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Weekly Criminal Law

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Executive Summary

SY v R (NSWCCA) - criminal law - historical sexual assault - rule in *Browne v Dunn* - agreement not to raise complainant's credit - judge's comments on failure to cross examine - error identified - verdict unreasonable - conviction quashed - acquittal entered

White v R (NSWCCA) - criminal law - duty to obtain instruction on giving evidence - whether prosecutor reversed the onus of proof - conviction appeal - authorities and principles considered - decision not to call applicant objectively rational - onus not reversed - appeal dismissed

R v Micheal Martin (NSWSC) - criminal law - murder - motive of financial gain - victim offender's father who had abused offender as a child - objective seriousness - relevance of childhood abuse and resulting depressive illness - causal link indirect to murder - as serious as contract killing - aggregate sentence of 37 years, NPP 27 years 9 months

DPP (NSW) v GW (NSWSC) - criminal law - arrest for breach of bail - failure to consider alternative to arrest - whether arrest improper - magistrate dismissed proceedings - whether appeal raised question of law - failure to give adequate reasons - error - question of law - appeal allowed - matter remitted - defendant to pay costs - certificate under *Suitors Fund* granted

Al Wahame v The Queen (VSCA) - criminal law - recklessly causing serious injury - mental health - sentencing principles - severity appeal - fresh evidence elevated need for specific deterrence - no other sentence appropriate - appeal dismissed

R v Burtt (SASCFC) - criminal law - drug importation - leniency appeal - suspended sentence - whether consistency in sentencing required imposition of prison term - double jeopardy - suspended sentence within judge's discretion - appeal dismissed

Summaries With Link (Five Minute Read)

SY v R [2018] NSWCCA 6
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL; Davies & Bellew JJ
Criminal law - conviction appeal - historical sexual assault - the applicant, who was a Deacon at St Joseph's Maronite Church, Croydon, was charged with assaulting the complainant and committing an act of indecency on him in circumstances of aggravation, the aggravation being that the complainant was under 16 - the offence was alleged to have occurred when the complainant stayed overnight at the church during the Australian tour in October 2005 of the Holy Relics of the Saints of Lebanon - the applicant was alleged to have driven the complainant home the following morning and to have assaulted him by masturbating him until he ejaculated - although the complainant did not tell his parents, or police about the matter until 2014, there was evidence that he had made complaint to fiends within a few days - the applicant denied the incident and one crucial issue was whether the complainant had been present during the all-night vigil - the applicant was convicted after a trial and sentenced to 2 years , NPP 12 months - he sought leave to appeal, submitting, *inter alia,* that the trial judge's directions misled and confused the jury as to the onus of proof and that the verdict was unreasonable - held: leave being granted - (1) whether the directions were apt to confuse the jury on the onus and standard of proof - the applicant submitted that the directions created a real risk that the jury may have perceived the case as a genuine contest of the strength of two competing bodies of evidence - a *Liberato* direction was given (*Liberato v The Queen* (1985) 159 CLR 507) [32] and experienced senior counsel had not sought a redirection - r4 *Criminal Appeal Rules 1952* (NSW) applied - ground rejected; (2) whether the Rule in *Browne v Dunn applied (Browne v Dunn* (1893) 6 R 67) - the case was conducted on the basis that the incident did not happen and it was agreed between the parties, in discussion with the trial judge, that the accused's counsel would not challenge the complainant's credibility - in the face of that agreement the trial judge raised for the jury matters beyond the issues upon which the trial was being conducted and effectively drew the jury's attention to the credibility of the complainant's evidence in a manner detrimental to the applicant by impliedly suggesting that there had been a failure by the applicant to put certain matters to the complainant and to Crown witnesses - such a comment may suggest an obligation on the accused to prove something and it should not have been made (see *MWJ v The Queen* (2005) 80 ALJR 329, [38] - [41]) - the rule in *Browne v Dunn* essentially requires a party to give appropriate notice to the other party of any imputation the party intends to make against the other - one corollary of the rule is that judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with the rule -

the effect of the judge's comments was to raise a matter not raised by the Crown, not by oversight but by agreement effectively worked out during debate before judge (see *Popovic v R; Hristovski v R; Bubanja v R; Koloamatangi v R* [2016] NSWCCA 202, [225] (*Popovic*)) - such comments can amount to a denial of natural justice and tend to compromise the appearance of impartiality (*R v Meher* [2004] NSWCCA 335, [87]-[88]; *R v Esposito* (1998) 45 NSWLR 442, 455D-E) - no further direction could have cured the problem; (3) whether the verdict was unreasonable - principles and authorities referred to *(M v The Queen* (1994) 181 CLR 487, 493-5; *MFA v The Queen* (2002) 213 CLR 606, [55]-[58]; *SKA v Regina* [2012] NSWCCA 205, [311]; *Popovic*, [278]-[279]) - here, the effect of the impugned passages in the judge's directions went to the very basis of the jury' consideration of whether the Crown had proved its case beyond reasonable doubt because the jury might well have excluded a consideration of alternative reasonable possibilities - accordingly, the advantage that the jury had should be accorded "little regard" - there was a real possibility that guilt had not been proved beyond a reasonable doubt and the appellant should have been acquitted; appeal allowed, conviction quashed, appellant released forthwith. [Editor's note: Hoeben CJ at CL & Bellew J agreeing with Davies J.]
SY

White v R [2018] NSWCCA 1
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, Davies & Bellew JJ
Criminal law - conviction appeal - instructions - applicant, who did not give evidence at trial, was convicted of sexual intercourse without consent and 3 counts of indecent assault - he was sentenced to an overall term of 3 years, NPP 18 months - applicant sought leave to appeal his convictions on two grounds: there had been a miscarriage of justice due to the incompetence of his counsel and a reversal of the onus of proof - the incompetence alleged was a failure to take the applicant's instructions on whether the applicant should give evidence - held: (1) alleged incompetency in failing to call the applicant or take his instructions on giving evidence - the Court examined affidavits relied upon by the parties in the appeal and considered the authorities (*Nudd v The Queen* (2006) 80 ALJR 9, [8]-[9] (*Nudd*), [64]; *Kho v R* [2012] NSWCCA 71, [20]-[21]; *R v McLean* (20010) 121 A Crim R 484, [54]-[55]) - the decision whether or not an accused gives evidence must be that of the accused himself or herself after having received proper and appropriate advice from counsel (*R v Smith* [1999] NSWCCA 126, [47]; *R v Szabo* (2000) 112 A Crim R 215, [40]; *MB v R* [2009] NSWCCA 200, [35]-[39]) - the matter is reinforced by r 37 *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) - the failure of counsel to comply with these requirements will not necessarily result in a trial which is unfair or in a miscarriage of justice (*R v Birks* (1990) 19 NSWLR 677, 685; *Ignjatic v R* (1993) 68 A Crim R 333, 336) - an appeal is not an enquiry into the professional competence of the accused's legal representative - here, the applicant's counsel formed the view that the better course was not to call the applicant - the first enquiry was whether that decision, viewed objectively, was a rational decision (see *Nudd* [9]) or whether it was a choice which competent counsel could make (*TKWJ v The Queen* (2002) 212 CLR 124, [95] (*TKWJ))* - considering that

the applicant was cognitively impaired and had a deteriorating memory, was half deaf and that it was by no means inevitable that he would be convicted if he did not give evidence, counsel's decision not to call him was, objectively, a rational decision that competent counsel could make - however, the ultimate enquiry was whether, considering the events that occurred at trial, an unfair trial resulted and that there was a miscarriage of justice - the decision not to call him was not unfair and did not deprive him of a chance of an acquittal that was fairly open (*Mraz v The Queen* (1955) 93 CLR 493, 514; *TKWJ* [26]); (2) whether the prosecutor's address reversed the onus of proof - the issue was whether the prosecutor's address impliedly posed the question "why would the complainant lie?" - no objection being taken at the time, r4 *Criminal Appeal Rules 1952* (NSW) applied - authorities considered (*South v R* [2007] NSWCCA 117, [41]-[43]; *Brown v R* [2008] NSWCCA 306, [50]; *Doe v R* (2008) 187 A Crim R 328, [58]-[60]) - what was said by the prosecutor did not go as far as what the Crown said in *Brown v R* where the prosecutor was saying that there was good reason why the complainant did not lie - nothing the prosecutor said invited reasoning involving a reversal of the onus of proof - leave refused, appeal dismissed. [Editor's note: Hoeben CJ at CL & Bellew J agreeing with Davies J.]
White

R v Micheal Martin [2018] NSWSC 84
Supreme Court of New South Wales
Hamill J
Criminal law - murder - sentence - offender who, as a child, had been subjected to abuse by his father which involved serious assaults, murdered his father in order to obtain the proceeds of life insurances which he had taken out over his father's life - the offender had attempted to murder his father and another person living in his house a week or so prior to the murder and was to be sentenced for those offences as well as for the murder (3 counts - murder (s18 *Crimes Act 1900* (NSW), causing grievous bodily harm with intent to murder (s27 *Crimes Act 1900*) and causing grievous bodily harm with intent (s33 *Crimes Act 1900*) - sentence: (1) the attempted murder and infliction of GBH - the offence of causing grievous bodily harm with intent fell within, or just below, the middle range of objective seriousness - the offence of attempted murder fell substantively above the putative mid-range for such an offence; (2) the murder - while early abuse and its psychiatric sequalae played a part in the offender embarking upon his cold-blooded and calculated plan, the offence was committed for financial gain and involved a brutal attack on a vulnerable man in his own home - it was premeditated and planned and, objectively, it was close to the most serious examples of homicide - it fell substantively above the mid-range of objective seriousness - the matters that aggravated the offence were that it was committed for financial reward, the victim was vulnerable and still recovering from the earlier attack and it was committed in the victim's home - while the abusive relationship between the father and offender did not constitute provocation, it was relevant as the offender was suffering from a depressive illness in the pried leading to the events and there was a link, albeit an indirect one, between the offending and his psychiatric condition - his moral culpability was somewhat diminished by the depressive illness and childhood trauma - correct approach to the determination of whether a life sentence for the murder should be imposed identified - *R v*

Farhad Qaumi, Mumtaz Qaumi & Jamil Qaumi ([2017] NSWSC 774) approved - the murder had a number of matters in common with a cold blooded contract killing - the various community interests identified in s61(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) could be satisfied by the imposition of a determinate sentence; (3) sentences - special circumstance not found, aggregate sentence of 37 imposed, NPP 27 years 9 months.
Micheal Martin

DPP (NSW) v GW [2018] NSWSC 50
Supreme Court of New South Wales
Rothman J
Criminal law - appeal by prosecutor against dismissal of proceedings - a magistrate (Dubbo Children's Court) dismissed proceedings against the defendant for assaulting a police officer in the execution of his duty (s60(1) *Crimes Act 1900* (NSW)); resisting an officer in the execution of duty (s546C *Crimes Act 1900*); use of offensive weapon (s33(1)(a) *Crimes Act 1900*) - respondent, an Aboriginal girl of 14 who was on bail, was observed by police at 1.50am walking in the streets of Dubbo - the officer recognised that she was in breach of the curfew conditions of her bail and had "numerous" outstanding warrants - the officer called to her by name and she ran off, throwing a rock at the officer - the officer decide that he would arrest her and she was apprehended - the respondent was told that she was under arrest - on the *voir dire,* the officer made it clear that due to the short interval of time involved he did not consider any other alternative conduct in relation to the breach of bail other than the respondent's arrest - accepting that the officer had the power to arrest for beach of a bail condition (s77 *Bail Act 2013* (NSW)), the issue raised was whether the decision to arrest was improper in the absence of a consideration of alternatives to arrest (see *NT v R* [2010] NSWDC 348) - the magistrate gave an extremely brief decision and dismissed the proceedings, concluding that the evidence had been improperly obtained and was to be excluded - the prosecutor appealed that decision under s56 *Crimes (Appeal and Review) Act 2001* (NSW), which permits an appeal only on a ground that "involves a question of law alone" - held: a question of law alone does not include a question of mixed fact and law (see *Williams v The Queen* (1986) 161 CLR 278; *Morris v The Queen* (1987) 163 CLR 454) - acknowledging the enormous workload of local Court Magistrates, the only requirement on a magistrate in relation to reasons for judgment is that the reasons disclose the process by which a conclusion has been reached and the rationale for that conclusion - failure to give more than that which is sufficient to explain adequality the findings made and give reasons for them, does not amount to an error of law - it is the substance of the magistrate's decision that is important (*Acuthan v Coates* (1986) 6 NSWLR 472, 478-9; *DPP (NSW) v Illawarra Cashmart Pty Ltd* (2006) 67 NSWLR 402, [17]-[19]) - here, the magistrate did not refer to any test of impropriety (s 138 *Evidence Act 1995* (NSW)) and no attempt was made to undertake the balancing exercise required under s138 - further, it did not appear that the evidence had in fact been obtained by impropriety - the Court said that while it was necessary to reinforce that it is inappropriate for the powers of arrest to be used for minor offences, where the defendant's name and address are known and there is no risk of flight and that it was necessary to emphasise the inappropriateness of treating the arrest of a young person as the

first and primary option even though arrest be "technically" permitted (see *DPP (NSW) v AM* (2006) 161 A Crim R 219, [34]), an arrest is not always improper and conduct arising from the chase does not necessarily stem from an ill-advised and unnecessary arrests - accordingly, whether the conduct of the arresting officer was "improper" depended upon conclusions of fact that had not been determined by the magistrate - this Court ought not to undertake the s 138 balancing exercise - the determination of whether the arresting officer's conduct was improper required the Court to determine facts such that the ground was a mixed question of fact and law - nevertheless, the reasons for the decision were before the Court and the contents of those reasons were a fact which was not in dispute - the Court could therefore determine that there was an error of law - that error was that the reasons for determination were insufficient and there was a failure to consider all relevant factors - to the extent that the grounds of appeal raised that issue, it was a ground that raised a question of law - appeal allowed in part, decision set aside and matter remitted for rehearing - defendant to pay plaintiff's costs and to be granted an indemnity certificate (s6 *Suitors' fund Act 1957* (NSW).
GW

Al Wahame v The Queen [2018] VSCA 4
Supreme Court of Victoria - Court of Appeal
Whelan & Kyrou JJA
Criminal law - severity appeal - recklessly causing serious injury - the applicant, who suffered from an intellectual disability, pleaded guilty to recklessly causing serious injury and 2 summary charges of failing to answer bail - an effective sentence of 6 years, with a 4 year 6 month NPP, was imposed - the applicant appealed and, relying upon fresh evidence, submitted that his intellectual disability had not been accorded proper weight in accordance with the *Verdins* principles (*R v Verdins* (2007) 16 VR 269) and that the sentences were manifestly excessive - the applicant, who was 19, had pushed and then hit another person he passed in the street in an unprovoked attack, leaving the victim with a skull fracture and bleeding on the brain - the resulting traumatic brain injury was of moderate severity - the applicant was introduced to cannabis at age 12 and had an extensive criminal history - the fresh evidence came from reports by a psychologist and a clinical neuropsychologist - held: the applicable legal principles concerning the applicant's mental impairment are set out in *Verdins* and by the High Court in the decisions of *Veen v R (No 2)* ((1988) 164 CLR 465) & *Muldrock v R* ((2011) 244 CLR 120) - impaired mental functioning can be relevant to sentencing by reducing moral culpability, by having a bearing on the kind of sentence that may be imposed, by moderating or eliminating general and/or specific deterrence, by leading to a conclusion that a given sentence will weigh more heavily on an offender, and by leading to a conclusion that a risk of imprisonment might have a significant adverse effect upon the offender's mental health - it must, however, be demonstrated that there is some realistic connection between the metal impairment and the offending - the offence of recklessly causing serious injury is a serious offence - the applicant carried out an unprovoked attack on a compete stranger in a public street - violence of this kind by young offenders is a matter of significant public concern - he pleaded guilty and was entitled to a discount on his sentence for that - the fresh evidence established that he had a mild

intellectual disability - this was a significant impairment which reduced his ability to exercise appropriate judgment and to make clam and rational choices - he had demonstrated a pattern of behavioural deregulation marked by agitation, anger and violence - he had little or no insight into his offending and rehabilitation would be very difficult - he represented a significant danger to the public - his mental impairment did reduce his moral culpability, but not to significant degree - general deterrence needed to be moderated - the need for specific deterrence was elevated by the fresh evidence - the sentence imposed was appropriate - the non-parole period was the minimum required - appeal dismissed.
Al Wahame

R v Burtt [2018] SASCFC 5
Supreme Court of South Australia - Full Court
Kourakis CJ, Stanley & Parker JJ
Criminal law - leniency appeal - the respondent was found guilty of the offence of attempting to import a border-controlled precursor (ephedrine and /or pseudoephedrine) contrary to s11.1 & s307.13 (1) *Criminal Code 1995* (Cth) - the substances were sewn into female clothing dispatched form India - the weight was unknown, but the prosecution was not required to prove weight in order secure a conviction - 3 other co-offenders were involved in the attempted importation - the respondent was aged 42 and had prior convictions for several minor offences and one drug related offence committed in 2005 - she was of average intelligence and had been in 3 previous significant relationships which involved domestic violence - she was diagnosed with alcohol use disorder, schizophrenia, borderline personality disorder and complex post-traumatic stress disorder - her executive functioning was impaired and her condition was exacerbated by “extreme” substance abuse - she was in the “extreme high risk” range for suicidal behaviour and was unlikely to receive the appropriate mental health treatment within the Adelaide Women’s prison - a sentence of 2 years 9 months was imposed, with an order for her immediate release upon her entering into a $300 recognizance to be of good behaviour for 2 years 9 months - the prosecution appealed, submitting that the sentence imposed was manifestly inadequate - held: (1) Crown appeals - in addition to demonstrating error, when the Crown seeks permission to appeal against a sentence the Court must be persuaded that there are public policy considerations that outweigh the public interest in protecting persons from having their liberty twice placed in jeopardy - leave to appeal should be granted “only in the rare and exceptional case” (*Everett v The Queen* (1994) 181 CLR 295, 299) - the relevant principles are summarised in *R v Payne* ((2004) 89 SASR 49, 70) - here, the “rare and exceptional circumstances” test was not satisfied - the public interest considerations relied upon by the applicant did not outweigh the countervailing public interest in protecting persons from double jeopardy; (2) whether the sentence as manifestly inadequate - while it is undesirable in most instance for a judge to indicate a proposed sentence and to then impose a different sentence, that is not what occurred in this case - the principles to be applied in determining whether a sentence is manifestly inadequate are stated in *R v Morse* ((1979) 23 SASR 98, 99) - consistency is an important aspect of sentencing - what is required is not numerical equivalence, but rather consistency in the application of sentencing principles (*Hili v The Queen*

(2010) 242 CLR 520, [48]; *The Queen v Pham* (2015) 242 CLR 520) - the double jeopardy principle was of particular importance here in considering whether the decision to order the immediate release of the respondent revealed error - when considering Crown appeals against the suspension of a sentence, the court should be slow to imprison once the defendant has been told by the lower court that they will not have to go to gaol (*R v Hicks* (1987) 45 SASR 270) - here, due to the delay in the matter coming to trial and the long period the respondent had spent on bail, she had ample opportunity to rehabilitate herself - in view of the efforts she had made to free herself from her addiction and to generally rehabilitate herself, it was within the judge's discretion to order her immediate release on recognizance - appeal dismissed. [Editor's note: Kourakis CJ & Stanley JK agreeing with Parker J.]
Burtt

To a Friend who sent me some Roses
By: John Keats
As late I rambled in the happy fields,
What time the sky-lark shakes the tremulous dew
From his lush clover covert;—when anew
Adventurous knights take up their dinted shields:
I saw the sweetest flower wild nature yields,
A fresh-blown musk-rose; ‘twas the first that threw
Its sweets upon the summer: graceful it grew
As is the wand that queen Titania wields.
And, as I feasted on its fragrancy,
I thought the garden-rose it far excell’d:
But when, O Wells! thy roses came to me
My sense with their deliciousness was spell’d:
Soft voices had they, that with tender plea
Whisper’d of peace, and truth, and friendliness unquell’d.
https://en.wikipedia.org/wiki/John_Keats

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