



Friday, 18 October 2024

Weekly Criminal Law

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

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Executive Summary

O’Rafferty v R (NSWCCA) - applicant’s legal representatives’ failure to obtain and place before the sentencing judge expert psychological reports meant that the sentence proceedings involved a miscarriage of justice which materially affected the outcome

R v MEB (QCA) - appeal allowed where trial judge should have left a defence of provocation under s269 of the *Criminal Code* (Qld) to the jury, even though the defence had not asked for this

HABEAS CANEM

Peace



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Summaries With Link (Five Minute Read)

O'Rafferty v R [2024] NSWCCA 189

Court of Criminal Appeal of New South Wales

Davies, Wright, & Rigg JJ

Sentencing - the appellant pled guilty to breaking and entering a dwelling house and committing a serious indictable offence, namely larceny, in circumstances of aggravation, and robbing the resident of that house of an iPhone and a handbag with its contents (including \$1,000, a number of identification and bank cards, and three small gemstones) - the sentencing judge imposed an aggregate sentence of 2 years and 9 months imprisonment, with a non-parole period of 21 months - the appellant appealed against sentence - held: for the Court to receive further evidence on appeal, it was for the appellant to establish that the evidence was of real significance and capable of materially affecting the outcome of the sentence hearing - the mere fact that more fulsome material could have been produced for the sentencing hearing was not sufficient to give rise to a miscarriage of justice - a deliberate choice to not adduce relevant evidence at first instance may be relevant to the discretion to admit the evidence - in this case, the expert material presented by the appellant should be received by the Court - on the basis of this expert evidence, the appellant's offending occurred in the context of severe drug addiction and interpersonal anger and dysfunction in his relationship with the victim, both problems associated with diagnosed psychiatric conditions - the appellant's background and resultant post-traumatic stress disorder have caused relevant hardship for him in custody - the material was also highly relevant to assessment of the appellant's prospects of rehabilitation, and the way in which the appellant's rehabilitation as a purpose of sentencing him would be best addressed - the failure by the applicant's legal representatives to obtain and place before the sentencing judge evidence such as that contained in the expert reports meant that the sentence proceedings involved a miscarriage of justice which materially affected the outcome - appeal against sentence allowed, and appellant resentenced to 2 years 3 months imprisonment with a non-parole period of 18 months.

[View Decision](#)

R v MEB [2024] QCA 188

Court of Appeal of Queensland

Bond & Brown JJA, & Kelly J

Miscarriage of justice - the appellant pleaded not guilty to one count of common assault, one count of assault occasioning bodily harm, and one count of deprivation of liberty, all of which being domestic violence offences - he was found guilty on the second count (assault occasioning bodily harm) but not guilty on counts one and three - he was sentenced to imprisonment of 18 months to be partly suspended after he had served four months - he appealed against conviction and sought leave to appeal against sentence - in the conviction appeal, the grounds were that the trial judge had failed to leave the defence of provocation for the jury's consideration and did not properly direct the jury in relation to evidence of uncharged injuries - held: s269(1) of the *Criminal Code* (Qld) provides that a person is not criminally

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responsible for an assault where he or she was deprived of the power of self-control by the victim's provocation, and acts suddenly before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not likely to, to cause death or grievous bodily harm - under s268, provocation is any wrongful act or insult that would be likely to deprive an ordinary person of the power of self-control, and to induce an assault - a trial judge should exercise caution before declining to leave provocation to the jury where, even though provocation is not raised by the accused, there is material in the evidence which might arguably be thought to give rise to a defence of provocation - here, the defence did not ask the judge to leave provocation to the jury - however, the appellant had described being belted, punched, slapped in the face and pushed over by the complainant - the truth of the appellant's and complainant's competing versions was a matter for the jury - it was not a case where the appellant's version could not be reconciled with clear and unchallengeable facts - the real issues for the jury were whether the wrongful acts were of such a nature as to be likely, when done to an ordinary person, to deprive that person of self-control and to induce that person to commit an assault and whether the force used by the appellant was not out of proportion to the provocation - provocation should have been left to the jury - the trial judge had not erred in respect of the directions concerning uncharged injuries - appeal allowed, and new trial on count two ordered.

[R](#)

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Aquino v Bondfield Construction Co (SCC) - The fraudulent intent of a senior employee, found to be the directing mind of companies, can be attributed to the companies in a bankruptcy proceeding

Summaries With Link (Five Minute Read)

Aquino v Bondfield Construction Co 2024 SCC 31

Supreme Court of Canada

Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Jamal, & O'Bonsawin JJ

The President of two family-owned construction companies had for years fraudulently taken tens of millions of dollars from the companies through a false invoicing scheme. In subsequent bankruptcy proceedings against the companies, the payments made under the invoicing scheme were challenged under the *Bankruptcy and Insolvency Act*. Under the Act, money paid by the debtor can be recovered if the transfers were made at undervalue with the intent to defraud creditors. The lower court concluded that these were payments made at undervalue with fraudulent intent. The bankrupt entities contended that the payments were made to creditors and that fraudulent intent was not present. The Court held that the executive's fraudulent intent could be attributed to the bankrupt companies and that the money should be paid back. The Supreme Court (Jamal J, joined by Wagner CJ, Karakatsanis, Côté, Rowe, Martin, O'Bonsawin JJ) dismissed the appeal and held that the courts could find that a debtor intended to defraud creditors even if the debtor was not insolvent at the time of the undervalue transfers. Specifically, the executive's fraudulent intent should be attributed to the debtor companies because he was their directing mind. The Supreme Court stated that the test for corporate attribution is simply whether the executive was the directing mind of the business and whether the actions were performed within the corporate responsibility assigned to him. If so, the fraudulent intent of the executive could be attributed to the corporation.

[Aquino](#)



Poem for Friday

In My Craft or Sullen Art

By Dylan Thomas (1914-1953)

In my craft or sullen art
Exercised in the still night
When only the moon rages
And the lovers lie abed
With all their griefs in their arms,
I labour by singing light
Not for ambition or bread
Or the strut and trade of charms
On the ivory stages
But for the common wages
Of their most secret heart.
Not for the proud man apart
From the raging moon I write
On these spindrift pages
Nor for the towering dead
With their nightingales and psalms
But for the lovers, their arms
Round the griefs of the ages,
Who pay no praise or wages
Nor heed my craft or art.

Dylan Marlais Thomas, poet, writer and broadcaster, was born on 27 October 1914 in Swansea, Glamorgan, Wales. His well-known works include *Under Milk Wood*, "a play for voices", *Do not go gentle into that good night*, and, *And death shall have no dominion*. He loved Wales but was not a Welsh nationalist. His father wrote that he was "*afraid Dylan isn't much of a Welshman*". Robert Lowell, wrote of criticism of Thomas' greatness as a poet, "Nothing could be more wrongheaded than the English disputes about Dylan Thomas's greatness...He is a dazzling obscure writer who can be enjoyed without understanding." The Welsh Academy Encyclopedia of Wales described him, and particularly his life in New York City before his death as a "roistering, drunken and doomed poet."

Dylan Thomas reads "In My Craft or Sullen Art"

<https://www.youtube.com/watch?v=Tiw3uOT2eUc>

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian



parents. He trained at the Royal Central School of Speech and Drama in London. In the UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage

actress: https://en.wikipedia.org/wiki/Patricia_Conolly and <https://trove.nla.gov.au/newspaper/article/47250992>.

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