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Weekly Criminal Law

Editor - Richard Thomas of Counsel

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

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Executive Summary

Tritton v Clarke (NSWCCA) - criminal law - defence of "could not reasonably have known" - fisheries prosecution - appeal to District Court - stated case procedure examined - necessity to annex reasons - questions of law required - questions not answered - appeal allowed - convictions set aside

R v Alou (No 4) (NSWSC) - criminal law - terrorism - murder - offence of aid and abet by supplying weapon - sentencing principles - plea - utilitarian value - assessment of objective gravity - moral culpability close to that of principal offender - sentence of 44 years, NPP 33 years

The Queen v Cerantonio (Ruling 16) (VSC) - criminal law - interlocutory appeal - certificate that appeal had "sufficient importance" to justify appeal - reasons - certification granted

R v Sun (QCA) - criminal law - administration of drug for sex - conviction appeal - whether verdict was unreasonable - examination of the evidence satisfied the Court that verdict was not unreasonable - appeal dismissed

R v Williams (SASCFC) - criminal law - severity appeal - vulnerable victim - aggravated robbery - sentencing considerations - youth, self-induced intoxication & mental illness to be balanced against sentencing considerations - authorities considered - sentence not plainly wrong - appeal dismissed

Summaries With Link (Five Minute Read)

Tritton v Clarke [2018] NSWCCA 31
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, White JA & Fullerton J
Criminal law - stated case - respondent took delivery of 240 Kg of pipis over 3 days - 40 % were subsequently found to be undersized and the respondent was prosecuted (by Fisheries Compliance of NSW) in the Local Court for possessing fish illegally taken (s35(1) *Fisheries Management Act 1994* (NSW) (*FMA*)) - the respondent was convicted and fined $5000 and ordered to pay professional costs in the sum of $10,000 - the respondent appealed to the District Court - the appeal proceeded upon the basis that a statutory defence provided by s25(2) *FMA* was made out, namely that the respondent "could not reasonably have known" that the pipis had been illegally taken - the stated case also included a statement of the appellant's contentions, which included 2 questions: does the defence "could have reasonably known" require more than a consideration of the reasonableness of the belief of an accused in that it also requires consideration of the surrounding circumstances of the individual case? Was there a failure to apply the correct test? - held: (1) the defence - the Court was satisfied that on the balance of probabilities the respondent's evidence could be accepted that the endorsement holders (the fishermen) were reliable and that the respondent held the belief that they would have accurately measured the pipis and that he volume of fish prevented accurate visual inspection; (2) the appeal procedure - the appeal was by way of a stated case pursuant to s5B *Criminal Appeal Act 1912* (NSW) - limitations on the s5B procedure identified [9] - the parties accepted that the technicalities and limitations inherent in the stated case procedure apply to a submission of a question for determination under s5B (*Lavorato v The Queen* (2012) 82 NSWLR 568) - those, limitations include that the Court cannot refer to any material not ciao tined in the stated case (*Thomas v The King* (1937) 59 CLR 279, 286, 299, 313; *R v Rigby* (1956) 100 CLR 146, 150-1; *Brisbane City Council v Valuer-General (Qld)* (1978) 140 CLR 41, 58; *R v Chan* (1992) 28 NSWLR 421, 431; *R v Madden* (1995) 85 A Crim R 367, 370-1; *Sasterawan v The queen* (2007) 69 NSWLR 547, [10]-[11]; *Lavorato v The Queen* (2012) 82 NSWLR 568, [8]; *Hammond v The Queen* (2013) 85 NSWLR 313, [11]) - another limitation is that the Court cannot draw inferences as to matters of additional fact that are not expressly stated as distinct from making a necessary implication as to what the judge stating the case must be understood to have said (*R v Rigby* (1956) 100 CLR 146, 151) - the stated case procedure does not confer a general avenue of father appeal (*R v Madden*(1985) 85 A Crim R 367, 370; *Castlebar Holding v Riley* [2005] NSWCCA 105, [3]-[4]; *Lavorato v The Queen* [2012] 82 NSWLR 568, [26]); (2) the questions - the first question was answered "yes" - the surrounding circumstances of the individual case must be taken into account in order to determine whether the person charged, if acting reasonably, could not have known that the fish had been taken illegally - but that did not mean that the question arose in the appeal to the District Court - the second question did not raise a question of law and even if it did, it could net be answered as the reasons for decision of the magistrate were not annexed to the stated case - annexing them is the usual procedure (see *Brisbane City Council v Valuer-General (Qld)*

(12978) 140 CLR 41, 58) - the question whether the respondent could not reasonably have known is a question of fact - it is not open on a stated case to go behind the stated finding - it was not appropriate to answer the questions in stated case even if time was extended - the fact that the primary judge found that the statutory defence was made out had no precedent value; (3) reform ? - the Court examined the stated case procedure, commenting that there might be need for its reform [40]-[45]; extension of time to submit questions refused; appeal allowed, conviction and penalty & cost orders set aside. [Editor's note: Hoeben CJ at CL & Fullerton J agreeing with White JA.]
Tritton

R v Alou (No 4) [2018] NSWSC 221
Supreme Court of New South Wales
Johnson J
Criminal law - terrorism - murder - sentence - offender supplied the weapon used to murder Curtis Cheng outside the NSW police headquarters - the offender was 18 and killer 15 years - both offenders were radicalised at the time of the offence - the radicalisation of the offender had commenced in 2014 - the offender pleaded guilty to a charge of aid, abet, counsel or procure the commission of an offence, murder, by Farhad Mohammad (s11.2(1) & s101.1(1) *Criminal Code Act 1995* (Cth) (*Criminal Code)*) - the particulars of the offence were that the action involving the use of a firearm was to be done or threatened with the intention of advancing a political, religious or ideological cause falling within the definition of "terrorist act" in s100.1 *Criminal Code* - Sentence: (1) sentencing principles - s16A *Crimes Act 1914* (Cth) were to be applied - the primary
considerations on sentence for terrorism offences are the protection of the community, punishment of the offender, denunciation of the offending and both specific and general deterrence (*R v Lodhi* (2006) 199 FLR 364; *Lodhi v R* (2007) 179 A Crim R 470, [274]; *R v Khazaal* [2009] NSWSC 1015, [47]) - subjective circumstances and mitigating factors, including considerations of rehabilitation, are to be given less eight (*R v Lohdi supra* [89]; *Lodhi v R supra* [274]; *R v Khazaal supra* [41]*; DPP (Cth) v Besim* [2017][VSC 158, [112]-[113]) - the religious and ideological motivation of an offender is relevant to the issue of community protection, as well as to the assessment of the objective gravity of the offence (*R v Kahar* [2016] 1 WLR 3156) - where it is not established that he offender has resiled from extremist views the protection of the community will assume greater importance (*R v Lodhi supra* [82]-[83; *R v Elomar & ors (*2010) 264 ALR 759, [93]; *Benbrika v R* (2010) 29 VR 593, [591]) - weight must be given to general deterrence even if the effect of ideological or religious motivations are that such deterrence may not be effective (*R v Lodhi surpa* [91]; *Lodhi v R supra* [87]-[88]*; R v Barot* [2007] EWCA Crim 1119, [45]; *DPP (Cth) v Fattal* [2013] VSCA 276, [169]; *DPP (Cth) v MHK* [2017] VSCA 157, [52]-[53]) - while youth is relevant to determining the weight to be given to general deterrence and denunciation, its weight is diminished quite measurably in terrorism case where the offender participates in, plans or caries out actions of extreme violence (*Dpp (Cth) v MHK supra*, [66]; *R v Khalid & ors* [2017] NSWSC 1365, [109]-[113], [270]) - factors used by

Australian& UK courts in determining the nature & objective gravity of terrorism offences identified [171]; (2) objective gravity of the offence - the offender was a radicalised supported of the Islamic State - he was not merely acting as a firearm supplier - the offence was not carried out on the spur of the moment - he was a key person involved in critical steps leading to the act of terrorism - findings by refence to factors identified in *R v Kahar (supra*) at [171] identified [189] - while the offender was to be sentenced for aiding, abetting, counselling or procuring, it was not a universal principle that the culpability of such an offender is less than that of the principal offender (see *GAS v The Queen (*2004) 217 CLR 198, , [23]) - here the offender's moral culpability was close, if not at the same level, as that of the principal offender - the offence occupied a very high level of objective gravity; (3) contrition & remorse - the case is unlike any other terrorist offence in Australia - the offender has not expressed any contrition or remorse and his response is devoid of basic humanity - he remains a danger to the general community and his prospects of rehabilitation are grim; (4) the plea - it was accepted that his peal was early - the Crown accepted that the Court was entitled to take into account the utilitarian value of the plea (s16A(2)(g) *Crimes Act 1914*; *Xiao v R* [2018] NSWCCA 4) - the Crown accepted that the subjective intention of the offender to facilitate the course of justice and the strength of the Crown case were not relevant to the objective assessment of the utilitarian value of the plea (*Xiao v R supra*, [267]-[268]) - the discount of 15% to be applied was a purely utilitarian one; (4) Non-parole period - s19AG *Crimes Act 1914* required the Court to set a NPP of at least three quarters of the head sentence; (5) continuing detention - the existence of the continuing detention regime (s105A.23 *Criminal Code*) is not to be taken into account in the imposition of the sentence itself (*DPP (Ctrh) v Besim (No 3*) (2017) 322 FLR 96, [59]); (5) sentence - 44 years, NPP 33 years.
Alou (No 4)

The Queen v Cerantonio (Ruling 16) [2018] VSC 97
Supreme Court of Victoria
Croucher J
Criminal law - interlocutory decision - particulars - accused applied for certification for an application for leave to appeal (ss295(2), (3) & (4) *Criminal Procedure Act 2009* (Vic)(*CPA*)) - the accused submitted (Cth Director of Public Prosecution conceding the point) that the interlocutory decision is "otherwise of sufficient importance to the trial to justify its being determined on an interlocutory appeal" (s295(3)(b) *CPA* - held: accepting the parties submission - the interlocutory decision was "of sufficient importance within the section to justify it being determined on an interlocutory appeal for the following reasons: (i) on the evidence in the Brief it was not possible to identify more precisely the alleged and agreed conduct in the Philippines - to attempt to do so would be to engage in speculation - the Director therefore accepted that if the particularization was inadequate a permanent stay would be ordered or a notice of discontinuance would be filed - an interlocutory appeal could thus avoided the conduct of a trial; (ii) the trial would be long and would employ substantial resources; (iii) while the law concerning the need for particulars might be regarded as well-settled, the legislation involved was unusual, complex and untested (see *The Queen v Cerantonio (rulings 1-11)* [2017] VSC

725, [33]-[34]) - the application had sufficient merit to warrant certification to permit the interlocutory appeal to proceed; application for certification granted.
Cerantonio

R v Sun [2018] QCA 24
Supreme Court of Queensland - Court of Appeal
Fraser, McMurdo JJA & Boddice J
Criminal law - drug to stupefy - conviction appeal - appellant was convicted of administering a drug for the purpose of sex and appealed, submitting that the verdict was unreasonable - held: the question was whether, on the Court's independent assessment of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty (*SKA v The Queen* (2011) 243 CLR 400, [11]-[14]) - the evidence presented a strong case that on the night the complainant suffered the effects of Rohypnol, the substance being detected in her urine and hair - her creditability was supported by her contemporaneous description of her condition in text messages sent by her - the symports she described were those to be expected from Rohypnol - on the evidence, it was open to the jury to conclude that there had been a man in her room and she was not challenged on that - if the jury accepted that she had been affected by Rohypnol and that a man had been in her room, the case against the appellant was stung - the ingestion of Rohypnol and the presence of a man in her room were unlikely to have been coincidental - the jury had the advantage of seeing the witness and of assessing creditability and reliability - it was open to the jury to be satisfied beyond reasonable doubt of guilt - appeal dismissed. [Editor's note: Fraser JA & Boddice J agreeing with McMurdo JA.]
Sun

R v Williams [2018] SASCFC 14
Supreme Court of South Australia - Full Court
Blue, Stanley & Hinton JJ
Criminal law - severity appeal - appellant pleaded guilty to offences of aggravated robbery, robbery & breach of bail and was sentenced to 6 years 4 months, NPP 12 months - the appellant summitted that the sentence was manifestly excessive and should have been suspended, submitting that insufficient weight had been given to the fact that he was suffering from post-traumatic stress disorder, was self-medicating and had been abused as a child - held: the offences were each of a kind where general deterrence and condign punishment played a large part in determining the appropriate penalty - in relation to the offence of aggravated robbery upon a vulnerable business using a weapon see *R v Place* ((2002) 81 SASR 395, 429) - the penalty imposed appeared to the Court merciful - considering the appellants youth, *Azzopardi v The Queen* ((2011) 35 VR 43) sets out the relevant sentencing principles - the common law accepts that there is greater "potential for young offenders to be redeemed and rehabilitated" and regard must be had to the impact upon the offender of incarceration in an adult prison - however there is a need to balance the mitigating influence of youth with the need for deterrence in cases of serious violent offending - considering the appellant's intoxicating, intoxicating, whether by drink or drugs, is not a mitigating factor - the possibility of an "out of

character exception" was considered in *The Queen v Sewell & Walsh* ((2010) 31 VR 28, [22]-[23]) which is binding upon the Court - that decision did not state a rule that the effect of intoxication could not mitigate offending - it is understood that drink and rugs disinhibit - into the sentencing mix must be thrown community expectations - as a general rule violence fuelled by intoxication cannot be tolerated - neither can sexual offending where the offender is emboldened by drink or drugs - the fact that the offender was intoxicated and the reasons for that intoxication will be important in fashioning a sentence intended to protect, punish, deter and rehabilitative - at the end of the day, sentencing is individualised - addiction often explains the offending and is rarely mitigatory - where it is mitigatory it is because the addiction cannot be said to have been the result of a free choice - here, youth, intoxication and metal illness could not be separated out and dealt with in isolation - the appellant's circumstances did not escape the sentencing judge and it could not be said that a starting point of 5 years was plainly wrong, the maximum penalty being life imprisonment - the impact of aggravated robberies upon those who work in vulnerable busies, as here, can be devasting - it could not be said that the sentence imposed for the offences was plainly wrong - appeal dismissed.[Editor's note: Blue & Stanley JJ agreeing with Hinton J.]
Williams

Sonnet 105

By: William Shakespeare

Let not my love be call'd idolatry,
Nor my beloved as an idol show,
Since all alike my songs and praises be
To one, of one, still such, and ever so.
Kind is my love to-day, to-morrow kind,
Still constant in a wondrous excellence;
Therefore my verse to constancy confined,
One thing expressing, leaves out difference.
'Fair, kind and true' is all my argument,
'Fair, kind, and true' varying to other words;
And in this change is my invention spent,
Three themes in one, which wondrous scope affords.
'Fair, kind, and true,' have often lived alone,
Which three till now never kept seat in one.

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

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