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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

Koani v The Queen (HCA) - criminal law - murder - intention - whether an unwilled, criminally negligent act can found murder conviction - Queensland Criminal Code and common law considered - identification of act causing death - conviction quashed, new trial ordered

Wick v R (NSWCCA) - criminal law - glassing - grievous bodily harm - whether the injuries sustained in a glassing attack constituted GBH - test and authorities considered - whether sentence manifestly excessive - appeal dismissed

R v TS (NSWCCA) - criminal law - attempted sexual intercourse without consent - what constitutes offence of attempt - whether expression of desire to commit offence sufficient - directed verdict - principles - when no case submission made be made - Crown appeals - question of law alone required - appeal dismissed

Wells v R (NSWCCA) - criminal law - causation - test identified - negligent driving causing death - conviction appeal on summary conviction - nature of appeal - negligent driving causing death - "emergency" considered - whether sentence manifestly excessive - appeal dismissed

Summaries With Link (Five Minute Read)

Koani v The Queen [2017] HCA 42
High Court of Australia

Kiefel CJ, Bell, Gageler, Nettle & Gordon JJ
Criminal law - murder - manslaughter - appellant loaded a shotgun while arguing with his de facto partner - the shotgun had a compromised hammer mechanism and it discharged, killing his partner - the appellant was charged with murder and while he offered to plead guilty to manslaughter, was tired and convicted murder - the appellant's appeal to the Queensland Court of Appeal was dismissed and he appealed, by special leave, to the High Court - the question raised on the appeal was whether an unwilled, criminally negligent act can found a conviction for murder under s302(1)(a) *Criminal Code Act 1899* (Qld,) where the jury is satisfied that the accused possessed the intention to kill or to do some grievous bodily harm - held: (1) criminal responsibility for murder - under the Code and common law, criminal responsibility for murder cannot be founded on an unwilled act - it is axiomatic that criminal responsibility is founded on the offender's acts or omissions (*Ryan v The Queen* (1967) 121 CLR 205, 213) - it is axiomatic in an offence of specific intent that the act or omission and the intent must coincide (*Ryan v The Queen, supra* 215-218; *Royall v The Queen* (1991) 172 CLR 378, 393, 401, 414, 420-421; *Meyers v The Queen* (1997) 71 ALJR 1488, 1489) - nothing in the scheme of the Code suggests that it is to be interpreted as departing from either of these principles - the only circumstances in which an unlawful killing constitutes the crime of murder are the 5 circumstances sated in s 302(1) *Code* - s302(1)(a) is not the statement of a free-standing mental element of criminal responsibility that can be attached to a negligent act or omission - the elements of the offend of murder for which s302(1)(a) provides require the prosecution to prove that the unlawful killing was caused by an act or omission of the accused that was done or omitted to be done by the intention *thereby* of causing the death or some grievous bodily harm to some other person - the offence of murder is not exempted from the rule that a person is not criminally responsible for an act or omission that occurs independently of the exercise of the person's will; (2) act causing death - identification of the act that gives rise to criminal responsibility for murder under the Code is not determined on a more confined basis than under the common law - whether it is necessary to direct the jury in the terms of s23(1)(a) *Code* (a person is not criminally responsible for an act or omission that occurs independently of the exercise of the person's will) will depend upon the facts of the case - here, the determination of what constituted the act causing death was a factual one for the jury - notwithstanding that the prosecution had not excluded the possibility that the appellant's finger slipped on the compromised hammer, it was open to the jury to find that his actions in loading the gun, presenting it to the deceased and pulling back the hammer were connected, willed, acts, which caused the death of the deceased - in this event it was necessary for the jury to consider whether, on the whole of the evidence, the prosecution had excluded the reasonable possibility that the appellant acted only to frighten the deceased and not with murderous intent - plainly enough, the capacity of the gun to discharge as the result of the appellant's finger slipping from the hammer was also relevant to the latter determination; appeal allowed, conviction quashed & new trial ordered.
Koani

Wick v R [2017] NSWCCA 244

Court of Criminal Appeal of New South Wales
Basten JA, Beech-Jones & Fagan JJ
Criminal law - glassing - recklessly cause GBH - the appellant was out socialising when the victim sat next to him at a table - without warning the appellant struck the victim over the right eye with a glass - the victim sustained 5 lacerations requiring 100 stiches, several other lacerations and while no loss of sight resulted, there was a nerve damage, but no residual functional deficit - the appellant was charged with causing grievous bodily harm with intent (s33(1)(b) *Crimes Act 1900* (NSW) and convicted of the lesser alternative of causing GBH (s35(2) *Crimes Act 1900* - the appellant was sentenced to 4 years, NPP 1 year 6 months and appealed, arguing that the verdict was unreasonable and the sentence manifestly excessive - held: considering the meaning of "grievous bodily harm" - authorities referred to (*Swan v R* [2016] NSWCCA 79 (*Swan*); *Haoui v R* [2008] NSWCCA 209) - in *Swan,* Garling J identified the relevant principles ([54]-[65]): the phrase is to be interpreted according to its natural and ordinary meaning; it means really serious bodily injury; not every injury is capable of amount to GBH & in every case it is a question of fact and degree; only the injury itself and not its personal, social and economic consequences, can be taken into account - here, the fact that a skilled surgeon was readily available and able to repair the damage leaving no residual functional deficit and minimal disfigurement, did not detract from the seriousness of the bodily harm - the injures were sufficient to constitute GBH - the trial judge accepted that the injures were at the lower end of the scale of possible GBH and found the appellant's level of intoxication did not stop him from considering the possible result of his actions and that his degree of recklessness was high - the judge found the appellant's remorse was genuine and found special circumstances existed - the sentence was not manifestly excessive - see: *Spooner v Regina* [2009] NSWCCA 247; *Butters v R* [2010] NSWCCA 1; *Dosen v R* [2010] NSWCCA 283; *Blackwell v R* [2012] NSWCCA 227 - appeal dismissed. [Editor's note: Basten JA & Beech-Jones J agreeing with Fagan J.]
Wicks

R v TS [2017] NSWCCA 247
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, Latham & N Adams JJ
Criminal law - attempt - the complainant was a transgender female who made contact with the respondent through a phone based dating app - the complainant invited the respondent to her home and when they met she had told him that she was not wearing underwear - he had then followed her into her bedroom with his erect penis exposed and had then grabbed her wrist, forcing her onto the bed, saying he wanted to "fuck her" - she had thrown him off and the respondent had subsequently been charged with , inter alia, attempted sexual intercourse (ss61I & 61P *Crimes Act 1900 (NSW))* - the trial judge directed the jury to acquit the respondent and the Crown appealed that directed verdict (s107(2) *Crimes (Appeal and Review) Act 2001* (NSW) - held: (1) attempted sexual intercourse without consent - it was necessary for the Crown to prove beyond reasonable doubt that the accused intended to have sexual intercourse with the complainant without her consent, knowing that she was not consenting or being reckless as

to that fact and that the accused, with that intention, did some act towards committing that offence which went beyond preparation and which could not reasonably be regarded as having any other purpose than the commission of the offence (*R v Mai* (1992) 26 NSWLR 371, 382; *Inegbedion v R* [2013] NSWCCA 291 (I*negbedion*)) - the expression of a desire to commit an offence does not, without more, constitute an attempt; (2) Crown appeals (s107(2) *Crimes (Appeal and Review) Act 2001*) - s107(2) provides for an appeal on a ground that involves a question of law alone - this is a more constrained jurisdiction than an appeal involving a question of law (*R v PL* (2009) 199 A Crim R 199, [20]) - a failure to apply correct principles in directing a verdict of acquittal constitutes an error of law alone (*RMC v R* [2013] NSWCCA 285, [40] (*RMC*)) - here, appeal ground 2 was not available as it involved a mixed question of law and fact; (3) directed verdict - appeal ground 1 argued that a no case submission can never be made until after the close of the Crown case - the principles are set out in *RMC v R* ([41]) - the principles link the power to direct a verdict with 2 factors, the high point of the Crown case and the incapacity of the evidence to prove the ingredients of the offence (*RMC* [44]) - the Court in *RMC* did not intend to convey that a no case submission can *never* be made until the close of the Crown case - an appropriate time to consider a no case submission is when the evidence in support of the charge has been fully presented, which in a sexual assault trial wholly dependent upon the evidence of the complainant, is at the close of the complainant's evidence in chief - it is not incumbent on defence counsel to commence cross examination or await the end of the Crown case, with the attendant risk that the gap will be filled - references to *May v O'Sullivan* ((1955) 92 CLR 654) & *R v R* ((1989) 18 NSWLR 74) at [44] in *RMC* must be taken in context - the determination of a no case submission is a question of law, whether that submission is made at the close of the prosecution case or before - here, the question was whether the respondent's acts and words in the bedroom were capable of establishing beyond reasonable doubt an attempt to have sexual intercourse with the complainant without her consent or being reckless as to that matter; (4) duty to give reasons - here, the requirement to provide reasons which articulate the essential grounds upon which the determination was made was satisfied, even though the reasons were economical, even sparse - (*Soulemezis v Dudley (Holdings) P/L* (1987) 10 NSWLR 247, 280D) - in any trial for an offence of attempt it is necessary to address the question of the requisite intention before moving to the question whether the acts of the accused are sufficiently proximate to compel the conclusion that the completed offence would have been committed (*Inegbedion* [16], [17]) - here, the judge's ruling was clearly based upon the incapacity of the respondent's words and acts in the bedroom to prove beyond reasonable doubt that he intended to commit the offence of sexual intercourse without consent - appeal dismissed. [Editor's note: Hoeben CJ at CL & N Adams J agreeing with Latham J.]
TS

Wells v R [2017] NSWCCA 242
Court of Criminal Appeal of New South Wales
Gleeson JA, Harrison & Button JJ
Criminal law - causation - negligent driving - the appellant was driving a Rural Fire Service fire tanker on the F3 freeway when he was diverted to attend to spillage at a weighbridge - in order

to reach the weighbridge he was required to do a U-turn through an emergency turning lane - as he re-entered the freeway he drove into the right hand lane of the freeway and an approaching car moved into the middle lane and then back into the right hand lane, colliding with the fire tanker (the first collision) - the vehicles were then stopped when a third vehicle collided with the car and an occupant in this last car sustained fatal injuries (the second collision) - the death was not occasioned as a direct result of the first collision - the appellant was charged with several offences and acquitted, but the prosecution then asked the judge to hear 2 summary charges pursuant to s166 *Criminal Procedure Act 1986* (NSW) - the 2 charges were: negligent driving causing death (s42(1) *Road Transport (Safety and Traffic Management) Act 1999* (NSW) (*Road Transport Act*)) and making a U-turn without giving way to a vehicle (r38 *Road Rules 2008* (NSW)) - the appellant was convicted of both summary offences and sentenced, on the negligent driving charge, to 12 months, to be served by way of an Intensive Corrections Order, with a fine of $1000 for the U-turn offence - the appellant appealed both the conviction and sentences pursuant to ss5AD & 5AA *Criminal Appeal Act 1912* (NSW) - pursuant to s5AD(3) of that Act, the appeal was heard by a bench of 3 judges of the Court - the appeal grounds argued that the convictions were unreasonable, the judge erred in applying the statutory provisions and there was a denial of procedural fairness - held: (1) nature of conviction appeal - an appeal against conviction brought pursuant to ss 5AD & 5AA of the *Criminal Appeal Act 1912* should be determined in the same way in which an appeal against conviction on indictment entered after a trial by judge alone is determined (*Filippou v The Queen* (2015) 256 CLR 47, [12]); (2) whether the convictions were unreasonable - the statutory provision was s 42 *Road Transport Act* - the Crown case was that the appellant had executed the U-turn in circumstances where he only had to wait a matter of seconds for the approaching vehicle to have passed and his failure to do so constituted negligence - there was no error in the trial judge finding the offences proved - the verdicts were not unreasonable; (3) causation - in criminal law, the concept of causation is founded upon substantial contribution (*Royall v R* (1991) 172 CLR 378; *R v Moffatt* [2000] NSWCCA 174) - the fundamental question is whether the prosecution can prove, to the criminal standard, that the act of the accused substantially contributed to the adverse outcome and the prosecution need not prove that the act was the only substantial contribution, or even the most substantial contribution - it was open to the trial judge to find that the appellant's negligent driving was a substantial contribution to the first collision between the tanker and the first car which led directly to the fatal collision between the 2 cars - it was open to the trial judge to find that the offence of negligent driving causing death was established; (4) "in the course of an emergency"; *Road Rules* 78 & 79 (now repealed) - an event that does not have some aspect of emergency to it will not constitute "an emergency"; (5) severity appeal - as each offence was wholly summary , and was being dealt with in the District Court pursuant to s166 *Criminal Procedure Act 1986,* the application for leave to appeal was to be approached in the same way that an appeal pursuant to s5(1)(c) *Criminal Appeal Act 1912* - it should be founded on error in the first instance (*House v The King* (1936) 55 CLR 499) - no remorse was demonstrated and the appellant had prior traffic matters on his record - the sentence was not manifestly excessive; appeal dismissed.

[Editor's note: Gleeson JA & Harrison J agreeing with Button J. For the earlier decisions see *R v*

Wells [2016] NSWDC 169; *R v Wells (No2)* [2016] NSWDC 313]
Wells

Moonrise
By Gerard Manley Hopkins

I AWOKE in the Midsummer not to call night, in the
white and the walk of the morning:
The moon, dwindled and thinned to the fringe of a
finger-nail held to the candle,
Or paring of paradisaïcal fruit, lovely in waning but
lustreless,
Stepped from the stool, drew back from the barrow, of
dark Maenefa the mountain;
A cusp still clasped him, a fluke yet fanged him, en-
tangled him, not quit utterly.
This was the prized, the desirable sight, unsought, pre-
sented so easily,
Parted me leaf and leaf, divided me, eyelid and eyelid of
slumber.

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