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Weekly Criminal Law Review

Editor - Richard Thomas of Counsel

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

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Executive Summary

Knight v The State of Victoria & Anor (HCA) - criminal law - murder - life sentence - plaintiff's right to parole restricted by legalisation (s74AA *Corrections Act 1986* (Vic)) - whether s74AA invalid (Ch III Constitution) - section valid

Hornhardt v R (NSWCCA) - criminal law - historical sexual child sexual assaults - severity appeal - appeal out of time - test for extension considered - leave granted - offences serious - age of offender not mitigatory factor - weight accorded to mitigatory factors discretionary - appeal granted, sentence confirmed

DPP v Tuite (Ruling No 3) (VSC) - criminal law - DNA - admissibility - STRmix software program - unfair prejudice (s137 *Evidence Act 2008* (Vic)) - probative value - court must assume reliability of evidence - application to exclude dismissed

R v Taylor (QCA) - criminal law - murder - conviction appeal - whether jury should have been given transcripts of witnesses' testimony - whether directions were required on the use of transcripts - appeal dismissed

SG v Tasmania (TASCCA) - criminal law - aggravated sexual assault - consent - mistake of fact - plea entered - plea constitutes full admission of all elements - severity appeal - weight given to plea not appealable - sentence not manifestly excessive - appeal dismissed

Summaries With Link (Five Minute Read)

Knight v The State of Victoria & Anor [2017] HCA 29
High Court of Australia
Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ
Criminal law - murder - life sentence - plaintiff pleaded guilty to 7 counts of murder & 46 counts of attempted murder - sentenced to life imprisonment, NPP 27 years - NPP expired 8 May 2014 - Victoria enacted s74AA *Corrections Act 1986* (Vic) restricting plaintiff's right to parole (2/4/2014) - in March 2016, plaintiff lodged an application for parole, but that application has not been progressed by the Adult Parole Board - plaintiff brought proceedings in original jurisdiction of High Court, seeking a declaration that s74AA is invalid on the ground that it is contrary to Ch III of the Constitution - relying on *Kable v DPP (NSW)* (1996) 189 CLR 51, the plaintiff argued that s74AA interfered with the sentences imposed by the Victorian Supreme Court such that it impaired the institutional integrity of the Court and its exercise was incompatible with the exercise of federal jurisdiction - held: s74AA was not invalid - it did not interfere with sentences imposed by the Supreme Court - whether the plaintiff was released at the expiry of the non-parole period was outside the scope of the exercise of judicial power [Editor's note: relevant facts set out in *R v Knight* [1989] VR 705].

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Hornhardt v R [2017] NSWCCA 186
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, Price & Adamson JJ
Criminal law - severity appeal - historical child sexual assaults - applicant pleaded guilty to 7 counts of sexual assault and act of indecency on a female under 16 (s76 *Crimes Act 1900* (NSW) (repealed); s76A *Crimes Act 1900* (repealed)) - the offences were committed upon his 3 daughters, who were aged between 5 and 12 years - the offences were committed between 1965 and 1978 and reported to police in 2014 - when the applicant was arrested, he refused the assistance of a solicitor and participated in an interview with police, making comprehensive admissions - the sentencing judge found special circumstances and allowed a 25% discount - the applicant was sentenced to an aggregate term of 4 years, NPP 2 years (s53A *Crimes (Sentencing Procedure) Act 1999* (NSW)) - the sentencing judge found that the offending involved gross breaches of trust and fell about mid-range in objective seriousness - the abuse of trust was an aggravating feature (s21A (2)(k) *Crimes (Sentencing Procedure) Act 1999* (NSW)) - the applicant did not have prior convictions , was a person of prior good character, unlikely to reoffend and had good prospects of rehabilitation - leave to appeal was required, the applicant's appeal being filed out of time - held: (1) extension of time to appeal: while the Court has a discretion to extend time (s10(1)(b) *Criminal Appeal Act 1912* (NSW)), the Court emphasised the importance of paying proper regard to the time limits (*RLS v R* [2012] NSWCCA 236, [21]; *Golossian v R* [2013] NSWCCA 311, [22]-[24]) - whether an applicant should receive an extension of time is determined by a consideration of the interests of justice -

the prospects of success of the appeal is one of the relevant considerations (*Kentwell v The Queen* (2014) 252 CLR 601; *Lehn v R* [2016] NSAWCCA 255) - extension of time granted; (2) severity appeal: whether the judge gave insufficient weight to mitigating factors (age, rehabilitation, remorse, good character) - the question of weight is very much a matter of discretionary judgment for the sentencing judge - to succeed, a *House v King* ((1936) 55 CLR 499) error must be demonstrated - *Zhao v R* [2016] NSWCCA 179, [59] referred to - each of the matters identified by the applicant were taken into account by the judge and appropriate weight was given to them - usually there is no separate discount for remorse, rather, it is one of a number of mitigating factors which can be taken into account in the sentencing synthesis (*Ngati v R* [2013] NSWCCA 203, [45]) - considering the issue of delay, *Wilson v R* [2017] NSWCCA 41, [48] & *Magnuson v R* [2013] NSWCCA 50, [62] referred to - no error demonstrated - error was, however, demonstrated in the way one count was formulated, requiring the applicant to be resentenced; (3) resentence: the objective gravity of the offending was high, involving substantial criminality and moral culpability - the counts were representative - in the case of historical sexual offences, age in and of itself is not a mitigating factor - no lesser sentence warranted - leave granted, appeal dismissed [Editor's note: Price & Adamson JJ agreeing with Hoeben CJ at CL].

Hornhardt

DPP v Tuite (Ruling No 3) [2017] VSC 442
Supreme Court of Victoria
Hollingworth J
Criminal law - DNA - admissibility - accused charged with aggravated burglary, attempted rape, indecent assault and intentionally causing injury - the offences were alleged to have occurred at the home of the complainant - the primary issue at trial would be the identity of the offender - DNA evidence derived from items (blindfold & cable ties used to restrain the complainant, a cigarette butt & filter) located at the complainant's home was to be relied upon by the prosecution - in calculating the DNA likelihood ratios, scientists at the Victorian Police Forensic Science Serviced relied upon a statistical software program called STRmix - the DNA analysis showed that the items contained mixed DNA profiles from 3 people - the defence applied to exclude the evidence under s137 *Evidence Act 2008* (Vic) - held: the defence relied on expert evidence to demonstrate that the prosecution evidence lacked reliability - however, in assessing the probative value of the DNA evidence, the court is now required to assume its reliability - the contest between the experts is for the jury to resolve - see *IMM v The Queen* [2016] HCA 14 - considering s137, unfair prejudice may arise in a number of ways: the jury may adopt an illegitimate form of reasoning, or give the evidence undue weight - the DNA evidence here has high probative value - application to exclude dismissed [Editor's note: see also *Tuite v The Queen* [2015] VSCA 148; *Tuite v The Queen (No 2)* [2015] VSCA 180].

Tuite (Ruling No 3)

R v Taylor [2017] QCA 169
Court of Appeal of Queensland
Fraser, Morrison JJA, Dalton J
Criminal law - conviction appeal - jury - appellant and the victim (McGrath) were in thrall of a woman named Susan Stewart - McGrath had given Stewart large amounts of money, believing she was pregnant with his child - Stewart then believed McGrath had changed his will, making her his beneficiary - Stewart then wanted McGrath dead and the appellant carried out her wishes - the Crown case was that the appellant confessed to having committed both offences to 2 separate sets of people, including undercover police officers - at trial, there was an issue as to whether the jury should have been provided with the transcripts of the evidence of witnesses who had given oral evidence in court - transcripts were provided as part of the evidence, but directions were not given as to how the jury should use the transcripts - on appeal, the appellant argued that a miscarriage of justice had been occasioned by the transcript being provided to the jury without directions or warnings from the judge as to the use of the material - held: it is within the discretionary power of a trial judge to give transcripts to the jury (*R v Tichowitsch* [2007] 2 Qd R 462, [9]) - here, the parties had agreed that the edited transcript was an accurate record of what was said by the witnesses in their evidence - the jury had seen the witnesses give their evidence - the fact that the judge did not warn the jury about the difference between oral evidence and the transcript did not produce a miscarriage - it was submitted that having the evidence in writing meant that the part of the evidence had a credibility which was divorced from the jury's assessment of a witness giving evidence orally (see *Driscoll v The Queen* (1977) 137 CLR 517, 542) - in general, there are good reasons for refraining from giving a jury a transcript of evidence or the transcript of part of the evidence unless it is absolutely necessary (see *Butera v DPP (Vic)* (1987) 164 CLR 180; *Gately v The Queen* (2007) 232 CLR 208, [95]-[96]) - reading or replaying part of the evidence carries a risk of disproportionately emphasising that part - these principles are undoubtedly important in the conduct of a fair trial - here, neither the experienced trial counsel nor prosecutor sought directions - and the appellant did not fare well in cross examination, so that it would not have been in his interests for the whole of the transcript to have been given to the jury - the question then was whether the trial judge should have reminded the jury of what the appellant said - there was no need for the judge to have done so - appeal dismissed [Editor's note: Fraser & Morrison JJA agreeing with Dalton J].

Taylor

SG v Tasmania [2017] TASCCA 12
Tasmanian Court of Criminal Appeal
Pearce J, Marshall & Porter AJJ
Criminal law - severity appeal - consent - mistake of fact - appellant and wife, who were in their 50s, were separated, but travelled together to Tasmania for a holiday - they shared the same room and after spending the afternoon and evening drinking and dining, returned to their room and consumed more alcohol - the wife attempted to take a spa bath, but had to be helped out of the spa by the appellant - the wife then lay on the bed naked and was either asleep or semi-

conscious when the appellant decided to initiate sexual activity - the appellant took a Viagra tablet and then started to touch the wife, who was unresponsive - the appellant then began to use a sex toy and by mistake inserted it into the wife's anus, rather than into her vagina - the wife woke and protested forcefully - the appellant spent the night in their car and he was then charged and pleaded guilty to, one count of aggravated sexual assault - appellant was sentenced to 18 months , NPP 9 months - the appellant appealed the sentence, arguing (i) that the sentence was manifestly excessive and (ii) that the judge gave insufficient weight to the appellant's plea of guilty - held: (1) appellant's state of mind (consent & mistake): the appellant's plea of guilty to the crime as it was particularised in the indictment carried the admission that he penetrated the complainant's anus with an inanimate object (vibrator) and that he did so indecently and unlawfully - his acts were unlawful as they were without the wife's consent - it may have been a ground of exculpation if the appellant acted under an honest and reasonable, but mistaken, belief, that the complainant consented to the penetration (s14 *Criminal Code Act 1924* (Tas); *Proudman v Dayman* (1941) 67 CLR 536; *CTM v The Queen* (2008) 236 CLR 440) - however, the Code provides that for certain specified sexual offences, including aggravated sexual assault, a mistaken belief as to the existence of consent is not honest or reasonable if the accused was in a state of self-induced intoxication, or was reckless, or failed to take reasonable steps to ascertain if the complainant was consenting - thus, the appellant's plea carried with it the admission that the mistaken belief was neither honest nor reasonable - whatever the appellant's state of mind, there was a patent failure to ascertain whether the complainant consented - his state of mind demonstrated the absence of an aggravating factor, however; (2) other mitigating factors: the appellant did not have a criminal record, was otherwise of good character, and he was contrite - he had suffered from considerable public opprobrium and his small business had failed; (3) aggravating factors: the crime constituted a breach of trust - vindication of dignity is a sentencing consideration; (4) the plea of guilty: it is not a proper ground of appeal to argue that the sentencing judge failed to give sufficient weight to the plea (*TAP v Tasmania* [2014] TASCCA 5, [30]; *Mulholland v Tasmania* [2017] TASCCA 2, [17]); (5) manifest excess: sentences for a single count of aggravated sexual assault are not common - the sentencing decisions identified by counsel were well below the sentence imposed here, which is equal to the highest identified in the relevant sentencing text - however, the sentences relied upon were far too few to establish a reliable sentencing range - appeal dismissed [Editor's note: Marshall & Porter AJJ agreeing with Pearce J].

SG

The Wine of Love
By James Thomson (Bysshe Vanolis)
The wine of Love is music,
And the feast of Love is song:
And when Love sits down to the banquet,
Love sits long:

Sits long and ariseth drunken,
But not with the feast and the wine;
He reeleth with his own heart,
That great rich Vine.

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