



Friday, 20 December 2024

Weekly Criminal Law

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

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Executive Summary

Holmes v R (NSWCCA) - trial miscarried due to accused's counsel failing to object to tender of police body worn video that gave rise to an appreciable risk that the jury could misuse the evidence in a manner that was unfair and prejudicial, and where any forensic advantage to the accused was slight

Ridley v The King (VSCA) - trial judge had not erred in refusing to exclude evidence of a third recorded interview with police after the second interview had failed to record, and evidence of alleged admissions made to undercover operatives while in police cells

Brooks (a pseudonym) v The King (VSCA) - trial judge had not erred by a member of the jury panel after the selection of the jury had commenced, and the jury's verdicts of guilty were not inconsistent with their not guilty verdicts on other counts



HABEAS CANEM

Merry Christmas from McGregor

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Summaries With Link (Five Minute Read)

Holmes v R [2024] NSWCCA 233

Court of Criminal Appeal of New South Wales

N Adams, Ierace, & Chen JJ

Incompetence of counsel - applicant convicted after jury trial of one count of sexual intercourse without consent - sentenced to imprisonment for 4 years and 6 months, with a non-parole period of 2 years and 6 months - applicant's case was that activity had been consensual - the Crown tendered two body worn videos taken by police at the time of the applicant's arrest, where the trial judge had raised concerns about their admissibility, but the applicant's counsel had said there were tendered either with the consent of the applicant or at the applicant's request - the applicant appealed against conviction and sentence - held: a criminal trial is adversarial and an accused is generally bound by the way the trial is conducted by their legal representatives - errors of judgment or even negligence by counsel are not grounds for setting convictions aside - the court does not inquire whether the course taken by counsel was, in fact, taken for the purpose of obtaining a forensic advantage, but only whether it is capable of explanation on that basis - the first body worn video had some prejudicial content, but in the context of clear and sufficient directions the trial judge had given to the jury, there was no prejudice or unfairness, and there was substantial forensic benefit to the applicant as the video showed him cooperating with police, and giving an early account of the incident that was consistent with his case of consent at trial - the second body worn video contained material giving rise to an appreciable risk that the jury could misuse the evidence in a manner that was unfair and prejudicial to the applicant - any forensic benefit to the applicant from this video would have been slight - there was no rational explanation why the applicant's trial counsel did not object to the tender of, at least, substantial parts of that video - the admission of that video was prejudicial in the sense that there was a real chance that it affected the jury's verdict, or realistically could have affected the verdict of guilt, or had the capacity for practical injustice, or was capable of affecting the result of the trial - proviso not applied as it was not open to find no substantial miscarriage of justice had occurred - unnecessary to deal with sentence appeal - leave to appeal against conviction granted, appeal allowed, conviction and sentence quashed, and new trial ordered.

[View Decision](#)

Ridley v The King [2024] VSCA 308

Court of Appeal of Victoria

Taylor JA & Fox AJA

Admissions - the applicant was facing trial in the County Court on one charge of aggravated home invasion and six other charges arising from a single incident - after the applicant had been arrested, he participated in a record of interview on three occasions, the second of which was not recorded due to equipment failure, and was also lodged in the police cells on two occasions, where it was alleged he made admissions to two undercover operatives - the trial judge refused to exclude the evidence of the third interview and of the admissions under s90 of the *Evidence Act 2008* (Vic), and certified that the decision concerned the admissibility of

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evidence, that, if ruled inadmissible, would eliminate or substantially weaken the prosecution case under s295(3)(a) of the *Criminal Procedure Act 2009* (Vic) - the applicant sought leave to appeal - held: the applicable standard on an interlocutory appeal from a decision under s90 has not been authoritatively determined, and, while the better view might be that the correctness standard applies, it was not necessary to decide this, as the result was the same under both the correctness standard and the *House v The King* standard - s90 derives from the common law fairness discretion, and the focus is on whether the use of the evidence at trial would be unfair - s90 is not limited to admissions made by an accused, although that the most common situation - the probative value of the admission has little or no bearing on the exercise of the discretion - it has been held that the reliability of evidence is a factor affecting the fairness of its use - the failure to record the second interview had not resulted in any unfair forensic disadvantage to the applicant - a jury would be able to assess the third interview, and the loss of the second interview did not remove, restrict, or unfairly impede a jury's ability to do so - there was no reason to regard the reliability of the admissions as suspect - it would not be unfair to the use the evidence of the admissions - leave to appeal refused.

[Ridley](#)

Brooks (a pseudonym) v The King [2024] VSCA 305

Court of Appeal of Victoria

McLeish, Boyce, & Kaye JJA

Juries - applicant was convicted of four charges of sexual penetration of a child under 16 with aggravating circumstances (being the fact that the child was under 10 years old) - he sought leave to appeal on the grounds that (1) the trial miscarried as a result of a fundamental procedural irregularity (the excusal of a member of the jury panel after the selection of the jury had commenced); and (2) that the four guilty verdicts were inconsistent with not guilty verdicts on two other charges - held: if ground 1 succeeded, the jury's verdict would be viewed as a nullity, and the applicant may then not be able to rely on the not guilty verdicts to establish inconsistency alleged in ground 2 so that verdicts of not guilty should be entered - the Court declined the applicant's suggestion to decide ground 2 before ground 1 to avoid this difficulty - the asserted two statutory powers to excuse the jury member were not available in the circumstances, and so any such power must derive from the common law - the court had power at common law to excuse a potential juror, before that person had been sworn as a juror, in order to ensure a fair trial - the *Juries Act 2000* (Vic) did not expressly exclude the capacity of a judge to ensure that the process of empanelment of a jury is conducted in a manner which is fair and just to both parties - it also does not do so by necessary implication - the common law power therefore remains - there was therefore no irregularity in the course taken by the judge in this case - it was unnecessary to decide whether there would have been a substantial miscarriage of justice had the judge acted without power - as to ground 2, the different verdicts were readily explicable - the fact that the jury did not accept the evidence of the complainant in respect of one charge on which the applicant was acquitted did not mean the jury found him to lack credibility or reliability as a witness more generally - that charge differed from the other charges in that there was independent evidence which conflicted with a material aspect of the



complainant's testimony - the applicant had not shown that the jury acted unreasonably in delivering the different verdicts - leave to appeal granted on ground 1 but refused on ground 2, and appeal dismissed.

[Brooks \(a pseudonym\)](#)

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Khachatryan v Armenia (EUHR5S) - In a matter of first impression, the European Court of Human Rights found that a member state has an obligation to provide a mechanism whereby victims of domestic violence may seek compensation for non-pecuniary damage from the perpetrator of the violence

Summaries With Link (Five Minute Read)

Khachatryan v Armenia, Case 11829/16

European Court of Human Rights

Guyomar P, Elósegui, Harutyunyan, Felici, Zünd, Sârcu, & Šimáková JJ

In Armenia, the victim had been subjected to numerous events of serious physical and emotional abuse by her former spouse. He repeatedly threatened and insulted her. He also repeatedly beat her, breaking bones and causing concussions and other grievous injuries. The perpetrator was charged with aggravated torture of a person who was dependent on the perpetrator. However, he was convicted of non-aggravated torture and sentenced to 18 months imprisonment. He did not serve any time as he was exempted under an Amnesty Act. The victim of the abuse unsuccessfully launched civil legal proceedings seeking compensation for both pecuniary and non-pecuniary damage for emotional and psychological suffering due to ill-treatment. Armenian domestic law did not provide for compensation for non-pecuniary damages in this situation. The judgment was affirmed by the local court of appeal. Armenia is one of the 46 member states comprising the Council of Europe and is subject to the European Convention on Human Rights and the jurisdiction of the European Court of Human Rights. The victim sought review of the decision by the Armenian courts by alleging that Armenia had acted in violation of Article 3 of the *European Convention on Human Rights*, which states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The Court found that the Armenian criminal-law mechanisms were so defective in terms of protecting the victim that they amounted to a breach of Armenia's obligations under Article 3. The European Court said that Armenia had repeatedly failed to discharge its procedural obligation to respond adequately to the serious acts of domestic abuse. In a decision of first impression, the Court also found that Article 3 imposed an obligation on the state to allow claims by the victim against the perpetrator for compensation for non-pecuniary damages in matters of serious domestic abuse. The Court stated that Article 3 created a positive obligation on the part of a member state in respect of allowing claims for non-pecuniary damage from the perpetrators of such violence directly, or indirectly through the member state. The European Court awarded the victim €24,000 plus €2000 in costs as against Armenia.

[Khachatryan](#)



Poem for Friday

Somewhere

By Rev David Conolly

Somewhere,
unexpectedly,
hope is born.

A voice.
At first, only the cry
of a new-born
gulping for breath.

In time, a voice.

The voice speaks to
a world grown used to
darkness, despair.

The voice says,
*You are light for the world;
Let it shine.
Love, and forgive*

And suddenly, hope is born.

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