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Benchmark

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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

Bromley v The King (HCA) - High Court refused by majority to grant special leave where the applicant sought to adduce fresh psychiatric evidence bearing on the evidence of a witness who had schizoaffective disorder

Kane (a pseudonym) v The King; Moon (a pseudonym) v The King (VSCA) - trial judge erred in deciding to admit hearsay evidence in a US law enforcement report under the *Foreign Evidence Act 1994* (Cth), and in failing to certify that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case

R v Baggaley (QCA) - conviction appeal allowed and retrial ordered where the appellant's trial counsel had failed to lead certain evidence from the appellant, thus failing to allow the appellant to put a very material part of his case before the jury

HABEAS CANEM

McGregor wishes you a happy and peaceful holiday season

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Summaries With Link (Five Minute Read)

Bromley v The King [2023] HCA 42
High Court of Australia
Gageler CJ, Edelman, Steward, Gleeson, & Jagot JJ
Criminal appeals - in 1985, the applicant and a co-accused were convicted of murder and sentenced to life imprisonment - an appeal was dismissed - in 2018, the Court of Criminal Appeal of the Supreme Court of South Australia refused him permission to appeal a second time against his conviction for murder under s353A of the *Criminal Law Consolidation Act 1935* (SA) - the applicant sought special leave to appeal to the High Court, which was referred to an enlarged bench - Bromley sought to adduce fresh psychiatric and psychological evidence concerning developments in the field of cognitive deficits or impairments in people suffering from schizophrenia and schizoaffective disorder and their effects on memory since the date of the applicant's conviction - held (by majority, Edelman & Steward JJ dissenting): the three requirements for evidence to be "compelling" in s353A(6)(b) of the *Criminal Law Consolidation Act*, are that it is reliable, substantial, and highly probative - these words are to be given their ordinary meaning, and each has work to do - "reliable" means a credible and trustworthy basis for fact finding - "substantial" means of real significance or importance with respect to the matter the evidence is tendered to prove - evidence that is reliable and substantial will often but not always also be "highly probative" in the context of the issues in dispute at the trial, because the issues in dispute at the trial will depend upon the circumstances of the case - the fact that the conviction was long-standing did not weigh into the consideration of the interests of justice in deciding if fresh and compelling evidence should be considered in a second or subsequent appeal - the Court of Criminal Appeal was right to conclude that the fresh psychiatric and psychological evidence was not compelling as it was not highly probative in the context of the relevant issue in dispute in Bromley's trial, being the reliability of the evidence of a witness who had schizoaffective disorder identifying the applicant as the man who, with his co-accused, attacked the victim at the River Torrens on the night in question - the application for special leave must be dismissed - Edelman & Steward JJ would have held that the fresh psychiatric and psychological evidence established that the witness's evidence of the assault needed to be corroborated in every respect in order to sustain a conviction of the applicant - the Crown accepted that the case would never have gone to trial if the witness's account had to be corroborated to that extent - special leave should be granted, the appeal allowed, the conviction quashed, and an acquittal ordered - by majority: application for special leave dismissed.
Bromley

Kane (a pseudonym) v The King; Moon (a pseudonym) v The King [2023] VSCA 305
Court of Appeal of Victoria
Priest & Beach JJA
Hearsay evidence - the applicants were charged with aiding, abetting, counselling or procuring the attempted possession of a commercial quantity of an unlawfully imported border controlled drug, namely, cocaine - the Crown alleged that the applicants and another person each played

a role in an attempt to possess at least 25 kilograms of cocaine that they believed had been imported into Australia from Colombia - the prosecution sought to adduce evidence of hearsay representations in two paragraphs of a report prepared by a Supervisory Special Agent with the US Immigration and Customs Enforcement, Homeland Security Investigation - both applicants challenged the admissibility of the hearsay representations at a pre-trial hearing - the trial judge refused to exclude the evidence, holding that it was admissible under s25 of the *Foreign Evidence Act 1994* (Cth) and did not fall to be excluded under s137 of the *Evidence Act 2008* (Vic) - the judge refused to certify under s295(3)(a) of the *Criminal Procedure Act 2009* (Vic) that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case - the applicants sought a review of the certification ruling, and, if successful, sought leave to appeal the evidentiary ruling - held: when determining whether the exclusion of evidence will substantially weaken the prosecution case, it needs be borne in mind that the adverb "substantially" connotes evidence which is of major importance, or, at least, very important to the prosecution case - when properly characterised and understood, the evidence constituted by the report was very important to the prosecution case, if not of major importance - the prosecution wanted to rely on facts proved by the report as circumstantial evidence to establish that the applicants intended that their conduct would assist and encourage the third person to possess cocaine - the hearsay representations in the report were the keystone locking the various segments of the prosecution's circumstantial case into position - the grounds seeking review of the judge's refusal to certify had been made out - it was in the interests of justice to grant leave to appeal the interlocutory evidence decision - the representations contained in the report were made in connection with an investigation which related or led to a criminal proceeding - therefore, s69(3) of the *Evidence Act* (the purpose of which is to reduce the risk of self-serving documents being admitted into evidence) would present an insuperable hurdle to the admissibility of the hearsay representations contained in the report unless the prosecution is able to rely on the provisions of the *Foreign Evidence Act* - the general rule established by s24(2) of the *Foreign Evidence Act* means that the testimony of the report writer, including any documents produced by or with such testimony, is not to be adduced as evidence, if the evidence would not have been admissible had it been adduced from him at the hearing - a direction should have been given under s25(1) of the *Foreign Evidence Act* that the foreign material constituted by the report not be adduced in evidence - interlocutory evidence decision set aside.
Kane (a pseudonym)

R v Baggaley [2023] QCA 249
Court of Appeal of Queensland
Dalton, Flanagan, Boddice JJA
Miscarriage of justice - the appellant had been convicted of one count of attempting to import a commercial quantity of a border controlled drug after he had been tried with his brother - the Crown tendered footage (taken from the air) of the appellant and another person on a seven metre rigid-hulled inflatable boat, meeting a large ship at a point 360 kilometres off the east coast of Australia, and large plastic containers with floats being thrown into the sea from the

ship, the containers being put on the boat, and the boat proceeding back towards Australia - one to two hours later, the Navy attempted to intercept the boat, and the Crown tendered footage of the appellant and the other person on the boat attempting to outpace the Navy vessel, which it eventually did, with the appellant throwing all the containers, which were later found to contain cocaine, off the boat during this pursuit - the boat was intercepted several hours later by Queensland police - during the trial, the appellant's counsel failed to lead evidence from the appellant to explain otherwise inculpatory evidence with a phone that had been found in the boat - the appellant appealed against conviction - held: counsel have a wide discretion as to how a trial is conducted - there will be no miscarriage of justice arising from the conduct of counsel unless that conduct deprived the person convicted of a significant possibility of acquittal, or the conduct of counsel deprived the accused of a fair trial according to law - the first of those tests will not be satisfied where the decision taken is one which involved both advantages and disadvantages for an accused person, where the decision did not produce the hoped for result, or where hindsight shows that the decision was wrong - trial counsel for the appellant swore two affidavits in the appeal, but did not say that he deliberately refrained from leading the evidence from the appellant regarding the phone in the exercise of any discretionary judgment - counsel's conduct had the effect of failing to allow the appellant to put a very material part of his case before the jury - omitting to lead this evidence did not have advantages and disadvantages for the appellant; it was only significantly disadvantageous - to fail to lead the appellant's exculpatory version of events (1) was a material irregularity inconsistent with a fair trial of the accused, and (2) must have been prejudicial in the sense that there was a real chance that it affected the jury's verdict, or 'realistically could have affected the verdict of guilt, or had the capacity for practical injustice, or was capable of affecting the result of the trial - there had been a miscarriage of justice - appeal allowed and retrial ordered.
R v Baggaley

Executive Summary and (One Minute Read)

Minnesota v Torgerson (MINSC) - Odor of marijuana on its own without other facts did not constitute probable cause for warrantless search of vehicle

Summaries With Link (Five Minute Read)

Minnesota v Torgerson 995 N.W.2d 164 (2023)
Supreme Court of Minnesota
Gildea CJ, Anderson, & McKeig JJ
A motor vehicle was stopped by the police because it had too many lights mounted on the grill. When the driver gave his license to the police, the officer stated that he smelled marijuana emanating from the vehicle. When questioned, the driver denied possessing marijuana. After conferring with a second officer, the police ordered the driver and passengers out of the vehicle and conducted a search. In the course of the search, the police discovered a canister of what was later found to be methamphetamine. At trial, the defendant sought to suppress the evidence obtained from the vehicle search on the grounds that there did not exist requisite probable cause for the search. The trial court suppressed the evidence and dismissed the matter. This was affirmed by the Minnesota Court of Appeals. The Minnesota Supreme Court stated that both the US and Minnesota Constitutions protect against unreasonable searches and seizures. Warrantless searches are *per se* unreasonable unless one of the exceptions to the warrant requirement applies. One of these exceptions is the automobile exception which permits the police to search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence. The Court said that probable cause requires more than suspicion but less than the evidence necessary for conviction. A warrantless search must be based on objective facts and not the subjective good faith of the police. The Court noted that both industrial hemp and medical cannabis were lawful in Minnesota and the possession of a small quantity of marijuana was a petty misdemeanour and not a crime. The Supreme Court stated that, while the odour of marijuana can be a fact that supports probable cause, it is insufficient on its own because of the lawful right to possess medical cannabis under certain circumstances. As there was nothing else to support probable cause, the facts were insufficient to establish a fair probability that the search would yield evidence of criminal conduct. The suppression order was affirmed.
Minnesota

Poem for Friday

In Memoriam, (Ring out, wild bells)

By: Alfred, Lord Tennyson (1809-1892)

Ring out, wild bells, to the wild sky,
The flying cloud, the frosty light:
The year is dying in the night;
Ring out, wild bells, and let him die.

Ring out the old, ring in the new,
Ring, happy bells, across the snow:
The year is going, let him go;
Ring out the false, ring in the true.

Ring out the grief that saps the mind
For those that here we see no more;
Ring out the feud of rich and poor,
Ring in redress to all mankind.

Ring out a slowly dying cause,
And ancient forms of party strife;
Ring in the nobler modes of life,
With sweeter manners, purer laws.

Ring out the want, the care, the sin,
The faithless coldness of the times;
Ring out, ring out my mournful rhymes
But ring the fuller minstrel in.

Ring out false pride in place and blood,
The civic slander and the spite;
Ring in the love of truth and right,
Ring in the common love of good.

Ring out old shapes of foul disease;
Ring out the narrowing lust of gold;
Ring out the thousand wars of old,
Ring in the thousand years of peace.

Ring in the valiant man and free,

The larger heart, the kindlier hand;
Ring out the darkness of the land,
Ring in the Christ that is to be.

Alfred, Lord Tennyson was born on 6 August 1809, in Somersby, Lincolnshire, England. *Ring Out, Wild Bells*, was part of *In Memoriam,* written to Arthur Henry Hallam, who died at 22. The poem was published in 1850, the year Tennyson was appointed Poet Laureate. The poem is inspired by the English custom to have the ring of bells, muffled to ring out the old year, and then, with muffles removed, to ring in the new year. *Ring Out, Wild Bells,* has been set to music including by Charles Gounod and Percy FletcherAlfred, Lord Tennyson died on 6 October 1892.

Ring Out, Wild Bells, Gounod, sung by the Mormon Tabernacle Choir
https://www.youtube.com/watch?v=TVEAt8v7b_g

Ring Out, Wild Bells, from The Passing of the Year by Jonathan Dove, Andrew Hon, conductor, sung by the Yale Glee Club
https://www.youtube.com/watch?v=yPIqqvOM8Og

Bell Ringing in the Belfry at Great St. Mary's, Cambridge
https://www.youtube.com/watch?v=KNMFvNZIsCM

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