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Weekly Criminal Law Review

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

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Executive Summary

Hughes v The Queen (HCA) - criminal law - tendency evidence - historical sexual assaults - cross admissibility - whether evidence had 'significant probative value' - whether approach in *Velkoski* (45 VR 680) too restrictive - whether an 'underlying unity' in the tendency evidence is required - evidence admissible - appeal dismissed (by majority)

R v Macdonald; R v Maitland (NSWSC) - criminal law - wilful misconduct in public office - accessory before the fact - common law offences - no maximum penalties - no comparable sentencing decisions - need for general deterrence - evidence in mitigation required to be proved or of little weight - aggregate sentences imposed

R v Rhodes (NSWSC) - criminal law - murder - victim offender's mother and young relative - self-induced intoxication - 'ice' and alcohol - offender of Aboriginal heritage - deprived background - whether self-induced intoxication a mitigating factor - whether discount should be allowed - whether offending in worst category - sentenced to 40 years, NPP 30 years

R v Collins (QCA) - criminal law - prior inconsistent statement - complaint evidence - evidence at committal differed to that at trial - procedure and proof of statement - cross examination and necessity for directions - error - no miscarriage - proviso applied

R v Krezic (QCA) - criminal law - murder - admissions to undercover police - whether admissible - no error identified - appeal dismissed

R v Lawrence (QCA) - criminal law - spitting - appellant agitated under the influence of drugs -

ambulance and police assisting - appellant challenged a police officer to a fight and spat at him - charged with serous assault - whether verdict unreasonable - whether judge failed to direct jury on issue of consent - appeal dismissed

R v Golja (SASCFC) - criminal law - search - reasonable suspicion - authorities considered - test identified - police officer's suspicion reasonable - search lawful - appeal dismissed

The State of Western Australia v Wark (WASC) - criminal law - propensity evidence - test for admissibility identified and considered - application granted in part - judge alone trial - whether in the interests of justice - danger of pre-trial publicity considered - application granted - admissibility of evidence from deceased witnesses considered

Guerin v HB (NTSC) - criminal law - child abuse material - professional photographer's photographs of his daughter taken 30 years earlier - whether child abuse material - statutory test - whether likely to offend reasonable adult - whether s31 *Criminal Code* (NT) applicable - appeal upheld, but dismissal of charge confirmed as no miscarriage

The Queen v MLW (No 2) (NTSC) - criminal law - hearsay - maintaining a sexual relationship with a child under 16 - Crown sought to adduce (hearsay) evidence of what the child told her mother 10 years earlier - child did not remember what was said - whether evidence admissible - application granted (WCL)

Summaries With Link (Five Minute Read)

Hughes v The Queen [2017] HCA 20
High Court of Australia
Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ
Criminal law - tendency evidence - historical sexual assaults - the appellant was indicted on 11 counts of sexual offences against 5 underage girls - prior to trial, the prosecution served a tendency notice (s97 *Evidence Act 1995* (NSW)) - the evidence of each complainant and several other witnesses was to be adduced at trial to prove tendencies identified as 'having a sexual interest in female children under 16 years of age' and 'using his social and familial relationships… to obtain access to female children under 16 years so that he could engage in sexual activities with them' - the appellant applied to have the counts relating to each complainant severed and an order for separate trials - the success of that application turned on the admissibility of the tendency evidence - the evidence was admitted - the appellant was convicted of 10 counts and sentenced to an aggregate term of 10 year 9 months, NPP 6 years - a conviction appeal to the NSW Court of Criminal Appeal (CCA) argued that the breadth of the tendency relied upon meant that the tendency evidence could not have 'significant probative value' - the CCA dismissed the appeal, declining to follow *Velkoski v The Queen* (2014) 45 VR

680, holding, consistently with NSW authority, that there is no requirement that conduct evidencing a tendency must display features of similarity with the charged conduct - special leave was granted to appeal to the High Court on 2 grounds: (1) error in the conclusion that the tendency evidence possessed 'significant probative value'; (2) error in the rejection of the approach adopted in *Velkoski* - held: preferring the approach identified in the NSW authorities (*R v PWD* (2010) 205 A Crim R 75; *R v Ford* (2009) 201 A Crim R 451) to that adopted in *Velkoski*: depending upon the issues at trial, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value, notwithstanding the absence of similarity in the acts which evidence it - s97(1) does not condition the admissibility of tendency evidence on the court's assessment of operative features of similarality with the conduct in issue - the probative value of tendency evidence will vary depending upon the issue that it is adduced to prove - the test posed by s91(1)(b) is stated in *R v Ford* (2009) 201 A Crim R 451, [125] - the evidence as a whole was capable of proving that the appellant was a person with a tendency to engage in sexually predatory conduct with underage girls as and when an opportunity presented itself in order to obtain fleeting gratification, notwithstanding the high risk of detection - s97(1) does not require the tendency evidence to be considered 'by itself' - the probative value of each complainant's evidence lay in proof of the tendency to act on the sexual attraction to underage girls, notwithstanding the evident risks - the fact that the appellant expressed his sexual interest in underage girls in a variety of ways did not deprive proof of the tendency of its significant probative value - here, the tendency evidence showed a level of disinhibited disregard of the risk of discovery which was unusual - proof that a man of mature years has a sexual interest in female children aged under 16 years and a tendency to act on that interest by engaging in sexual activity with underage girls opportunistically, notwithstanding the risk of detection, is capable of having significant probative value on his trial for a sexual offence involving an underage girl - appeal dismissed [Editor's note: Gageler, Nettle and Gordon JJ would have allowed the appeal, quashed the convictions on counts 1 to 9 & count 11 and ordered a retrial on those counts. Uniform Evidence legislation: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW; *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act* (NT). The Director of Public Prosecutions for Victoria was given leave to intervene in support of the respondent with respect to the second ground of appeal].

Hughes

R v Macdonald; R v Maitland [2017] NSWSC 638
Supreme Court of New South Wales
Adamson J
Criminal law - misconduct in public office - sentence - Macdonald convicted of 2 counts of wilful misconduct in public office - Maitland convicted of 2 counts of being an accessory before the fact to the offences committed by Macdonald - common law offences - no maximum penalties - Sentences: facts set out at length - none of Macdonald's referees gave evidence - their evidence disregarded where they did not accept the jury verdicts - untested evidence in form of

pre-sentence report to be treated with caution and views of such witness of limited weight (*R v Qutami* (2001) 127 A Crim R 369, [58]) - similar considerations applied with respect to Maitland's sentencing material - relevant principles for offence of wilful misconduct in public office summarised in *R v Obeid (No 12)* [2016] NSWSC 1815, [83]-[86] - here, in relation to Macdonald, there was a substantial breach of public trust vested by Parliament in a Minister of the Crown - the office of Minister has been described as 'an office at the pinnacle of the structure of government' *(R v Nuttall; ex parte Attorney-General* [2011] 2 Qd R 32, [52]) - the offenders' conduct damaged the institutions of government and public confidence in them, which resulted in widespread harm to the community, tainting the State's reputation and tending to engender public cynicism - there were no isolated victims of the crimes as such, as the harm was done to the community as a whole (*R v Obeid (No 12*)) - the Westminster system expects and depends on individual ministers to do the right thing - general deterrence has 2 aspects: to deter others from similar wrongdoing and to ensure public confidence in the administration of justice is maintained (*Markarian v The Queen* (2005) 228 CLR 357, [82]) - no comparable sentencing decisions identified - here, in relation to Macdonald, there were multiple victims and the offences were planned - the Court was not satisfied that the offences were, in Macdonald's case, carried out for financial gain - Macdonald was otherwise a person of good character and was unlikely to re-offend, but his prospects of rehabilitation were not good as he had not demonstrated any insight into his offending - having regard to the seriousness of the offending and the need for general deterrence, hardship to his wife and stepdaughter as the result of his incarnation was not taken into account (*Dipangkear v R* [2010] NSWCCA 156, [34]) - here, the purpose of general deterrence could only be fulfilled by imposing custodial sentences on both offenders (*R v Donald* [2013] NSWCCA 238, [86]) - the Court noted that no public trust was vested in Maitland and that he did not exercise any public power - he was entitled to make a profit and his conduct was less serious than Macdonald's conduct - the liability of an offender who is convicted of intentional participation in a crime by lending assistance or encouragement is central to the sentencing exercise both in terms of assigning culpability and to finding facts (*GAS v The Queen; SJK v the Queen* (2004) 217 CLR 198) - Maitland's offending was a contributing cause to Macdonald's offences - the harm caused was substantial - his conduct as an accessory was serious - his conduct was required to be punished to deter others who seek government permissions from seeking to profit from the wilful miscount of public officials who have the power to grant such permissions - he encouraged and assisted Macdonald for financial gain (an aggravating factor: s21A(2)(o) *Sentencing Act*) - Maitland was otherwise of good character, was unlikely to re-offend, but his prospects for rehabilitation were not good as he lacked insight into his offending and had not shown remorse or contrition - special circumstances were found for each offender - Macdonald sentenced to aggregate sentence of 10 years, NPP 7 years - Maitland sentenced to aggregate sentence of 6 years, NPP 4 years [Editor's note: For the elements of the offences see *R v Macdonald; R v Maitland* [2017] NSWSC 337].

Macdonald; Maitland

R v Rhodes [2017] NSWSC 694
Supreme Court of New South Wales
Campbell J
Criminal law - murder - sentence - offender, of Aboriginal heritage, with a history of domestic violence against his mother, murdered her and an 8 year old relative - he also assaulted a passer-by, damaged her car and assaulted police, while resisting arrest - these subsequent offences were to be taken into account on a Form 1 - prior to the murders, the offender had been drinking, playing poker machines and consuming cannabis and methylamphetamine - Sentence: the mother was murdered in her own home in a sustained, persistent attack - while there was little or no premeditation and the offending occurred impulsively, the attack was persisted in - it was grave offending, well above middle-of-the-range of objective seriousness - the murder of the child was also well above mid-range - the offender had a history of substance abuse from the age of 15, with a somewhat deprived upbringing - significant difficulties at school due to dyslexia and undiagnosed ADHA, but it was not accepted that his cognitive impairments were gross or that he suffered from a Mild Intellectual Disability - while his deprived background partially explained his recourse to violence, these considerations did not reduce his moral culpability and there was no evidence of any lack of capacity to reason as an ordinary person might as to the wrongness of his conduct (*Muldrock v The Queen* (2011) 244 CLR 120) - at the time of the offending the offender was in the grip of an ice-induced psychosis - self-induced intoxication is not a matter of mitigation (s21A(5AA) *Crimes (Sentencing Procedure) Act 1999* (NSW)) - the legal principles relevant to self-induced intoxication are discussed in *R v Fang (No 4)* [2017] NSWSC 323, [70]-[81] - where the relevant mental condition (drug-induced psychosis) is itself a transient effect of the offender's use of drugs on the occasion of his offending, as here, s21A(5AA) applied - an offenders' self-induced intoxication cannot mitigate his offending - the drug-induced psychosis and his upbringing and ADHA provided, however, a partial explanation for his offending (see *R v Henry* (1999) 48 NSWLR 346) - deterrence remained an important sentencing consideration - the offender pleaded guilty at the first available opportunity (ie in the Local Court) - however where crimes offend the public interest, or the protection of the public requires the imposition of the maximum penalty, a court is justified in refusing to allow a discount for an early plea (*R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [157]-[158]) - the allowance of a discount involves the exercise of judicial discretion - the categories where a discount will be withheld are confined, but not closed - the Crown accepted that this case was not within the worst category - the plea involved an actual acceptance of responsibility by the offender - discount of 25 % allowed - remorse being demonstrated, aggregate sentence of 40 years, NPP 30 years, imposed.

Rhodes

R v Collins [2017] QCA 113
Court of Appeal of Queensland
Gotterson & Morrison JJA, Burns J
Criminal law - prior inconsistent statement - appellant, aged 61, was living on a yacht moored at

a marina in Southport, Queensland - he placed an advertisement in a newspaper for a nanny to accompany him, his partner and their child, on a sailing trip - the complainant answered the advertisement and alleged that the appellant had sexually assaulted and raped her - shortly after the alleged incident, the complainant had telephoned her mother and made complaint to her of the offences - the mother gave evidence both at committal and at trial of the conversation - her evidence in the committal differed to the version she gave at trial - the appellant, who did not give evidence, was convicted and appealed, arguing that the trial judge had misdirected the jury as to the use that could be made of the mother's evidence - held: cross examination of a witness on a previous statement (ss18, 19 *Evidence Act 1977* (Qld)) - ss18 & 19 are concerned with cross examination on a 'former' or 'previous' statement made by a witness, relevant to the subject matter of the proceedings - s18 applies to both oral and written statements - s19 comprehends a previous statement 'in writing or reduced into writing' - s19 'deals with cross-examination and with the laying of the ground for proving an earlier statement' and s18 'deals with the proof of the earlier statement' - the *whole* focus of s18 is on what must be established by the cross-examination before a previous inconsistent statement by that witness may be proved in evidence and the *primary* focus of s19 is on relieving the cross-examiner from the common law obligation of having to place the statement before the witness - it is only where the cross-examiner intends to contradict a witness by the previous statement that s19(1A) lays down what must be done before that 'contradictory proof can be given' - inconsistency must be demonstrated - the witness must be asked whether he or she made the statement and thus provided with an opportunity to distinctly admit (or not) that he or she made the statement - it is only when the witness fails to distinctly admit its making that the previous inconsistent statement will be receivable into evidence (s18) - at this point, if the previous statement is in writing and its authenticity is not in issue or it is proved, the document may be tendered - in the case of a previous oral statement, evidence is required to be adduced as to its making - if the previous statement is admitted by the witness, it cannot be proved under s18 - only where the statement is in writing (or reduced to writing) and it is intended to contradict the witness by that writing pursuant to s19(1A), can it be proved and received into evidence - where a previous statement is not distinctly admitted and is proved under s18, its contents become part of the evidence - ss101 and 102 must then be referred to and directions must then be fashioned, directing the jury as to how it is to determine what weight (if any) is to be attached to the statement - a party seeking to rely upon a previous inconsistent statement for its truth by operation of s101 should make an application to the judge for appropriate directions - accordingly, where, as here, a witness admits a previous inconsistent statement and does not dispute its truth/accuracy, it cannot be proved in evidence puissant to either s18 or s19 - s19(1A) can have no operation as there is nothing to contradict the writing - here, the mother's evidence at trial was preliminary complainant evidence - at best, that evidence could establish *consistency* in the complainant's complaint and if accepted by the jury may have supported her credit, but it was not capable of proving what the mother was told - because the mother admitted the committal testimony, it could not be proved under s18, 18(2) or s19(1A) - there was no need to contradict her evidence and her adoption of what she said at committal became part of her oral testimony at trial - the result was that there were 2 competing accounts from the mother as to what the complainant

had said to her and it was for the jury to decide which to accept - accordingly, the jury had to be directed that the mother's evidence went to both the complainant's credit and to the issue of the consistency of her complaint - the judge erred in his directions to the jury and he limited the use they could make of the evidence as to credit - however, no substantial miscarriage of justice having occurred, the proviso was applied and the appeal dismissed [Editor's note: Gotterson & Morrison JJA agreeing with Burns J].

Collins

R v Krezic [2017] QCA 122
Court of Appeal of Queensland
Gotterson & McMurdo JJA, Boddice J
Criminal law - admissions to undercover police - murder and common purpose - appellant and Huston formed a plan to rob the deceased of illicit drugs - the Crown case was that the appellant, as the principal offender, had stabbed the deceased (s7 *Criminal Code 1899* (Qld)) or that he was liable for the murder on the basis of common purpose (s8 *Code*) - the Crown case relied on evidence from 2 undercover police officers who had been placed in the appellant's cell and had recorded conversations with him in which he made admissions - evidence on the *voir dire* showed that prior to the undercover officers being placed in his cell, the police were aware that he had exercised his right to silence - further, in order to have sufficient time to place the officers in the cell, the police had to obtain an extension of the appellant's detention period and they did that without advising the appellant's solicitor and in doing so advised the approving magistrate that the appellant was 'talking' - by a pre-trial ruling the evidence from the undercover officers was admitted and the appellant and Huston were found guilty and sentenced to life imprisonment - the appellant appealed his conviction, arguing that the evidence was wrongly admitted - held: *R v Swaffield* (1998) 192 CLR 159, 202 held that a breach of an accused person's freedom to choose to speak to police enlivens a discretion to exclude evidence obtained in breach of that freedom - this Court has considered the consequences of a breach of an accused's freedom to choose to speak to police in the context of the use of a covert police officer subsequent to the exercise of a right not to speak to police (*R v Belford & Bound* (2011) 208 A Crim R 256, [53]) - in order to succeed on this ground, it was not enough for the appellant to establish that another judge in the position of the pre-trial judge would have taken a different course (*House v The King* (1936) 55 CLR 499, 504-5) - here, the pre-trial judge correctly identified the relevant factors - his conclusion that the circumstances did not justify exclusion of the evidence was reasonably open to him (*Tofilau v The Queen* (2007) 231 CLR 396, [20]-[21]) - appeal dismissed [Editor's note: Gotterson & McMurdo JJA agreeing with Boddice J].

Krezic

R v Lawrence [2017] QCA 106>
Court of Appeal of Queensland

Fraser & Philippides JJA & Boddice J
Criminal law - spitting at police - conviction appeal - appellant convicted of serious assault in circumstances of aggravation, namely that he assaulted a police officer in the execution of his duty - ambulance officers had been called to assist the appellant, who had taken a large quantity of antidepressant medication - police were called when the appellant became agitated and the appellant became involved in a confrontation with the officers - during the confrontation, he challenged an officer to a fight and then spat at him- on appeal, the appellant argued (inter alia) that the judge erred in failing to direct the jury on the issue of consent to fight - held: (1) whether the verdict was unreasonable: this ground (s668E(1) *Criminal Code 1899* (Qld)) requires the court to determine whether, upon the whole of the evidence, it was open for the jury to be satisfied beyond reasonable doubt of the appellant's guilt (*MFA v The Queen* (2002) 213 CLR 606, [59]) - the relevant principles are summarised in *R v SCH* ([2015] QCA 38, [7]-[8]; see also *R v Baden-Clay* (2016) 90 ALJR 1013, [65]-[66]) - here, the jury's advantage was particularly significant - while there may have been discrepancies in the evidence as to the circumstances of the complainant officer's utterances about the spitting, the jury were entitled to view the statement as reflecting a spontaneity inconsistent with fabrication and thus having credibility - ground rejected; (2) whether the trail judge erred in failing to direct the jury on consent to fight: this ground was premised on the proposition that a police officer is not acting in the execution of his duty if he elects to engage in a consensual fight, regardless of whether he is at the time on duty or not - the appellant did not give evidence at trial and thus there was no direct evidence as to his belief - it was never put to the complainant officer that he was agreeing to engage in a consensual fight by indicating that he did not have a gun or badge - the jury were entitled to be satisfied on the evidence that the officer was intending to arrest an unruly and offensive individual for a lawful purpose and thus was acting in the execution of his duty - the jury were adequately directed - once the jury found that the complainant officer was acting in the execution of his duty, consent became irrelevant - ground rejected; appeal dismissed [Editor's note: Fraser JA & Bodice J agreeing in the orders proposed by Philippides JA].

Lawrence

R v Golja [2017] SASCFC 61
Full Court of the Supreme Court of South Australia
Kourakis CJ, Stanley & Parker JJ
Criminal law - search - police arrested appellant's co-accused and, during a search of his vehicle, discovered methylamphetamine, MDMA, a firearm, and cash - a police officer subsequently examined a police database and formed the suspicion that a search of a Parafield Gardens address might provide evidence of drug trafficking and exercised a general search warrant at that address - at the appellant's trial, the prosecution sought to tender evidence obtained during that search - the appellant was convicted and appealed, arguing that the search was unlawful as there was no reasonable basis for the police officer's suspicion - held: s67(4)(a)(iii) *Summary Offences Act 1953* (SA) confers on a police officer, who is the holder of a search warrant, power to search premises where the officer has reasonable cause to suspect

there is anything there that may afford evidence as to the commission of an offence - whether or not reasonable suspicion attaches to certain conduct or circumstances is a question of fact (*R v Colenso* [2016] SASCFC 128, [32]) - the law in relation to reasonable suspicion is considered in *R v Nguyen* ((2013) 117 SASAR 432, 437) - a suspicion founded upon information that is subsequently discovered to be wrong does not negative the existence of the suspicion or its reasonableness (*R v Rogers* (2011) 109 SASR 307, 312; *Manley v Tucs* (1984) 40 SASR 1, 9) - here, it was implicit in the trial judge's reasons that he accepted that the officer held a genuine suspicion that a search of the appellant's house might lead to the discovery of evidence of drug-related offending - there was no proper basis to interfere with that finding - it was objectively reasonable - the resulting search was not unlawful - *R v Rockford* (2015) 122 SASR 391 provides an analysis of the principles relevant to the exercise of the *Bunning v Cross* discretion to exclude evidence (*Bunning v Cross* (1978) 141 CLR 54) - the discretion is enlivened by unlawful or improper police conduct - once the discretion is enlivened, the exercise of the discretion involves the weighing of competing considerations which focus upon the competing aspects of the public interest - the court must be careful to protect the citizen from the abuse of police powers, while ensuring that the guilty are convicted where the unlawfulness or impropriety is not the result of some conscious or deliberate flouting of police powers - here, it was significant that the judge found that there was no conscious impropriety and that finding was not challenged on appeal - this would have been a case of unlawful conduct resulting from a police mistake - additionally, the case involved serious offending and there was a strong public interest in the detection and prosecution of such offending - appeal dismissed [Editor's note: Kourakis CJ & Parker J agreeing with Stanley J].

Golja

The State of Western Australia v Wark [2017] WASC 154
Supreme Court of Western Australia
Pritchard J
Criminal law - propensity evidence - pre-trial applications - deceased was hitchhiking in an area about 200 km, north of Perth when she disappeared - her body has never been found, but in 1999 police seized a utility vehicle used by the accused and obtained a DNA mitochondrial profile which the Crown alleged was consistent with the deceased and her mother - the accused was then charged with the deceased's murder - 3 pre-trial applications arose for determination - Held: (1) propensity evidence application (s31A *Evidence Act 1906* (WA)): in order for propensity evidence to be admissible, each of the requirements of s31A(2)(a) and (b) must be satisfied - the principles applicable to the requirement in s31A(2)(a) that the evidence have 'significant probative value' are summarised in *DKA v The State of Western Australia* [2017] WASCA 44 & *RMD v The State of Western Australia* [2017] WASCA 70 - those principles are set out at [14] - s31A(2)(b) involves a comparison between probative value of the propensity evidence or relationship evidence and the degree of risk of an unfair trial if it is admitted - the risk of an unfair trial is the risk that a jury might uncritically overvalue the probative effect of the evidence and conclude the accused to have committed the offence simply because he or she

has the propensity identified or because he or she has demonstrated a particular attitude towards a person or class of persons, rather than confining the evidence to a process of dispassionate and logical reasoning - the process of analysis required [16] under the provision is outlined in *DKA* ([31], [32]) - examining the Crown evidence, the court concluded that the evidence of one witness, D, who said that she had been assaulted while hitchhiking and that her attacker had retained her earring as a trophy, was clearly relevant to the questions whether the accused killed the deceased and whether he intended to do so - it was not necessary that the propensity evidence be identical to the circumstances of the charged conduct to have significant probate value - the evidence from the other witnesses put forward by the Crown was not admissible as propensity evidence, the evidence being ambiguous - offhand remarks and hypothetical discussions in a social context are not accepted as reflecting genuinely held beliefs - application granted in part; (2) application for trial by judge alone (s118 *Criminal Procedure Act 2004* (WA)): the section requires the court to consider whether it is in the interests of justice to grant the application and, if it is, whether it should exercise its discretion to grant the application (*TVM v The State of Western Australia* (2007) 180 A Crim R 183) - the interests of justice are not coterminous with the interests of the accused - while the length of the trial may be relevant, the fact that the Crown case is wholly circumstantial is not - the overarching consideration is whether the accused can receive a fair trial by jury (*The State of Western Australia v Rayney* (2011) 42 WAR 383, [30]) - it is not necessary for an applicant to demonstrate an extreme, corrosive and prejudicial effect of pretrial publicity in order to persuade a court that it would be in the interests of justice for a trial to be by judge alone in order to overcome lingering prejudice which members of the jury might feel, notwithstanding the judge's directions (*TVM v The State of Western Australia* (2007) 180 A Crim R 183, [29]) - the question is simply whether, having regard to the information before the court, a trial by judge alone is in the interests of justice - here, the tipping point was the prejudicial impact of reports, including in the mainstream media, that the accused was suspected of involvement in the disappearance of another woman and that he was questioned about that at the inquest into her death - the risk was that there was now a well-established association in the public consciousness between the accused and the disappearance and suspected murder of this second woman, which carried with it the risk that members of the jury would not be able to put out of their minds that knowledge, even with a strong direction - application granted; (3) application to adduce evidence from 5 deceased witnesses (s158 *Criminal Procedure Act 2004*): granted.

Wark

Guerin v HB [2017] NTSC 14
Supreme Court of the Northern Territory
Blokland J
Criminal law - child abuse material - the respondent's house had been broken into and police had attended - during their investigation of the break-in they saw, hung on the walls, several photographs of a child, apparently aged between 5 and 12 years - the police believed the photographs were sexually suggestive and contacted other officers, who, under the pretext of

investigating the break-in, attended the house and observed the photographs - these other officers then obtained a search warrant and a number of other photographs were discovered - the respondent was a retired professional photographer and the photographs were of his daughter, who was now 35 years old - the family had permissive views of nudity and the photographs had been hung on the walls for many years - the respondent was charged with one count of possessing child abuse material (s125B(1)(a) *Criminal Code 1983*) - a magistrate dismissed the charge, relying on the context in which the photographs had been originally created and possessed - the informant appealed - held: s125A(1) *Criminal Code 1983* defines 'child abuse material' - the clear ordinary meaning conveyed by the text of the *Criminal Code* must prevail - for the definition to make sense, paragraphs (a), (b), (c), (d) & (e) must be read to refer back to the preliminary paragraph 'material that depicts, describes or represents… a child' and then (b) 'in a sexual, offensive or demeaning context' - 'sexual, offensive or demeaning context' relates back to what is 'depicted', 'described' or 'represented' by the material - it is necessary to consider whether the photograph 'depicts', in a manner likely to cause offence to a reasonable adult, a child (b) 'in a sexual, offensive or demeaning context' - the use of the word 'context' in paragraph (b) relates to each of the identified indicators of child abuse material: 'sexual, offensive or demeaning' - it is the context evident or 'depicted' in the photograph that is the relevant context - the assessment of the material is confined to the image and it is the context drawn from that image that is to be assessed - it is the image that is scrutinized and not the broader circumstances in which it was created - in determining whether the material depicted a child in a manner that was likely to cause offence to a reasonable adult and whether the child was depicted in a sexual, offensive or demeaning manner, it was appropriate to consider relevant common law approaches, the *Criminal Code,* and the Classification Guidelines - the mode of creation of the material is not a relevant matter - making an independent assessment of the material, some of the photographs fell below accepted standards of decency - the broader contextual issues are relevant to determining whether the respondent intended or foresaw that the items he possessed were likely to cause offence to a reasonable person - it was unlikely that he intended to possess child abuse material - s31(2) *Criminal Code 1983* would excuse him if an ordinary person similarly circumstanced would have proceeded with possession of the photographs - he had possessed them over a number of decades and had invited the police into his house - in those circumstances, it could not be proven that he intended or foresaw the images would cause offence to a reasonable person - the appeal was upheld - it was error to have regard to the broader family context and the circumstances of the original creation of the photogates ,however, taking into account s31, the appeal was dismissed (s177(2)(f) *Local Court (Criminal Procedure) Act*) as no substantial miscarriage of justice actually occurred - Local Court finding of not guilty confirmed.

HB

The Queen v MLW (No 2) [2017] NTSC 20
Supreme Court of the Northern Territory
Mildren AJ

Criminal law - hearsay - accused charged with 2 counts of maintaining a sexual relationship with a child under 16 (s131A(2), (5) *Criminal Code 1983* (NT)) - 2 sisters - Crown sought to adduce evidence from their mother that one child had told her 10 years ago, when the child was 5, that the accused had said to her 'Nana likes to drink the white stuff that comes out of my penis' - Crown argued that the evidence showed the accused had a sexual interest in the child and was grooming her by normalising fellatio - the child did not remember the incident and the defence objected to the evidence - held: the evidence was admissible and was not caught by s59(1) *Evidence (National Uniform Legislation) Act 2011,* because it was not being adduced to prove an asserted fact, but to prove the accused's conduct - the mother's evidence was caught by s59(1), the asserted fact being what the child said the accused told her - the child had 'personal knowledge' of the asserted fact (s66A) because she heard it (ss62(1) & (2)) - the previous representation was made shortly after the 'asserted fact' occurred and it was unlikely to be a fabrication - it was highly probable that it was reliable - the mother's evidence was therefore admissible under s65(2)(b) & (c).

MLW (No 2)

“Dank fens of cedar; hemlock-branches gray”
By Frederick Goddard Tuckerman
from *Sonnets, First Series*

VI

Dank fens of cedar; hemlock-branches gray
With trees and trail of mosses, wringing-wet;
Beds of the black pitchpine in dead leaves set
Whose wasted red has wasted to white away;
Remnants of rain and droppings of decay, —
Why hold ye so my heart, nor dimly let
Through your deep leaves the light of yesterday,
The faded glimmer of a sunshine set?
Is it that in your darkness, shut from strife,
The bread of tears becomes the bread of life?
Far from the roar of day, beneath your boughs
Fresh griefs beat tranquilly, and loves and vows
Grow green in your gray shadows, dearer far
Even than all lovely lights and roses are?

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