should be concurrent or consecutive - issue is determined by principle of totality - sentence was manifestly excessive - sentence did not bear a sufficiently reasonable proportionality to the totality of the applicant's offending - Court should intervene to prevent the consequences of a crushing sentence - circumstances of offending called for greater concurrency of sentences than the trial judge imposed - sentencing discretion exercised afresh - applicant re-sentenced to aggregate term of 20 years imprisonment with non-parole period of 14 years.
Chaouk

Scott v R [2017] NSWCCA 296
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, McCallum & Bellew JJ
Criminal law - applicant convicted of murder following plea of not guilty - appeal against conviction - applicant contended trial judge erred in failing to discharge the jury following admission of evidence going to his bad character and the withdrawal and replacement of defence counsel - also that the verdict was unreasonable and could not be supported by the evidence - held: no rigid rule as to whether to discharge jury for an inadvertent and potentially prejudicial event that occurs during trial - an appeal in these circumstances is not against the failure to discharge, but against the conviction - question is whether a miscarriage of justice occurred - appellate court will not interfere with trial judge's exercise of discretion unless the judge acted on a wrong principle or there was a miscarriage of justice - impugned evidence was relevant to issues in dispute - there had been a forensic advantage to the applicant in having the impugned evidence before the jury - trial judge gave an accurate and appropriate direction to the jury - no miscarriage of justice in the admission of the evidence or the failure to discharge the jury - as to whether the verdict was reasonable and supported by the evidence, in a circumstantial case, the prosecution's burden requires it to exclude all reasonable hypotheses consistent with innocence - however, hypotheses consistent with innocence may cease to be reasonable where evidence to support them must be within the knowledge of the accused and the accused does not give such evidence - guilty verdict was open to the jury - appeal

dismissed.
Scott

Shiel v The Queen [2017] VSCA 359
Supreme Court of Victoria - Court of Appeal
Santamaria & Coghlan JJA
Criminal law - appellant pled guilty to five charges of obtaining financial advantage by deception and once charge of attempting to obtain financial advantage by deception - total effective sentence of six years and three months imprisonment with non-parole period of four years - appellant had been a retail claims assessor for a life insurance company - authorised payments to his own bank account - appeal against sentence - contended trial judge had erred in imposing an automatic increase for the later offences being "continuing criminal enterprise" offences - Part 2B, Sentencing Act 1991 (Vic) - held: to succeed, the appellant must show both that there was an error in the sentence, and that a different sentence should be imposed - s281, Criminal Procedure Act 2009 (Vic) - trial judge had not given any reasons to explain the difference between the first offence and the continuing criminal enterprise offences - error was established - a "different sentence" for the purposes of s281, Criminal Procedure Act 2009 (Vic), is not a different total effective sentence, that term refers to each individual sentence and any orders of cumulation or concurrency, and any non-parole period - different individual sentences on certain charges should be imposed - appellant re-sentenced to total effective sentence of five years and ten months imprisonment with non-parole period of three years and nine months.
Shiel

R v Ngwira [2017] QCA 294
Supreme Court of Queensland - Court of Appeal
Sofronoff P, Philippides JA & Flanagan J
Criminal law - appellant convicted of rape and murder - appeal against conviction - three grounds of appeal - that the trial judge erred in directing the jury under s23(1A), Criminal Code (Qld), where accident was raised and the death did not result because of defect, weakness or abnormality - that the verdict was unreasonable - that the trial judge erred in failing to give the jury the separate consideration of charges warning - held: the trial judge's warning under s23(1A), Criminal Code (Qld), correctly informed the jury of the very weak possibility of a defect, with an acknowledgment that it would be fairer to the accused to treat the deceased as not having such a defect - in assessing whether a verdict was reasonable, the court must review the whole of the evidence - the question is not merely whether, as a matter of law, there is evidence to support the conviction - a conviction must be set aside if it would be dangerous in all the circumstances to allow the conviction to stand - upon the whole of the evidence it was reasonably open to the jury to be satisfied that the appellant was guilty - the trial judge had left the jury in no doubt that each charge had to be considered separately and that they had to return separate verdicts for each charge - appeal dismissed.
Ngwira

R v Jones [2017[SASCFC 163
Supreme Court of South Australia - Full Court
Kourakis CJ, Peek & Nicholson JJ
Criminal law - applicant was convicted of one count of aggravated harm with intent to cause harm contrary to s24(1), Criminal Law Consolidation Act 1935 (SA) - applicant was on home detention bail during trial - he absconded and was convicted in his absence - succeeded in evading arrest until after the expiration of the time limit to appeal - sought extension of time to appeal - alleged miscarriage of justice occurred when trial judge refused defence counsel permission to cross-examine the victim as to the victim's previous offences - held (by Koukakis CJ with whom Nicholson J agreed, Peek J dissenting): applicant was not bound to concede he had stabbed the victim before cross-examining the victim to impeach the victim's credit - applicant's counsel was entitled to cross-examine victim on the victim's alleged and proven offences - after such cross-examination, jury may have had doubt as to applicant's guilt - proviso should not be applied - extension of time should be granted - held (Peek J, dissenting): where an applicant's absconding causes an appeal to be delayed, an extension of time should only be granted if the applicant demonstrates substantial grounds for apprehending that a miscarriage of justice has actually occurred - applicant had not done so - extension of time granted, appeal allowed, and re-trial ordered.
Jones

Sonnet 59

By: William Shakespeare

If there be nothing new, but that which is
Hath been before, how are our brains beguil'd,
Which, labouring for invention, bear amiss
The second burthen of a former child!
O, that record could with a backward look,
Even of five hundred courses of the sun,
Show me your image in some antique book,
Since mind at first in character was done!
That I might see what the old world could say
To this composed wonder of your frame;
Whether we are mended, or whe'r better they,
Or whether revolution be the same.
O! sure I am, the wits of former days
To subjects worse have given admiring praise.

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

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